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## Supreme Court overturns Court of Appeal decision in Nortel and Lehman pensions cases.

In 2011, the Court of Appeal ruled that a financial support direction issued by the Pensions Regulator ranked as an expense of the administration if the target was insolvent. This ruling could have given priority to the pension scheme over all other creditors, except for fixed charge holders (e.g. banks with a mortgage over land).

The Supreme Court in *Re Nortel; Re Lehman* [2013] UKSC 52 has today overturned the Court of Appeal's decision. It has decided that liabilities imposed under financial support directions/contribution notices imposed by the Pensions Regulator on companies in administration are not administration expenses (which would have meant that they were paid in priority to floating charge holders, preferential creditors and other unsecured creditors). Instead such liabilities are provable debts which rank equally with the claims of other unsecured, non-preferential, creditors.

While not an “*absolute rule*”, Lord Neuberger (who gave the main judgment) considered that a liability would be a “necessary disbursement” constituting an administration expense only “*if it arises out of something done in the administration (normally by the administrator or on the administrator's behalf), or if it is imposed by a statute whose terms render it clear that the liability to make the disbursement falls on an administrator as part of the administration – either because of the nature of the liability or because of the terms of the statute.*”

In the pensions context, there was no evidence from the legislation that Parliament intended that unsecured pension liabilities should rank ahead of other liabilities, including employment related claims which have a specific preferential status under insolvency legislation. Section 75 of the Pensions Act 1995 expressly states that this preferential status does not apply to statutory debts owed by employers to pension schemes under that Section.

In treating the statutory pensions liability as a provable debt, ranking alongside other unsecured claims, the Supreme Court adopted a wide approach to the interpretation of the term “provable debt” under the Insolvency Rules, overruling earlier long standing decisions which suggested that certain debts should not be provable.

The Supreme Court, in concluding that statutory liabilities which arise after a company goes into administration were provable, focussed on whether they constituted an “obligation” (as required by the Insolvency Rules). Lord Neuberger suggested that normally, for a company to have incurred an “obligation” for these purposes, it must be subject to some form of legal duty or relationship which “*resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred*”. In this case, the test was clearly satisfied.

### In short:

*The effect of this decision is that a liability imposed by the Pensions Regulator will rank on insolvency in the same way as a debt arising under the statutory debt laws in Section 75, Pensions Act 1995*

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