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High Court Pensions Ruling Favours Pensions Regulator

The High Court has this morning decided that the costs of complying with Financial Support Directions (**"FSDs"**) issued to certain Nortel and Lehman companies by the Pensions Regulator (**"TPR"**) earlier this year qualify as "super priority" administration expenses, payable in priority to unsecured creditors, floating charge holder and the administrator's own costs.

The Question

The Court was asked to determine, where an FSD or a Contribution Notice (**"CN"**) is issued after the date on which a company goes into administration or liquidation, whether the costs of complying with the FSD or the payment of the CN debt will be:

- a standard unsecured debt provable in the administration or liquidation;
- a debt that enjoys super priority; or
- neither of the above.

The Answer

The Court's answer, in short, was that an FSD does not create a provable debt but that where a CN is subsequently issued or an arrangement is reached with TPR, the debt that ensues will fall as an expense of the administration or liquidation. In other words, it has super priority and trumps other costs such as the administrator's own fees and also some secured creditors (where there are floating charges).

That is unless the administration was commenced before 5 April 2010, in which case, if the FSD is issued after administration but the CN is not issued until after liquidation, the CN debt will be a provable debt in the liquidation and will not enjoy super priority.

The Reasoning

The Court's reasoning was that the legislation dealing with the FSD regime had not been drafted with insolvency regimes in mind and it was not possible to fit the two regimes together neatly because of difficulties of timing. Previous caselaw made it impossible to characterise the pension debt as an ordinary unsecured debt. It came down, therefore, to the choice between giving the pension debts super priority or for them not to be paid at all. The Court decided that Parliament must have intended for them to be paid and therefore they must have super priority.

Comment

Today's result is a good result for pension scheme trustees and TPR but in practice it may cause difficulties for employers in obtaining funding as the pension debt will be payable in priority to bank debt secured by a floating charge. An unhappy and unintended consequence could therefore be that more employers are pushed into insolvency. It is likely that this case will be appealed and indeed, the Court expressed hope that a higher court or Parliament would review the position. This saga is definitely not concluded yet.

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