

Nortel & Lehmans – a triumph of common sense?

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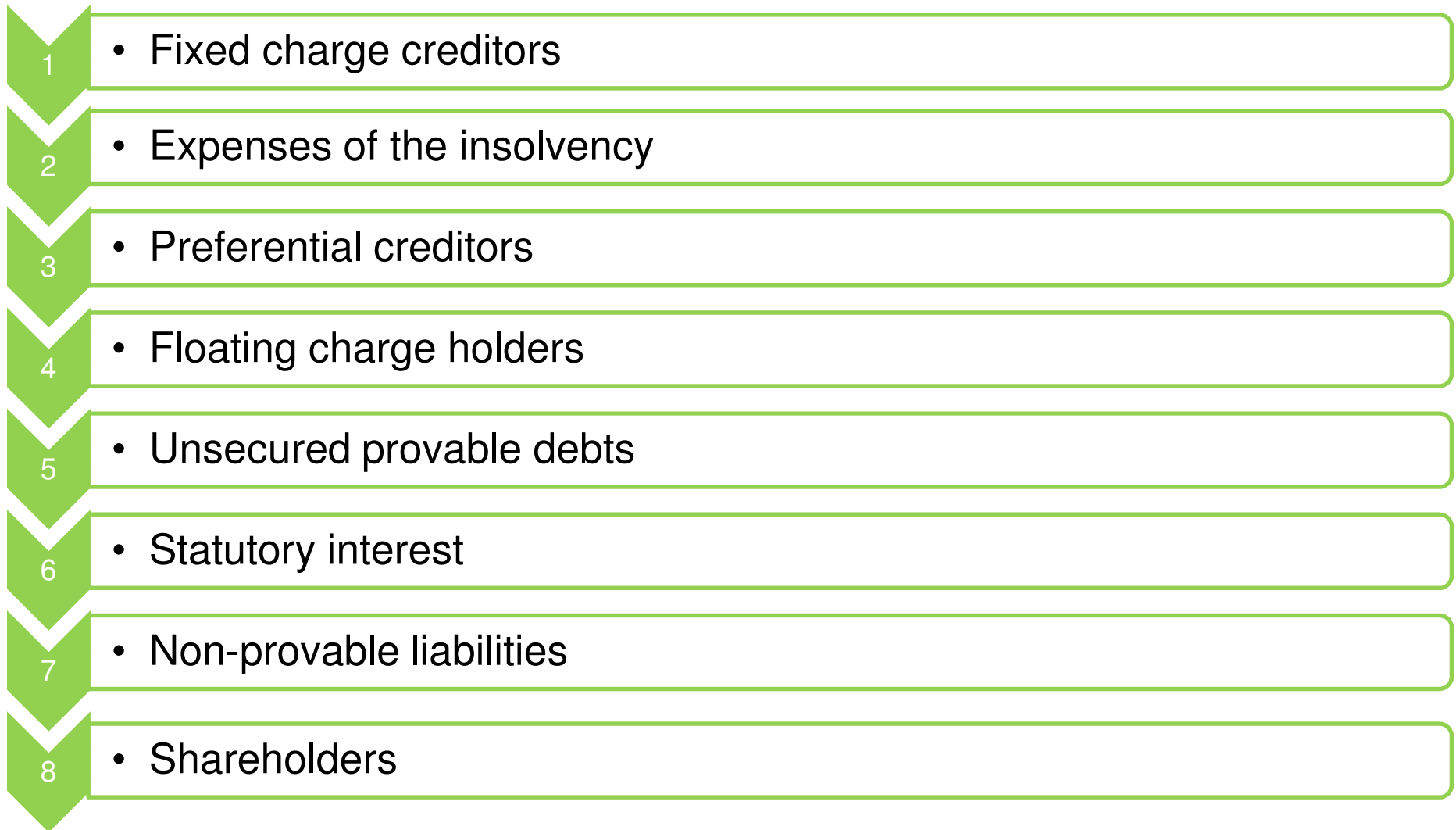
A triumph of common sense?

- What was the problem?
 - Insolvency priority order
 - FSDs and 2 previous court decisions
- What options did the Supreme Court have?
- What did they decide?
- Common sense triumph...?

Nortel & Lehmans

- Insolvencies for both groups
- Determinations Panel decided FSDs should be imposed in both cases
- Appeals to Upper Tribunal issued
- But preliminary question as to where FSD would rank in insolvency priority order

What's the problem – insolvency priority order



Where do pension claims fit in priority order?

- Claims under Schedule of Contributions / s.75 debts?
 - Typically unsecured, so fall within category 5
 - If secured, typically fall within 4 or perhaps 1
- Certain employer contributions for contracted-out schemes
 - Preferential debt so fall under Category 3 (Schedule 4 Pension Schemes Act 1993)

Financial Support Directions...?

- Determinations Panel decides a FSD *should be* imposed
- Terms of financial support negotiated between target and Regulator
- If no agreement, Regulator can seek a Contribution Notice for a specific amount
- CN/FSD doesn't become binding until appeals process exhausted
- In all FSD cases save for ITV & Box Clever, FSD has been imposed on companies already in insolvency proceedings (Sea Containers came out of Chapter 11)

Ranking of FSDs

- FSDs only arose (or were even contemplated) after the insolvency
- Nothing in PA2004 or Insolvency Rules
- 3 possible options:
 - Category 2 – administration expense
 - Category 5 – unsecured provable debts
 - Category 7 – unprovable debts
- Both High Court and Court of Appeal held it fitted into Category 2
 - Criticised by administrators
 - Perverse (why pre/post insolvency difference?)
- Administrators appealed to the Supreme Court

Supreme Court decision

- Upfront comment that "fair answer" was that it be a provable debt (Category 5)
- Problematic definition of "debt":

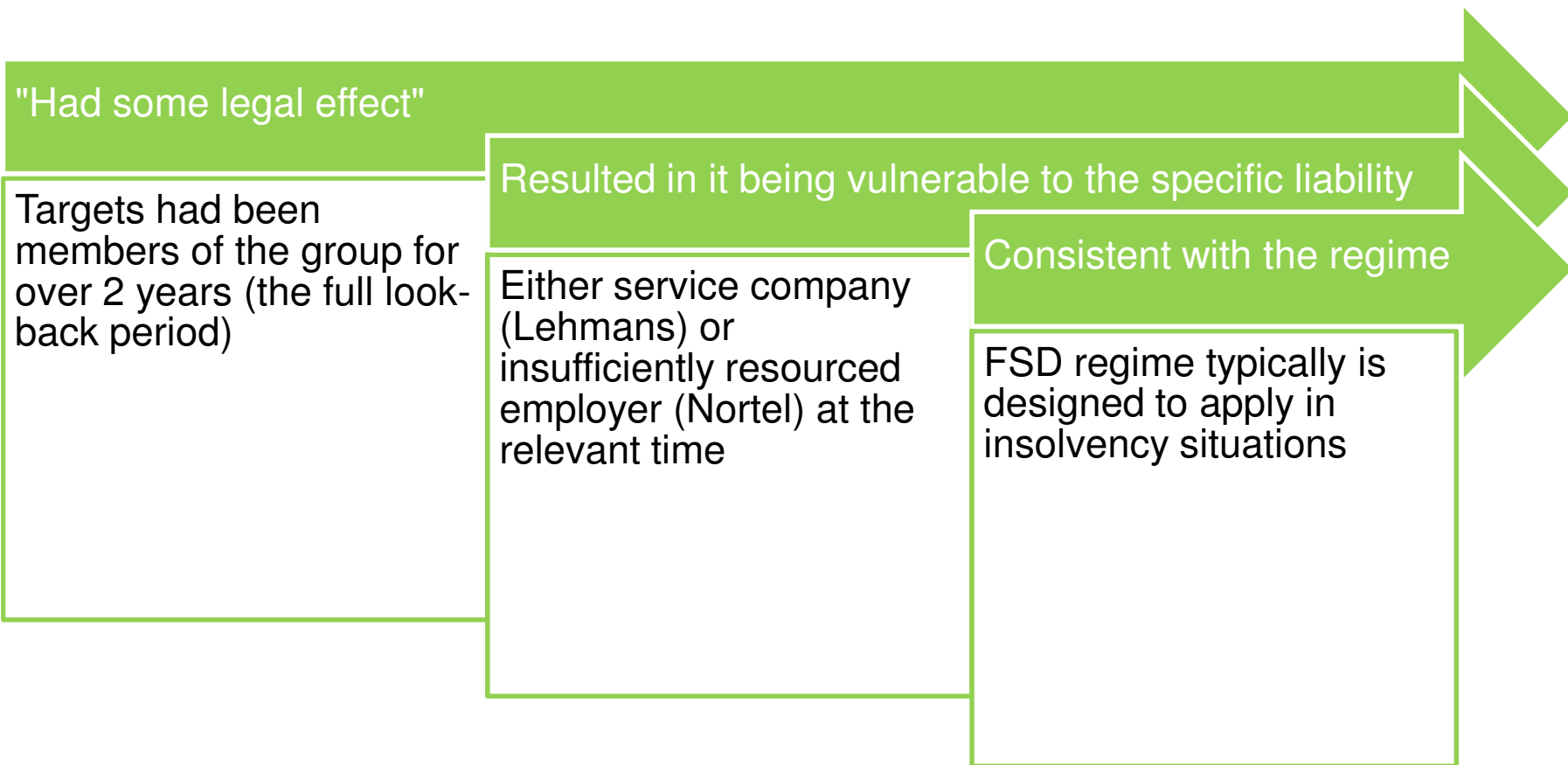
*"any debt or liability to which the company **may become subject** after [the insolvency date] by reason of **any obligation incurred before that date**"*

- Difficulties were:
 - Target had no contractual/legal "obligation" prior to insolvency to the scheme
 - Discretionary process of Regulator & DP made it too arbitrary to be an obligation under legislation?

Lord Neuberger's analysis

- Where liability could be imposed by statute in future, that could constitute an "obligation" prior to the power being exercised...
- ...but only in 3 circumstances – target must have taken or been subjected to steps which:
 - had some legal effect;
 - resulted in it being vulnerable to the specific liability in question
 - would be consistent with the regime to impose liability

All 3 tests met



- FSD therefore provable debt (Category 5)

Triumph of common sense?

- Could have simply thrown the issue back to Parliament
- Ultimately has reached the "right/fair" answer
- Promotes "rescue culture"
- But...
 - the 3-stage test slightly engineered...?
 - First test – emphasis on the "full 2 years" – but FSD regime doesn't require that
 - Second test – simply begs the question whether FSD jurisdiction tests met
 - If not provable debt will **NOT** be an expense

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