THE NORTEL STORY

The Trustee of the Nortel Networks (UK) Pension Plan (the "Trustees" and the "Scheme" respectively) has now received two major instalments of the sum of approximately £1.2bn which has been recovered in litigation lasting some 8 years and taking place across two continents. The recovery means that it is now likely the Scheme will not enter the Pension Protection Fund ("PPF") and the Trustees will, overall, be able to buy better benefits (on the insurance market) for the Members than the compensation they would have received from the PPF.

This is the largest pensions dispute in terms of both scope and value there has been. No pension trustee has ever recovered so much in litigation. The recovery is a remarkable achievement but it has not been easily achieved; it has been a long and anxious journey. The Trustees believe that their Members and very possibly wider communities in the pensions industry will have an interest in understanding what has happened in this case, and so they have set down the "story" here. The facts leading up to the recovery, and the milestones along the way, are described below.

January 2009—2013

The Insolvency and the sale of assets

1. In January 2009 the Nortel Group, a transnational telecommunications group of companies, became insolvent. Insolvency filings were made at the same time in many places across the world but notably in Canada, where the Nortel parent was situated, in the US, where Nortel had its biggest market, and in the UK, where it had developed significant intellectual property that contributed to the Group's success.

2. Recognising the hugely integrated nature of Nortel's business, and the difficulty of realising its assets on a country-by-country basis, the various insolvency office-holders worked together to sell the key assets and business units on a joint, global basis, calculating that by doing so they would realise greater value for creditors.

3. Accordingly, they entered into an agreement (the "Agreement") to sell the Nortel assets as a whole, and to share the proceeds afterwards. The Agreement provided that the sharing proportions would either be arrived at by consensus, or determined by the "Dispute Resolvers", as defined in the Agreement. The "Dispute Resolvers" were the Courts of both the US and Canada. When, as it turned out, the parties could not agree the division of spoils, it was therefore the case that both the US Court and the Canadian Court had jurisdiction to decide that division. Self-evidently, however, the two Courts had to agree, otherwise there was no resolution. And if they did not agree, then potentially the assets remained in limbo indefinitely. This was the dilemma that faced the parties, and it proved to be a dilemma that was not resolved for many years.

4. In 2009 and 2010, various Nortel business lines were sold and the proceeds placed in an escrow account held in J P Morgan in New York. This became known among the parties as the "Lockbox".

5. The Nortel intellectual property portfolio was auctioned in New York in July 2011. Against all expectations (there had previously been a stalking horse bid of US$1bn) the portfolio was sold for US$4.5bn. Like the business lines proceeds of sale, the money paid for the IP portfolio was placed into the so-called Lockbox.

6. In all, the residual Nortel assets held in the Lockbox now amounted to some $7.3bn. The problem then arose that no one could agree how they should be split.

The position of the UK Pension Scheme

7. At the time of the insolvency, the UK branch of Nortel, Nortel Networks (UK) Limited ("NNUK") was the sponsoring employer of the Scheme, which had been set up to provide defined pension benefits to the UK personnel. In 2009, the Scheme had about 42,000 Members.

8. Prior to the Nortel insolvency the Trustees had worked over a number of years to secure additional protection in the form of two parent company guarantees. The first was negotiated in 2006 as part of the Scheme's funding valuation prior to the insolvency, and the second was negotiated as mitigation for a corporate transaction which impacted the sponsoring employer, NNUK in 2007. These guarantees later featured in the litigation (see below).

9. Nonetheless, the Scheme was materially underfunded. In April 2008, before the Nortel collapse, the Scheme had a deficit of approximately £1.1 billion calculated on the basis the Scheme would be on-going. The Trustee had been holding negotiations with the management of the company to try to address the deficit, which was getting worse due to the financial crisis, but those negotiations were terminated by reason of the insolvency. On insolvency, the deficit was calculated on a different, higher cost, basis, prescribed by statute and equating broadly to buy-out. It was estimated by the Scheme's appointed Actuary as being £2.1bn as at January 2009. Under the 1995 Pensions Act, this gave rise to a statutory debt in the same amount from NNUK as sponsoring employer.

10. In the wake of the insolvency, the Trustees considered urgently what they could do to improve the position of the Scheme's Members. At that time, and without any further injections of cash, benefits were covered only to a level of about 40%. The Trustees took legal and financial advice. They liaised closely with the Pensions Regulator (the "Regulator") and they also worked in tandem with the PPF, the Scheme having entered an "assessment period" with the PPF upon the insolvency of the sponsoring employer in 2009. Depending on the total assets recovered during the assessment period, the Scheme would either transfer to the PPF—if the recovery failed to reach a certain threshold, set by statute--which would mean the PPF would take over its assets and pay an amount of statutorily defined compensation to the Members, or, as is now anticipated, if the threshold was reached, the Scheme would be wound up, and the benefits bought out with an insurance company.

11. Following the administration, the Trustees also actively engaged with Ernst & Young, the EMEA Administrators of the various Nortel companies within the EMEA (Europe, Middle East and Africa) region, (the "EMEA Administrators"), and established a position as an influential creditor of NNUK. A reporting protocol was put in place with the EMEA Administrators, who shared information on a regular basis and reported on their costs bi-annually. Together with the PPF, the Trustees represented the Scheme's interests at the NNUK creditor committee meetings organised by the EMEA Administrators.

The Regulator

12. One potential source of assistance to the Trustees was the making, by the Regulator, of what is called a "Financial Support Direction" ("FSD"). The power to impose an FSD was conferred upon the Regulator by the Pensions Act 2004. An FSD requires another party to provide

financial support for a particular pension scheme in certain circumstances, but, broadly, where it is fair and reasonable that such support should be provided, having regard to the previous connections between the third party and the pension scheme in question. The FSD was devised to help particularly in situations such as Nortel, where the company which was the sponsoring employer of a scheme was worse off than other companies in the Group. The FSD legislation was closely modelled on the US equivalent, known as the "ERISA" legislation.

13. When Nortel failed in 2009, the Trustees looked into the possibility of the Regulator using FSDs against Nortel companies in Canada, the US and EMEA. With their advisers, they compiled evidence to demonstrate that the statutory requirements existed for entertaining the issue of FSDs, for example, benefits conferred on the other Nortel companies by NNUK and the fact that Nortel had in fact been operated as one cohesive international entity.

14. The Regulator investigated the matter and in June 2010 the Determinations Panel of the Regulator decided that appropriate circumstances existed in this case for FSDs to be issued against various Nortel companies requiring them to provide financial support to the Scheme. The companies concerned, the "Targets", were based in Canada, the US, and various countries in EMEA.

15. The North American Targets took no part in the proceedings before the Determinations Panel, and refused to accept that it had any jurisdiction over them. The EMEA Targets referred the Determination to the Upper Tribunal, which they had an automatic right to do. (A "referral" takes effect essentially as an appeal.) From this point on, the litigation in North America took a very different course from the litigation in EMEA.

EMEA

16. It was agreed between the EMEA Administrators and the Regulator that the substantive FSD proceedings would be put on hold, pending the outcome of the litigation in North America—which was where the central fight was.

17. However, while the main proceedings were put on hold, a Court application was issued in the UK by the EMEA Administrators seeking a declaration as to the effect of an FSD when issued against an insolvent company. This was virgin territory in legal terms, as the legislation was relatively new. The issue for the Court was essentially: does the FSD have any effect at all in such circumstances? If it does have an effect, does it rank rateably alongside other creditor debts, or does it have to be paid first from the residual assets as an expense? The FSD legislation was only four years' old, essentially untested and its precise effects unknown, so that it was of wide interest to the pensions and business industry.

18. This application was eventually determined by the UK Supreme Court in 2013, when it was ruled that the FSD took effect as any other creditor debt would do, and ranked rateably with all other such debts.

North America

19. In North America, both the US Targets and the Canadian Targets applied to their domestic Courts to rule that the Determination of the UK Regulator to issue FSDs against them was void and of no effect because it would contravene the rule that no proceedings were allowed to be

instigated against an insolvent company without Court permission. (This was called the "automatic stay" rule.)

20. In both the US and Canada, the Courts ruled in the Targets' favour—the Regulator's proceedings were held to be void and of no effect. In Canada, the Regulator sought to appeal, but in 2011 finally lost its case and was ordered to pay costs.

21. In the US, the Trustees, as an interested party, sought to appeal the ruling, and the matter went to the Third Circuit of Appeals, where the Trustees lost. An attempt was made to appeal that ruling to the US Supreme Court but that attempt also failed in 2012.

22. By 2012, therefore, direct regulatory action in and of itself was clearly not going to help the Trustees in North America. The regulatory measures had, essentially, failed. This was a blow to the Regulator, who was faced with the fact that the FSDs—a key provision of the legislation contained in the 2004 Act---had not been capable of being "exported".

What recourse did the Trustees themselves have?

23. The Trustees were advised to pursue claims in their own right for what might have been received into the Scheme had regulatory action been permitted to continue and had it been successful. This was on the basis that FSDs had actually been issued in the UK, even if the North American Courts' rulings meant that the FSDs could not be directly enforced.

24. In Canada, the claim brought by the Trustees also included, importantly, a claim based on two guarantees given to the Trustees by the Canadian parent of NNUK prior to the insolvency, in 2006 and 2007 respectively.

Mediations

25. There were several attempts to achieve a mediated resolution of the dispute about the Lockbox proceeds—the "Allocation Dispute"---without recourse to the Courts. There were three such attempts before the trial of the dispute took place. These happened in New York in November 2010, in New York in April 2011, and in Toronto in January 2013. The Trustees recognised that the EMEA Administrators (administrators of NNUK), while in theory having fiduciary duties to them as creditors of NNUK, were also the EMEA Administrators of the other EMEA entities against whom the Regulator had determined FSDs should be issued. As such their views and the interests of others whom they represented were not always aligned with those of the Trustees. It was accordingly extremely important that the Trustees had their own “seat at the table” to negotiate on behalf of the pensioners specifically.

26. Given the number of interested parties, the mediations were vast affairs with some 150 people in attendance. In addition, there were also multiple "sidebar" conversations between the different parties to try to achieve a settlement.

27. All of these mediations failed, but after the unsuccessful Toronto mediation in January 2013, Judges in Delaware and Toronto decided that "enough was enough" and ruled that the litigation should proceed. They ordered that the Allocation Dispute should be resolved by way of a joint trial before both Courts.

2013-2014

The Commencement of the North American litigation proper

28. In summary, the position by the spring of 2013 when the litigation proper was underway, was as follows:

    (a) Allocation Dispute

        (i) All the parties were locked into a dispute about how the Lockbox should be distributed.

    (b) Trustees' FSD based Claims

        (i) The Trustees had brought claims in the US for the benefits that would have accrued to them had the regulatory proceedings been capable of being pursued. The amount of this claim was said to be US$1.3 billion.

        (ii) Similarly, the Trustees had brought claims in Canada on the basis of the issued FSDs. The claim was estimated as being in the sum of US$1.8bn.

    (c) The Trustees had brought claims in Canada against the Canadian parent company for the enforcement of two guarantees, namely:

        (i) a guarantee against the insolvency of NNUK (the sponsoring employer of the Scheme), referred to as the "Insolvency Guarantee"; the amount of this guarantee was US$150m.

        (ii) a guarantee against the default by NNUK of contractually agreed periodic payments into the Scheme. The amount of this guarantee was alleged by the Trustees to be £491.75m.

29. There followed an intensive and vast litigation process, of unprecedented complexity in the international insolvency world. Part of the difficulty with the Allocation Dispute was that so many interests were engaged that the process could easily have become unwieldy. Apart from the three sets of debtor companies based respectively in the US, Canada, and EMEA, there were also Bondholders (of different kinds), and distinct creditor groups such as the former employees of the Canadian parent, as well as the Trustees themselves.

30. The challenges presented by the enormity of the task were considerable. Entities from all over the world had an interest in the outcome. Approximately 140 depositions were conducted in different parts of the US and Canada, in the UK and in Hong Kong. Some three million documents were disclosed and had to be electronically marshalled and reviewed in order to extract the relevant evidence for the Courts. Some [ ] witness statements were filed and [ ] expert reports were commissioned to assist the Courts with their analysis and highly sophisticated financial modelling was commissioned by most of the parties.

31. In addition to the Allocation Dispute, the Courts had to address the Trustees' Claims based on the FSDs and on the two Guarantees, before any final distribution of the Nortel assets could be made.

32. The trials of both sets of claims were scheduled for 2014. This gave the parties just over a year, from the failure of the Toronto mediation, to manage the matter into Court.

US settlement

33. Before the trials took place, the Trustees received an offer to settle their claims into the US in November 2013. They eventually concluded a deal which saw them receiving $37.5m, and NNUK (in which they had a 96% interest as chief creditor) receiving the same amount.

Summer 2014

The Allocation trial

34. The trial of the Allocation Dispute took place jointly before both Courts over 6 weeks in May and June 2014. This was an unprecedented act of cross-border co-operation; the Judges "sat" jointly, but each in their separate jurisdictions, connected by video-link, and the trial being broadcast across a private internet network to client parties worldwide. Witnesses appeared, and advocates made their submissions, to both Judges simultaneously.

35. In addition to the three main office-holder constituencies - EMEA, Canada and the U.S. – the Judges permitted key stakeholders to participate in the Allocation Dispute as "core parties". These additional stakeholders included representatives of Nortel's *ad hoc* bondholder committee, the Canadian pensioners and former employees, and the UK Pension Claimants, who, for the reasons explained, wanted their own voice to be heard, separate from that of the EMEA Administrators.

36. From the start, the Trustees had appointed their own financial advisers and taken control of understanding the financial impact of various contingencies for themselves. Because the Trustees' claim was more than 90% of the available assets of NNUK, it was felt that this was important and worthwhile. With the assistance of sophisticated financial support they were able to perform their own entity priority modelling to understand expected returns to the Scheme under various scenarios. This put them on an even footing with the EMEA Administrators and North American parties, who had performed their own modelling, so that they were able to challenge assertions made in the negotiations as well as run their own arguments, with associated financial detailing, at trial.

37. In keeping with their wish to remain independent in the representation of their Members' interests, the Trustees had also appointed their own legal advisors in the UK, Canada and the US. This ensured their independence, both in negotiations and at trial, and most importantly, allowed them to put forward their own allocation theory to the Judges, rather than relying on arguments put forward by others.

38. The difficulty which faced the Courts with the Allocation Dispute was the very polarised positions adopted by the US and Canadian estates. These arose from traditional methodologies for allocating sales proceeds. Thus, the US argued that the bulk of the Lockbox should go to the US estate because it had enjoyed the most sales revenues while Nortel was trading. Canada by contrast argued that it should receive the vast bulk of the Lockbox based on its legal ownership of all Nortel intellectual property. As was pointed out by the Trustees in the proceedings, the legal registration of ownership bore no relationship to where the intellectual property had actually been created, material amounts of it having been developed in the UK.

39. These traditional valuation theories threw up some enormous inequalities. The Canadian argument was that Canada was entitled to some 83% of the Lockbox proceeds. The US argument was that the US was entitled to some 76% of the Lockbox. It can be seen therefore that, even without any stake at all going to Europe, there was no possibility of accommodating both these positions.

40. The Trustees chose to offer a rational, and fair, solution to the Courts. They argued that Nortel had been a globally integrated company: a product would be invented in the UK, manufactured in, say, Ireland, and then sold in the US. At the same time, the patent would be registered in Canada, in the name of the parent company. No one company in the Nortel network was responsible for the wealth that was accumulated, but when the "ship went down", that wealth was very unevenly distributed among the group companies. In particular, the UK company was one of the poorest in terms of what was left on its balance sheet. At the same time, it had the largest pension scheme of any company in the Group, and the largest deficit. Tens of thousands of people who had laboured for the wealth and success of Nortel would be left without a huge part of their promised income in retirement.

41. The plight of the UK pensioners was not unique; the Canadian pensioners were in similar difficulties.

42. In the meantime, the Bondholders professed the right to recover 100% of their claims, plus interest which could have amounted to as much as US$1.6bn.

43. There was obviously the potential for great disparity of outcome. Nevertheless, the traditional legal principles that applied in such disputes would, had they been followed, have led to such an uneven result. If such great inequality was to be avoided, a radically new approach would have to be taken.

44. The Trustees proposed to the US and Canadian Courts that the correct way of dealing with this insolvency, given the globalisation of the company, was effectively to merge the assets and distribute them *pro rata* to creditor claims worldwide. Their argument was that there was no warrant for treating the Nortel assets any differently after the insolvency from the way in which they had been treated before the insolvency. That was to treat the assets as belonging to the whole Group and as being for the benefit of the whole Group. This became known as the "*pro rata*" argument.

45. The *pro rata* case was supported, in part, by those acting for the Canadian pensioners, but, subject to that, it was not adopted by any other party to the litigation; indeed, it was effectively discounted as not having any legal precedent and not being capable of being seriously entertained.

The Claims trial

46. About a month after the Allocation trial had finished, the trial of the Trustees' Claims against the Canadian parent began and lasted for some three weeks. This trial took place only before the Canadian Court. The short gap between the hearings meant that the Trustees and their advisers had to manoeuvre from the intense Allocation Dispute proceedings into another set of proceedings on the Trustees' separate claims against the Canadian estate with very little time in between.

August 2014

Canadian Court's decision on Bondholder interest

47. In August 2014, the Canadian Judge, Justice Newbould, ruled on the discrete issue of Bondholder interest, holding that the Bondholders were not entitled to interest on the amount of their debt. This was at the time hugely significant; the claim for interest could have amounted to some US$1.6 billion.

December 2014

Decision on the Trustee's Claims

48. In December 2014 the Canadian Court issued its judgment on the Trustees' claims against the Canadian parent. Justice Newbould:

    (a) Found against the Trustees on the FSD-related remedy.

    (b) Found against the Trustees on the Insolvency Guarantee.

    (c) Found for the Trustees on the Funding Guarantee, but in a lesser amount than the Trustees had asked for, awarding a judgment for £340m.

May 2015

Decision on the Allocation Dispute

49. As explained, the *pro rata* argument advanced by the Trustees at trial had received little credit from the other parties, none of whom wholeheartedly supported it, and all of whom, with the possible exception of the Canadian pensioners, appeared to think it had little, if any, chance of success.

50. It was therefore against all the odds when, a year to the date when the Allocation Dispute had gone to trial, the Judges delivered their judgment in favour of a *pro rata* approach. In essence, this meant sharing the Lockbox proceeds among the various insolvent companies rateably, in proportion to the creditor claims which existed against each company. It allowed UK pensioners to share dividends, on an even footing, with Bondholders and trade creditors.

51. In reaching their view, both Judges paid close attention to the integrated nature of Nortel's business and assets, and the manner in which it had operated prior to collapse. As the US Judge, Judge Gross, commented in his judgment:

> "*The Court's adoption of pro rata allocation is the only outcome that reflects uncontroverted evidence and leads to a just result.*"

52. Both Judges rejected various alternative theories which had been advocated by other parties, including each of the separate groups of office-holders representing the European, U.S. and Canadian insolvent companies. The unattractive effects of the extreme arguments put forward were clearly operating on the Judges' minds in reaching their decisions. Specifically, the U.S. Debtors and Bondholders had argued that in excess of $5 billion belonged to the U.S. estate

and that the Canadian estate should receive only $0.77 billion. At the same time, the Canadian Debtors and Monitor had argued that in excess of $6 billion belonged to the Canadian estate and that the U.S. estate should receive just over $1billion.

53. Judge Gross, in commenting on the positions advanced by these parties, observed:

> "*The Courts also agree that the self-serving allocation positions of the Canadian Interests, the US Interests and the EMEA Debtors are not determinative or helpful.*"

He was critical of the fact that

> *"widely varying approaches for deciding the issue"*

left

> *"virtually no middle ground."*

54. The judgments of the US and Canadian Courts, delivered a year to the day after the Allocation trial had begun, sent ripples round the international insolvency world; such an approach had never been taken before, but, given the increasing level of corporate globalisation, the commentary was that such an approach might be taken again.

2015—2016

Appeals and further mediation

55. The judgments were not the end of the story. In 2015, various appeals were launched:

(a) Appeals on the Guarantees:

(i) The Canadian estate appealed against the Funding Guarantee Decision.

(ii) The Trustees appealed against the Insolvency Guarantee Decision.

(b) Appeals on the Allocation Decisions:

(i) All the US parties, including the US estate, the US Creditors Group, the Bondholders and various trade creditors, appealed against the Allocation Decision in the US.

(ii) All the US parties, including the US estate, the US Creditors Group, the Bondholders and various trade creditors, appealed against the Allocation Decision in Canada.

(c) Interest

(i) The Bondholders appealed against the ruling that they were not entitled to interest on the amount of their debt.

56. Before any of these appeals could be heard, there was a further mediation in New York in October 2015, effectively required by the US Court as part of the appeal procedure. That was

one of several mediation sessions that took place as part of this particular process, and the negotiations extended until well into the following year, 2016.

57. None of these appeals ever either succeeded or came to fruition. In the meantime, negotiations continued.

The October 2016 Settlement

58. Negotiations dragged on through the spring of 2016 but eventually, in June, an agreement in principle was reached. The documentation papering the parties' binding agreement was vast in scope and the Settlement was not concluded and signed until October.

59. The Settlement of October 2016 covered all areas of dispute, including the Canadian Guarantees and the EMEA litigation, which had remained on hold since 2010. All parties had to concede some ground to achieve the settlement of a case which might otherwise have run on for many years, and depleted the various estates' assets still further.

60. In EMEA, the Settlement provided that the Regulator would not enforce the FSDs which it had determined should be issued against various EMEA entities. This was in return for the creditors in the various EMEA estates where interest was payable, agreeing to such interest being paid at a commercial rate rather than the higher judgment rate (which would have been payable under the relevant insolvency rules). The difference between the two rates would flow up the equity chain to NNUK (which company was the parent of the entities in question) and thus in due course benefit the Trustees as the major creditor of that company.

61. The effectiveness of the Settlement was subject to certain conditions, including Court approvals in various jurisdictions. It took some time for all these to be fulfilled, not least because a group of disabled former Nortel employees based in Canada challenged the Settlement on the basis, they said, it was unfair to them. Their challenge was rejected first by the Ontario Court of Appeal and ultimately by the Supreme Court of Canada, but this prolonged the time in which uncertainty persisted and funds were effectively frozen. It was not until 8 May 2017, that the Settlement finally became binding and the Lockbox could be "opened". Funds could at last begin to flow to creditors.

Recoveries

62. The total recovery of the Trustees, totalling some £1.2bn, can be broken down in the following way:

    (a) The Settlement provided that NNUK was to receive 14.0249% of the Lockbox, with the Trustees being the c.96% creditors of that company, leading to a recovery from NNUK's lockbox allocation and existing cash assets of c.£900m.

    (b) Alongside this, the Trustees have their award against the Canadian estate on the Funding Guarantee in the sum of £340m leading to a dividend recovery of c.£170m.

(c) Through the settlement with the US estate in November 2013, the Trustees had previously recovered US$37.5m (or £27m) directly.

(d) Through the settlement between the US estate and the EMEA Administrators in November 2013, the Trustees would receive a creditor's dividend of £23m on the US$37.5m paid to NNUK by the US estate.

(e) Some £100m is anticipated to be recovered from the EMEA entities.

63. This should be contrasted with the positions adopted at trial by the various parties and the resultant recovery by the Trustees (shown in the grid below):

Allocation theory	**Lockbox allocation to NNUK (£m)**	**Calculated return to Trustees (£m)**
Canada	c.90	c.630
US	c.400	c.770
EMEA Administrators	c.500	c.930
Global settlement	c.800	c.1,200

Lessons

64. The most obvious lesson that can be drawn from the Nortel Story is that the Regulator's FSD powers failed in North America. That was a great blow to the Trustees at the time, and no doubt also to the Regulator and the wider pensions industry.

65. It may be that the DWP might now consider how the legislation could be improved so as to enhance the prospects of successful enforcement of UK regulatory measures outside the UK. But while the Regulator's powers designed to protect pensioners had failed in North America, the Allocation Dispute outcome effectively gave the Trustees and their Members the same result—a fair share of the global Nortel assets, so that the Scheme did not have to rely solely on the remaining funds of the "poor relation" sponsoring employer, NNUK.

66. The Trustees ran the *pro rata* case against all predictions as to its success. The Bondholders and other large institutional creditors were prepared to litigate their positions very aggressively, and at multiple points throughout eight years of litigation the Trustees came under very significant pressure from different parties around the world to settle. They were, and were perceived to be for many years, something of an "underdog" in the game. Their theory of allocation, when it was laid out, received no credence and was largely decried. Without the success of that theory, however, the interests of both the Members of the Scheme and the PPF itself would look very different today. So would the interests of all the other creditors of NNUK.

67. The Nortel case was a long hard lesson for everyone involved, but especially so for the ordinary, individual, creditors who were comparatively vulnerable, such as pensioners. More than one Court referred, along the way, to the pensioners in the UK and elsewhere as the "pawns in the "moves being made by the Knights and the Rooks". Pension schemes and their members are and will remain vulnerable to seismic economic and financial developments, and it is likely, if not certain, that in the future there will be other schemes that suffer the fate of the Nortel UK scheme. However, even if the current regulatory scheme cannot help with foreign recoveries, it may be that in the context of future international insolvencies, regard will be had to the precedent value of Nortel, and the Nortel Judges' conclusion that what are essentially global assets while a company is trading should remain global assets when it has ceased to trade. Certainly, for as long as the UK legislation on FSDs appears not to be effective in North America, it will be useful to those seeking to protect the pensions of individuals in a world-wide corporate group, to draw to the attention of other bankruptcy Courts the pragmatic solution which the US and Canadian Judges applied. Where pensioners are left "high and dry" when their company fails, their representatives might point to Nortel to support an argument that assets in the insolvent group should be pooled to reflect the commercial reality: that, in today's world, corporate wealth is rarely created in one place.

Acknowledgements

68. To say that the Trustees have undergone a difficult journey is an understatement! They recognise that they could not have persisted in their determination to improve the outcome for members had it not been for the support they received from various quarters.

69. In particular, the Trustees wish to thank the PPF for its help and support throughout. The ultimate fate of the Scheme was not known until the very end of the case and there was the constant and very real risk that the Scheme would transfer to the PPF if sufficient recovery was not made. On one view therefore, the risk lay entirely with the PPF. The relationship between the PPF and the Trustees was one of exemplary collaboration. They worked closely together from start to finish, with the sole and common goal of taking the best course based on the advice available. Such was the united nature of their approach that it never became necessary for separate advice to be taken on any apparent conflict of interest.

70. Also of great comfort to the Trustees was the support of the Court in the actions they took. Very early on the Trustees made a "*Beddoe*" application, which is a mechanism whereby trustees can seek the sanction of the Court to embark upon, continue, or settle, litigation. In such cases, trustees give a confidential and frank account to the Court, on a rolling basis, of their position in the litigation, with the benefit of a formal opinion from their lawyers on a "warts and all" footing. At each report stage the Court will consider whether to permit the trustees to spend trust money on litigation, and sanction the proposed actions. It is assisted in its consideration by the independent assessment of a "Representative Beneficiary", a person who is a beneficiary under the trust in question. To fulfil this role, the Trustees appointed a member of the Scheme, whose name is not recorded here for privacy reasons. The Representative Beneficiary was separately advised by law firm Eversheds, and his costs of such representation were paid by the Trustees. Eversheds advised the Representative Beneficiary at all important stages of the litigation, on a completely independent basis, and with the benefit of frank disclosure by the Trustees of their advice and all material developments. It was on the basis of the Representative Beneficiary's

and the Trustees' own reports that the Court was able to reach the view that the Trustees should be permitted to continue with their claims in order to try to improve the funding of the Scheme. And when ultimately the Settlement was brokered, the Trustees sought and received the blessing of the Court, with the independent input of the Representative Beneficiary, to enter into it. The Trustees are very grateful for the efforts of the Representative Beneficiary and his lawyers, for their support and the constructive nature of their comments throughout the litigation.

71. The working relationships which the Trustees formed with the PPF, the Regulator, and the Representative Beneficiary, were things that "made a difference" to the Trustees' ability to achieve the outcome they did.

72. Finally, the Trustees would also like to pay tribute to the team efforts of all their advisers, who worked seamlessly to support them in their objective. In the UK, the Trustees were represented by law firm Hogan Lovells and various members of Wilberforce Chambers, notably, Mike Tennet Q.C.. They also had, even before lawyers were involved, the invaluable and hugely sophisticated support of financial advisers, PwC. In Canada, the Trustees were represented by law firm Thornton Grout Finnigan, and in the US, by law firm Willkie Farr & Gallagher.

APPENDIX ON APPEALS

The appeals on the Guarantees

The appeals on the two Canadian Guarantees were heard in February 2016. At the request of the parties, who were still in negotiations at that time but felt that they were close to agreement, no judgment was ever delivered and the appeals were eventually overtaken by the Settlement (below).

The appeals on the Allocation Decisions

(a) In Canada

(i) In Canada, the US parties needed leave to appeal from the Ontario Court of Appeal.

(ii) In May 2016, however, the Appeal Court rejected the US parties' application for leave to appeal the Allocation Decision, on detailed legal grounds but also making the practical comment:

> *"A further appeal proceeding in Canada would achieve nothing but more delay, greater expense, and an erosion of creditor recoveries."*

(iii) In order to preserve their position, the US parties made an application to the Supreme Court of Canada for leave to appeal the Allocation Decision, but this was never decided because, again, the Settlement eventually overtook events.

(b) In the US:

(i) In the US, there was an appeal as of right to the US District Court, and that appeal was heard in April 2016.

(ii) In the wake however of the Canadian Appeal Court's judgment refusing leave to appeal, the US District Court decided that it should "certify" the appeal of the US parties (that had been heard in April but not yet adjudicated) directly to the US Court of Appeals—the "Third Circuit". The Court's reasoning was essentially that, whatever its own judgment might be, it would almost certainly be appealed to the Third Circuit in any event. And the Judge took on board the Canadian Appeal Court's concerns about continuing delay and the erosion of creditor funds.

(iii) The appeal before the Third Circuit, which would have followed on from this certification, never took place, the Court acceding to the parties' joint request that any hearing be deferred, pending the pursuit of settlement discussions.

The appeal on Bondholder interest

In October 2015, the Ontario Court of Appeal rejected the Bondholders' appeal on the question of whether they were entitled to interest. In May 2016, the Canadian Supreme Court refused the Bondholders permission to appeal that decision.