

## Executive Summary

In the recent High Court case of [Virgin Media v NTL Pension Trustees](#) (the *Virgin Media* case), the judge ruled that amendments to benefits in schemes that were contracted out on the reference scheme test basis between 6 April 1997 and 5 April 2016 are void if they were made without written confirmation from the scheme actuary that the scheme would continue to meet the reference scheme test.

This case may be subject to a further hearing, and possibly an appeal. Some schemes may decide not to take action until we have further clarity. However, there may be circumstances where trustees and sponsoring employers should consider taking advice on the impact of the judgment now, including if the scheme is undertaking a de-risking exercise, such as a buy-in or buyout of benefits, or where a corporate transaction is planned.

## Contracting-out Background

Between 6 April 1997 and 5 April 2016, pension schemes could contract out of the state second pension if they met the conditions set out in the Pension Schemes Act 1993 (PSA 1993) and connected regulations. Schemes had to satisfy a reference scheme test standard<sup>1</sup>, which was a quality test of scheme benefits, certified by the scheme actuary and subject to triennial recertification. Members' contracted-out rights from 6 April 1997 are commonly referred to as "Section 9(2B) rights".

The PSA 1993 restricts the rule amendments that could be made to contracted-out schemes – broadly, to ensure that the amendment would not impact the scheme's ability to meet the reference scheme test. As part of the rule amendment process, trustees were required to inform the scheme actuary in writing of the proposed rule change, and the scheme actuary was required to confirm to the trustees in writing that the scheme would continue to satisfy the reference scheme test after the alteration was made. The scheme actuary's written confirmation is commonly referred to as a "Section 37 certificate", but the legislation refers to a written exchange between the trustees and the scheme actuary, without use of the word "certificate".



## The Judgment

In the *Virgin Media* case, the judge was asked to proceed on the basis that no Section 37 confirmation had been obtained when an amendment to the rules concerning the revaluation of deferred benefits was introduced in 1999.

Put very simply, the High Court ruled that:

- Amendments to the rules of a scheme that related to Section 9(2B) rights were rendered void if a rule change was introduced without a Section 37 confirmation.
- The term "Section 9(2B) rights", as used in regulations from 6 April 1997 until 5 April 2013, encompassed benefits accrued in respect of service both before and after the date of an alteration. (It is worth noting that, from 6 April 2013, the regulations were amended to cover changes to benefits accrued in respect of future service only.)
- All changes to members' Section 9(2B) rights are impacted, even if the change resulted in a benefit improvement.

1. Note that schemes could alternatively be contracted out on a money purchase basis (also known as a "protected rights" basis). This communication is concerned with schemes contracted out on the reference scheme test basis only.

The implications of this judgment are potentially widespread. In many cases, there will be clear evidence that a Section 37 confirmation was obtained prior to a rule change – for example, it may be appended to the deed of amendment. In other cases, the paperwork may be more difficult to extract from scheme records, or there may be no evidence that a Section 37 confirmation was obtained, or the confirmation may be retrospective.

## What Is Next?

It may be some time before the position is certain. This is because:

- We await confirmation of whether there will be a further hearing and what points would be addressed.
- We await confirmation of whether the case will be appealed.
- The PSA 1993 includes a power for regulations to retrospectively validate rule amendments that would otherwise be void under Section 37. It remains to be seen whether there will be any intervention from the government.

## Potential Action

Trustees should consider the position of their scheme and assess whether legal advice should be sought now, because immediate clarity is required on the validity of past rule amendments, or whether to wait for the outcome of a potential further hearing or appeal. If the scheme is in the process of entering into an arrangement such as a buy-in or buyout of benefits, the parties should consider and understand the risks, and the terms of any residual risk insurance. Scheme funding levels may also be impacted if past rule amendments are found to be void and extra benefits need to be funded.

Please contact your usual member of our Pensions team if you have any questions about this issue.

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