

## Actuarial confirmation required for alterations to contracted-out past and future service pension rights (*Virgin Media v NTL Pension Trustees II*)

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19 Aug 2024

Pensions analysis: In a landmark ruling, dismissing the appeal brought by Virgin Media Ltd (Virgin) against the first instance decision of Mrs Justice Bacon, the Court of Appeal held that the term ‘section 9(2B) rights’ in regulation 42(2) of the Occupational Pension Schemes (Contracting-out) Regulations 1996 (the Contracting-out Regulations), as in force from 6 April 1997 to 5 April 2013, included pension rights earned by both past and future service. The judgment potentially has very significant implications for occupational pension schemes that were contracted out of the Additional State Pension on the salary-related basis under section 9(2B) of the Pension Schemes Act 1993 (PSA 1993) : absent actuarial confirmation as required by PSA 1993, s 37, it now appears certain historical alterations to members’ future (as well as past) service rights under such schemes will be void. Important practical issues concerning the nature and scope of the required actuarial confirmation, however, remain unresolved. Written by Henry Day, barrister at Radcliffe Chambers.

*Virgin Media Ltd v NTL Pension Trustees II Ltd and others* [2024] EWCA Civ 843, [2024] All ER (D) 118 (Jul)

### What are the practical implications of this case?

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The Court of Appeal’s decision is unlikely to be universally welcomed.

For one, the idea that ‘accrued rights’ include rights to be earned by future service—a fundamental element of the court’s interpretation of the term ‘section 9(2B) rights’ in Contracting-out Regulations, SI 1996/1172, reg 42(2)—may strike some as surprising; Lord Justice Nugee himself acknowledged that it involved an element of paradox.

In practical terms, as matters now stand, trustees of occupational schemes that were formerly contracted out on the salary-related basis are likely to need to review amendments made to their rules between 6 April 1997 and 5 April 2016 (even if such amendments applied only to future service rights) to check whether actuarial confirmation was obtained and the requirements of section 37 met. Where this cannot be evidenced, such amendments (on the basis of the Court of Appeal’s decision and Bacon J’s first instance judgment) will be void. The consequent costs to schemes maybe considerable.

Significant questions, however, remain. What, for example, constitutes sufficient evidence of actuarial confirmation? What form must confirmation take? Would confirmation post-dating an amendment (whether as part of the scheme’s next triennial valuation or otherwise) be valid and, if so, with effect from what date? What scheme amendments engage the requirement for confirmation? Would closure of a scheme to future accrual be caught?

Where actuarial confirmation was required but not obtained (or can no longer be evidenced), trustees and/or sponsoring employers may have grounds for professional negligence claims against advisers (although, given the time period in question, limitation may be in issue).

Practitioners should also be alive to the possibility of the government legislating to address the problem, using its power under PSA 1993, s 37(2) to retrospectively validate alterations to scheme rules which section 37 would otherwise render void. Whether such legislation will be introduced, and if so when, remains to be seen.

The immediate practical impact of the ruling aside, Lord Justice Nugee's judgment offers a clear and comprehensive account of the history of contracting out, to which practitioners may usefully refer. His judgment also includes a short but helpful summary of the principles of statutory interpretation, following recent Supreme Court authority.

## What was the background?

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The claim concerned the National Transcommunications Ltd Pension Plan (the Plan), a salary-related occupational pension scheme, under which Virgin was the principal employer. The Plan was contracted out of the Additional State Pension under PSA 1993, s 9(2B) from inception until contracting-out was abolished with effect from 6 April 2016.

Section 37, as amended by the Pensions Act 1995 (PA 1995) with effect from 6 April 1997, provided by subsection (1) that, '[e]xcept in prescribed circumstances, the rules of a contracted-out scheme cannot be altered unless the alteration is of a prescribed description'.

The Contracting-out Regulations, SI 1996/1172, reg 42 (as in force from 6 April 1997 to 5 April 2013) set out the 'prescribed circumstances' and 'prescribed description'. It included provision, by sub-regulation (2), that the rules of a salary-related contracted-out scheme could not be altered in relation to any 'section 9(2B) rights' without written actuarial confirmation that, were the alteration made, the scheme would continue to satisfy the statutory reference scheme test under PSA 1993, s 12A (section 37 confirmation).

'Section 9(2B) rights' were defined by regulation 1(2) of the Contracting-out Regulations (again as in force from 6 April 1997 to 5 April 2013) as 'rights to the payment of pensions and accrued rights to pensions... under a scheme contracted out by virtue of section 9(2B) of [PSA 1993], so far as attributable to an earner's service in contracted-out employment on or after [6 April 1997]'.

By a deed and rules dated 8 March 1999 (the 1999 Deed & Rules) the Plan was amended so as (inter alia) to bring into line with the requirements of PSA 1993 (and so potentially reduce) the rate of revaluation of deferred pensions derived from future benefit accrual. However, neither Virgin nor the Plan's trustees were able to locate any section 37 confirmation in relation to the intended amendment.

Virgin therefore issued proceedings by way of Part 8 claim, seeking the court's determination as to whether:

- in the absence of section 37 confirmation, section 37 rendered an amendment to members' 'section 9(2B) rights' void (contending that it did not);
- the term 'section 9(2B) rights', as used in Contracting-out Regulations, SI 1996/1172, reg 42(2) as in force prior to 6 April 2013, meant that section 37 took effect only in relation to rights attributable to past service between 6 April 1997 and the date of the intended amendment or also in relation to rights attributable to future service from that latter date (contending for the former position) and
- section 37 took effect only in relation to adverse alterations to 'section 9(2B) rights' or in relation to all alterations to such rights (again contending for the former position)

Bacon J found against Virgin on each point.

With the judge's permission, Virgin appealed on the second issue, as to the meaning of 'section 9(2B) rights'. It was

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common ground that the words 'rights to the payment of pensions', as used in the definition of the term, referred to the rights of existing pensioners to pensions currently in payment. The question, therefore, was what, in the context of the definition, 'accrued rights to pensions' meant: specifically, whether (as Bacon J had held) the expression included rights which are to accrue by virtue of future service.

The cost to the Plan of Bacon J's ruling, which meant that the revaluation amendments intended by the 1999 Deed & Rules were void, was estimated at around £10m.

## What did the court decide?

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Giving the leading judgment, with which Lord Justice Peter Jackson and Lady Justice Asplin agreed, Lord Justice Nugee dismissed the appeal.

Emphasising the need in interpreting legislation to take into account its purpose and scheme (per Lord Sales JSC in *R (PACCAR Inc & ors) v Competition Appeal Tribunal* [2023] UKSC 28 at paras [40]–[41] and Lord Bingham in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 at para [8]), Lord Justice Nugee surveyed the legislative context in which the Contracting-out Regulations were made, starting with the original provisions for contracting-out enacted in the Social Security Pensions Act 1975 (SSPA 1975) before analysing the relevant provisions of PSA 1993 (as it stood both before and after amendment by PA 1995) and of the Contracting-out Regulations (as originally made, as amended prior to coming into force on 6 April 1997 and as further amended with effect from 6 April 2013), together with the relevant pre-legislative material.

He noted that SSPA 1975 and PSA 1993 (both before and after 6 April 1997) included provisions restricting alteration of the rules of contracted-out schemes, that these provisions were designed to ensure members received the pensions to which they were entitled, and that there was nothing in their language to suggest their operation was confined to amendments affecting only past service rights.

He also considered the language of the Contracting-out Regulations, SI 1996/1172, regs 1(2), 42 as originally made, concluding that their reference to 'rights' would 'naturally' be understood by the 'well-informed reader' as encompassing rights earned by both past and future service. Many schemes, he observed, already contained provisions restricting the alterations that could be made in respect of past service benefits and from 6 April 1997 there existed a similar statutory restriction in the form of PA 1995, s 67. The limited meanings ascribed to the concept of 'rights' to a pension in *Bradbury v BBC* [2017] EWCA Civ 1144 and *Wedgwood Pension Plan Trustee Ltd v Salt* [2018] EWHC 79 (Ch) were distinguished on the grounds that they were case-specific.

As to the Contracting-out Regulations, SI 1996/1172, regs 1(2), 42 as in force from 6 April 1997 to 5 April 2013, and the meaning of the expression 'accrued rights to pensions' (which had not appeared in the Contracting-out Regulations' original definition of 'section 9(2B) rights'), Nugee LJ held that:

- for the same reasons as he had given when considering the Contracting-out Regulations as originally made, the meaning of the word 'rights' was not limited to rights already earned
- while 'ordinarily' the expression 'accrued rights' denoted rights earned by past service, it was 'very difficult to believe' that the Contracting-out Regulations as they came into force were intended to cut down the previous scope of regulation 42 such that it no longer applied to future service rights: there was no hint to this effect in the Explanatory Notes to the legislation, the relevant actuarial guidance or any other material; no change had been made to the text of what became regulation 42(2); and it was 'difficult to think of any rational explanation' for why such a reduction in the scope of regulation 42 might have been intended, the applicable statutory protection not previously having been limited to past service rights
- it was 'not impossible' to interpret regulation 42 in a way consistent with the provision's previous iteration: while conceding it might seem 'paradoxical' for 'accrued rights' to include both rights earned to date and those to be earned in the future, Nugee LJ concurred with Bacon J's view that the expression was intended

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to operate in 'qualitative' rather than 'temporal' terms (see paras [60] and [64] of the first instance judgment), concluding that it identified 'the type of rights concerned', ie the right of a scheme member who has not yet retired to future payment of pension (as opposed to a right to present payment of pension following retirement), rather than identifying rights earned by reference to a particular date

It followed that 'section 9(2B) rights' encompassed both rights attributable to a member's past service and rights yet to accrue by way of future service.

## Case details

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- Court: Court of Appeal, Civil Division
- Judges: Lord Justice Peter Jackson, Lady Justice Asplin and Lord Justice Nugee
- Date of judgment: 25 July 2024

Henry Day, barrister at Radcliffe Chambers. If you have any questions about membership of our Case Analysis Expert Panels, please contact [analysiscommissioning@lexisnexis.co.uk](mailto:analysiscommissioning@lexisnexis.co.uk).

## Document Information

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