

# COURT OF APPEAL DECISION IN VIRGIN MEDIA ON NEED FOR ACTUARIAL CONFIRMATION WHEN AMENDING REFERENCE SCHEME TEST BENEFITS

*The Court of Appeal has decided in [Virgin Media Limited v NTL Pensions Trustees II Limited](#) that where amendments were made to contracted-out DB rights between 6 April 1997 and 6 April 2013 and did not comply with the requirement to obtain actuarial confirmation that the scheme would continue to satisfy the contracting-out test, such amendments may be void irrespective of whether they related to past or future service or improved benefits. Trustees and sponsors should consider what action should be taken and how this might affect historic amendments in their scheme.*

**Background:** Between 6 April 1997 and 6 April 2016, schemes could contract members out of the second tier of the state pension on a final salary “reference scheme test” basis. This meant that the scheme had to provide benefits which were broadly equivalent to or better than a “reference scheme”. In broad terms the reference scheme provided for benefits at age 65 of 1/80<sup>th</sup> of salary (limited to salary the member paid national insurance contributions on) for each year of service and a spouse’s pension of 50% of the member’s benefits.

The actuary needed to certify that a contracted-out scheme continued to meet the reference scheme test every three years.

In addition, section 37 Pension Schemes Act 1993 provides that a scheme with salary-related contracted-out benefits can only be amended if prescribed conditions are complied with, otherwise the amendment will be void. The conditions in relation to amending reference scheme benefits are set out in regulations and have changed over time. Key conditions to note are:

- **6 April 1997-5 April 2013:** amendments could not be made in relation to any “rights to the payment of pensions and accrued rights to pensions” relating to contracted-out employment unless the trustees had informed the actuary in writing and the actuary had confirmed in writing that the scheme would continue to satisfy the reference scheme test;
- **6 April 2013-6 April 2016:** amendments could not be made in relation to contracted-out benefits which accrued under the scheme on or after the effective date of the amendment unless the trustees had informed the actuary in writing and the actuary had confirmed in writing that the scheme would continue to satisfy the reference scheme test;
- **6 April 2016 onwards:** the drafting of the current requirements is subject to debate, but an interpretation is that amendments can only be made if the scheme would continue to provide benefits for the member and their surviving spouse or civil partner at least equal to the benefits that would have been provided by the reference scheme. What is clear is that the requirement for actuarial confirmation no longer applies.

**(Previous) High Court decision:** The [Virgin Media case](#) concerned an amendment to a contracted-out scheme which was made in 1999 and sought to reduce the rate of deferred member revaluation. It was assumed for the purposes of the proceedings that no section 37 confirmation would be found so the question arose whether the amendment was void in the absence of such a certificate and if so, to what extent.

The High Court concluded that the amendment was void if the actuarial confirmation required was not obtained. For the purposes of the conditions as they stood in 1999 (and until 2013), that meant that amendments which affected both past and future service benefits were void even where such amendments had been beneficial to members.

**(New) Court of Appeal decision:** The employer appealed and asked the Court of Appeal to consider whether the conditions for amendment which applied up to 2013 related to both past and future service amendments or to past service only. No appeal was made on the question of whether the absence of required actuarial confirmation was sufficient to render an amendment void.

In a judgment delivered on 25 July 2024, the Court of Appeal unanimously upheld the decision of the High Court and concluded that the pre-April 2013 conditions applied to amendments to both future and past service.

The pre-2013 conditions apply to amendments to “*rights to the payment of pensions and accrued rights to pensions*”. It was argued on behalf of the employer that this referred to pensions in payment and rights to future pensions already earned by past service, i.e. not future service benefits. Nugee LJ, giving the leading judgment, said that this interpretation was “*a good illustration of the danger of approaching a question of statutory construction by starting with giving words their natural meaning before orientating oneself by reference to the legislative purpose*”. In this context it seemed highly unlikely that Parliament would have intended not to protect future service rights, not least because section 37 was designed to ensure that contracted-out schemes delivered the required level of benefits for their members in return for the reduced level of national insurance contributions that were payable in relation to contracted-out employees. Therefore, although he acknowledged that the use of the phrase “*accrued rights to pensions*” to mean rights a member presently has to accrue pension benefits in the future was “*an unusual one*”, he nevertheless concluded “*it is not an impossible one*” and so should be taken to have that meaning.

**What next?** It is not yet known whether the employer will appeal to the Supreme Court.

However, in the meantime trustees and sponsors should consider what action to take in relation to any historic deeds of amendment made between April 1997 and 2016, for example whether to check if the appropriate actuarial confirmation was obtained. Sponsors will also need to consider what disclosure obligations they may have for the purposes of their accounts or financial reporting.

Where trustees have entered into a buy-in contract, there may be provisions which restrict or prevent them from reviewing or revisiting the validity of scheme documentation and they will need to check the precise scope of such provisions. If they are considering entering into a buy-in or buy-out, they may want to discuss the position with potential insurers.

Where trustees are renewing their professional indemnity insurance and/or purchasing run-off insurance, they should consider whether they can give any warranties required by the insurer without first investigating the implications of the judgment for their scheme.

Additional issues which may need to be considered in relation to past deeds of amendment include:

- What was the nature of the required actuarial confirmation when the deed was executed - which of the various tests applied?
- Whether a particular deed of amendment related to reference scheme test benefits at all as some benefits such as lump sums and DC benefits are not covered by the test?
- How the requirements relate to deeds which closed a scheme to future accrual, rather than amending future accrual?
- Whether there is any evidence that actuarial confirmation was obtained before the amendment was made even if it cannot now be found? Note that the confirmation did not have to be in a particular format, simply in writing, so an email could suffice.
- Whether there are recitals to a deed of amendment which refer to an actuarial confirmation required by section 37 and what weight can be given to those in the absence of any other evidence that confirmation was given?
- Is there a later deed which did have actuarial confirmation which repeated the contents of the earlier deed (for example a new definitive deed) and which could therefore limit the period during which any changes were invalid?
- Whether amendments that are potentially void can be made retrospectively now? This might be the case where, for example, an amendment was a benefit improvement or where the amendment can be made by resolution under section 68 Pensions Act 1995 (for example A Day changes may be covered by this).
- What tax implications might flow from an amendment being found to be void?
- What the potential cost implications are for sponsors and whether there will be an impact on the scheme’s funding position?

It will be clear from the above that questions around evidence will be key and Virgin Media does not provide much help. Trustees and sponsors should consider taking legal advice where it is not clear whether actuarial confirmation was given and what may amount to sufficient evidence that it was.

Finally, it is worth noting that the government has power to make regulations which retrospectively validate deeds that would otherwise be void as a result of section 37 and could permit the scheme actuary to give a certificate retrospectively. A number of industry organisations have engaged with DWP about the possibility of such regulations.

## CONTACT

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