Neutral Citation Number: [2023] EWHC 1441 (Ch)

Case No: PE-2022-000010

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Rolls Building
Fetter Lane
London, EC4A 1NL

16 June 2023

Before :

MRS JUSTICE BACON

- -

Between :

VIRGIN MEDIA LIMITED

Claimant

- and -

(1) NTL PENSION TRUSTEES II LIMITED
(2) ROSS RUSSELL LIMITED
(3) JOHN JARDINE

Defendants

- -
- -

Nicolas Stallworthy KC and Philip Stear (instructed by **Gowling WLG (UK) LLP**) for the **Claimant**
Jennifer Seaman (instructed by **Eversheds Sutherland (International) LLP**) for the **First and Second Defendants**
Andrew Short KC and Patrick Tomison (instructed by **Squire Patton Boggs (UK) LLP**) for the **Third Defendant**

Hearing dates: 2–3 May 2023

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 16 June 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

MRS JUSTICE BACON:

Introduction

1. In this claim under CPR Part 64, the claimant Virgin Media Limited asks the Court to determine the correct interpretation of historic provisions relating to contracting-out from the State Earnings Related Pension Scheme (**SERPS**), as applicable between 6 April 1997 and 6 April 2013, in relation to the National Transcommunications Limited Pension Plan (the **Plan**).

2. The questions raised concern the interpretation of s. 37 of the Pension Schemes Act 1993 (the **1993 Act**) as amended by the Pensions Act 1995 (the **1995 Act**), and Regulation 42 of the Occupational Pension Schemes (Contracting-out) Regulations 1996 (SI 1996/1172) (the **Regulations**). The questions seek to determine how s. 37 and Regulation 42 affect the Plan's Second Definitive Trust Deed and Rules dated 8 March 1999 (the **1999 Deed & Rules**), which sought to amend the Plan's revaluation provisions with effect from 6 April 1997.

3. The questions in this case proceed on the assumption that the 1999 Deed & Rules were not the subject of actuarial confirmation (as required by Regulation 42) that the pension scheme would continue to satisfy the relevant statutory standard following the amendments. On that basis, the essential question is whether the effect of s. 37 is to render the amendments void, and if so to what extent. These questions have been the subject of considerable uncertainty in the pensions industry for some time, but have not yet been determined in proceedings concerning other schemes.

4. The claimant is the principal employer under the Plan, and was represented by Mr Stallworthy KC and Mr Stear. It says that s. 37 did not render the amendments void. Alternatively, it contends that the Regulation 42 requirements only applied to past service benefits, and not to benefits arising from service after the date of the amendment; and that any sanction of voidness should only apply to adverse alterations.

5. The first and second defendants are the trustees of the Plan and are neutral in these proceedings. They were represented by Ms Seaman.

6. The third defendant has been appointed to represent those beneficiaries of the Plan in whose interests it would be to argue for the invalidity of the 1999 Deed & Rules and to the greatest extent. He was represented by Mr Short KC and Mr Tomison. The third defendant's position is that the failure to obtain the necessary actuarial confirmation means that the amendments made by the 1999 Deed & Rules are of no effect; that the Regulation 42 requirements apply to both past and future service benefits; and that voidness under s. 37 applies to all relevant alterations and not only adverse alterations.

Factual and procedural background

7. The Plan is an occupational pension scheme which provides "defined benefit" pensions (i.e. pensions based on the member's salary and how many years of service the member has accrued) and lump sum benefits on the retirement and death of members of the Plan, and those claiming through its members. It was established with effect from 1 January 1991 for employees of National Transcommunications Limited (**NTL**) and associated

companies, by the Trust Deed and Rules dated 6 December 1990 (the **1990 Deed & Rules**).

8. From the outset, the Plan was contracted out of SERPS and was therefore what was referred to as a "contracted-out salary-related" scheme. The effect of contracting-out of SERPS was that the employer could pay national insurance contributions at a reduced rate on behalf of both employer and employee. The corollary was that the employee would not accrue the additional earnings-related component of the state pension under SERPS.

9. Before 6 April 1997, a contracted-out salary-related scheme was required to provide each member with a Guaranteed Minimum Pension (**GMP**), broadly equivalent to the SERPS pension that it replaced. The scheme had to be the subject of a contracting-out certificate issued by the Occupational Pensions Board (**OPB**), which would only be provided if the OPB was satisfied that various prescribed conditions were met by the scheme.

10. The amendments to the 1993 Act introduced by the 1995 Act made extensive changes to that regime, with the detail of the new regime set out in the Regulations. In particular, with effect from 6 April 1997, further accrual of GMP ended and instead contracted-out schemes had to satisfy a more general test of overall quality, which became known as the "reference scheme test". Whether that test was met had to be assessed and certified by the scheme actuary. The OPB was abolished, and responsibility for issuing, varying and cancelling contracting-out certificates was passed to the Secretary of State, who delegated those functions to the Contributions Agency.

11. The 1999 Deed & Rules were executed on 8 March 1999. They sought to amend the Plan's revaluation provisions, by (in broad terms) reducing the rate of revaluation of deferred pensions under the Plan. The claimant and the trustees are agreed that the 1999 Deed & Rules did not adversely affect any benefits which had already been earned by 8 March 1999, because of a fetter in the amendment power (in clause 31(2) of the 1990 Deed & Rules) under which the 1999 Deed & Rules were executed. The reduction in the rate of revaluation therefore only affects future accrual of benefits after 8 March 1999.

12. It is common ground that the parties have not located any confirmation from the Plan actuary that the alterations to revaluation made in the 1999 Deed & Rules would continue to satisfy the reference scheme test. In that context the claimant issued these proceedings on 10 October 2022, to determine the impact of that (if any) on the validity of the 1999 Deed & Rules as concerns the accrual of benefits after 8 March 1999. It should be emphasised that there has been no determination of whether an actuarial confirmation was in fact issued at the relevant time. The court is, however, asked to proceed on the assumed basis that no such confirmation was issued.

13. Under the Third Definitive Trust Deed and Rules dated 21 June 2010 (the **2010 Deed & Rules**) the Plan closed to new members. For existing members, the revaluation of deferred benefits continued on the same basis as under the 1999 Deed & Rules. The 2010 Deed & Rules appended the required actuarial certification. In the present case, therefore, the question of validity of the 1999 Deed & Rules affects Plan members with pensionable service between 8 March 1999 and 21 June 2010 (believed to be around 430 to 450 members). If it is held that the changes to revaluation set out in the 1999 Deed & Rules are void and ineffective, that will improve the benefits accrued by those members during that period of time, at a cost to the Plan which has been estimated at around £10 million.

14. The relevant legislation was later amended, and contracting-out of SERPS was eventually abolished with effect from 6 April 2016. For present purposes, the question is the interpretation of the legislation in the version applicable between 8 March 1999 and 21 June 2010.

Legislative framework

Requirements for a contracted-out scheme

15. Section 9 of the 1993 Act set out the requirements that any scheme had to satisfy if it was to be approved as a contracted-out scheme. As originally enacted, those requirements included conditions in relation to GMP accrual. As amended by the 1995 Act, with effect from 6 April 1997, the GMP conditions remained for benefits relating to the employee's service before that date: s. 9(2A). For benefits relating to the employee's service from 6 April 1997, however, the requirements for a contracted-out scheme were as set out in s. 9(2B). That section required the Secretary of State to be satisfied that the scheme complied with s. 12A of the 1993 Act as amended, as well as various other conditions.

16. Section 12A(1) of the 1993 Act, as amended by the 1995 Act, required the scheme to satisfy the "statutory standard", defined in s. 12A(2)–(4) as being met if the pensions under the scheme were collectively broadly equivalent to, or better than, the pensions that would be provided under a reference scheme as specified in regulations made under s. 12(A)(4). Section 12A(5) then provided that regulations made under s. 12(A)(4) may provide for the determination (of whether the scheme met the reference scheme test) to be made in accordance with guidance approved by the Secretary of State.

17. Crucially, for present purposes, s. 12A(6) provided that:

> "The pensions to be provided for such persons under a scheme are to be treated as broadly equivalent to or better than the pensions which would be provided for such persons under a reference scheme if and only if an actuary (who, except in prescribed circumstances, must be the actuary appointed for the scheme in pursuance of section 47 of the Pensions Act 1995) so certifies."

18. The Regulations were made pursuant to various provisions of the 1993 Act, including s. 12A(4). They set out the detail of the requirements for contracted-out schemes and the way in which those were to be assessed by the scheme actuary. Regulation 23 provided that in determining whether the pensions provided under the scheme were broadly equivalent to or better than those which would be provided under a reference scheme, the actuary was required to follow actuarial guidance note GN28 prepared from time to time by the Board for Actuarial Standards and approved by the Secretary of State. This is considered further below.

Alteration of a contracted-out salary-related scheme

19. When first enacted, s. 37 of the the 1993 Act provided (so far as material):

> "37. **Alteration of rules of contracted-out schemes**
>
> (1) Subject to subsection (2), where a contracting-out certificate has been issued, no alteration of the rules of the relevant scheme shall be made so as

> to affect any of the matters dealt with in this Part … or Chapter III of Part IV or Chapter II of Part V without the consent of the Board.
>
> (2) Subsection (1) does not apply—
>
> …
>
> (b) to an alteration of a prescribed description.
>
> (3) Subject to subsection (4), any alteration to which subsection (1) applies shall be void if it is made without the consent of the Board.
>
> (4) A consent given by the Board for the purposes of this section shall, if and to the extent that the Board so direct, operate so as to validate with retrospective effect any alteration of the rules which would otherwise be void under this section."

20. As amended by the 1995 Act, s. 37 provided (again so far as material):

> "37. **Alteration of rules of contracted-out schemes**
>
> (1) Except in prescribed circumstances, the rules of a contracted-out scheme cannot be altered unless the alteration is of a prescribed description.
>
> (2) Regulations made by virtue of subsection (1) may operate so as to validate with retrospective effect any alteration of the rules which would otherwise be void under this section.
>
> (3) References in this section to a contracted-out scheme include a scheme which has ceased to be contracted-out so long as any person is entitled to receive, or has accrued rights to, any benefits under the scheme attributable to a period when the scheme was contracted-out."

21. Regulation 42 (in the version applicable from 6 April 1997) set out the "prescribed circumstances" and "prescribed description" envisaged in s. 37(1) of the 1993 Act as follows:

> "42. **Alteration of rules of contracted-out schemes**
>
> (1) For the purposes of section 37(1) of the 1993 Act (prohibition on alteration of rules of contracted-out scheme unless the alteration is of a prescribed description), the alterations which are prescribed are any alterations which are not prohibited by paragraph (2), (2A) or (2B).
>
> (2) The rules of a salary-related contracted-out scheme cannot be altered in relation to any section 9(2B) rights under the scheme unless –
>
> (a) the trustees of the scheme have informed the actuary in writing of the proposed alteration,

> (b) the actuary has considered the proposed alteration and has confirmed to the trustees in writing that he is satisfied that the scheme would continue to satisfy the statutory standard in accordance with section 12A of the 1993 Act if the alteration were made (a 'Section 37 Confirmation'), and
>
> (c) the alteration does not otherwise prevent the scheme from satisfying the conditions of section 9(2B) of that Act.
>
> (2A) The rules of a scheme contracted-out under section 9(3) of that Act (a money purchase contracted-out scheme) cannot be altered in relation to protected rights if the alteration would –
>
> (a) affect any of the matters dealt with in Part III of that Act or any regulations made under that Part which relate to protected rights in a manner which would or might adversely affect any entitlement or accrued rights of any member of the scheme acquired before the alteration takes effect, or
>
> (b) otherwise prevent the scheme from satisfying the conditions of that section.
> …
>
> (2B) The rules of a contracted-out scheme cannot be altered in relation to any guaranteed minimum pensions under the scheme if the alteration would –
>
> (a) affect any of the matters dealt with in Part III of that Act or any regulations made under that Part which relate to guaranteed minimum pensions in a manner which would or might adversely affect any entitlement or accrued rights of any member of the scheme acquired before the alteration takes effect,
>
> (b) affect any of the matters dealt with in sections 87 to 92 … and 109 and 110 of that Act … or in any regulations made under those provisions which relate to guaranteed minimum pensions, or
>
> (c) otherwise prevent the scheme from satisfying –
>
> (i) In the case of a salary-related contracted-out scheme, section 9(2) of that Act, …"

22. It is common ground that the effect of Regulation 42(2)(b) was to require any alteration to a contracted-out salary-related scheme in respect of "section 9(2B) rights" to be preceded or accompanied by a written confirmation by the scheme actuary that if the alteration was made the scheme would continue to satisfy the reference scheme test.

23. For the purposes of the reference in Regulation 42(2) (and other provisions of the Regulations) to "section 9(2B) rights", Regulation 1(2) of the Regulations contained the following definition (in the version applicable from 6 April 1997):

> " 'section 9(2B) rights' are –
>
> (a) rights to the payment of pensions and accrued rights to pensions (other than rights attributable to voluntary contributions) under a scheme contracted-out by virtue of section 9(2B) of the 1993 Act, so far as attributable to an earner's service in contracted-out employment on or after the principal appointed day; and
>
> (b) where a transfer payment has been made to such a scheme, any rights arising under the scheme as a consequence of that payment which are derived directly or indirectly from—
>
> (i) such rights as are referred to in sub-paragraph (a) under another scheme contracted-out by virtue of section 9(2B) of that Act; or
>
> (ii) protected rights under another occupational pension scheme or under a personal pension scheme attributable to payments or contributions in respect of contracted-out employment on or after the principal appointed day".

24. Following a consultation in 2012, Regulation 42 was amended by Regulation 3 of the Occupational and Stakeholder Pension Schemes (Miscellaneous Amendments) Regulation 2013, with effect from 6 April 2013. The amended Regulation 42(2) replaced the reference to "any section 9(2B) rights under the scheme" with:

> "any rights which are to accrue under the scheme in so far as such rights are attributable to an earner's service in contracted-out employment on or after the date on which the alteration to the rules takes effect (other than rights attributable to the payment of voluntary contributions)".

25. This provision therefore explicitly limited the ambit of Regulation 42(2) to rights accruing on or after the date of the alteration. In relation to rights which had accrued before the date of alteration, new subparagraphs (2ZA) and (2ZB) were inserted. Subparagraph (2ZA) maintained the reference to s. 9(2B) rights, providing that:

> "The rules of a contracted-out salary-related scheme cannot be altered in relation to any section 9(2B) rights under the scheme unless –
>
> (a) following the alteration, the scheme provides benefits … which are at least equal to the benefits that would be provided by a reference scheme (within the meaning of section 12B(2) of the 1993 Act …"

Supervision by the Secretary of State

26. Accompanying the transfer of supervisory functions from the OPB to the Secretary of State, the amendments to the legislation introduced by the 1995 Act and related guidelines made provision for the Secretary of State's ongoing supervision of the eligibility of schemes for contracting-out.

27. In particular, Regulation 16 required an employer to provide the Secretary of State with periodic confirmation that its scheme continued to satisfy the contracting-out

requirements, with evidence in the form of a certificate from the scheme actuary that the scheme continued to satisfy the reference scheme test. Actuarial guidance note GN28 stated at §2.4 that the Contributions Agency would specify when such certificates needed to be provided, but that this would normally be every three years. The Contributions Agency guidance CA14C issued on 6 April 1997 duly provided (at §§11.1–2) for actuarial certificates to be provided at intervals of no more than three years.

28. Section 34 of the 1993 Act (as amended by the 1995 Act) provided for Regulations enabling the Secretary of State to cancel or vary a contracting-out certificate where relevant conditions ceased to be met. That provision was implemented by Regulation 47, which gave the Secretary of State the power to cancel or vary the certificate with retrospective effect, from the date on which the requirements for contracting-out ceased to be met.

The issues

29. The questions set out in the claim form raise, in essence, three issues:

    i) Issue 1: did s. 37 of the 1993 Act render an amendment made in the absence of the written actuarial confirmation contemplated by Regulation 42(2)(b) void to any extent? If so, issues 2 and 3 then arise.

    ii) Issue 2: did the words "section 9(2B) rights" as used in Regulation 42(2) mean that s. 37 only had such effect in relation to rights attributable to service prior to the execution of the 1999 Deed & Rules (i.e. 8 March 1999), or did s. 37 also have such an effect in relation to rights attributable to service after that date?

    iii) Issue 3: did s. 37 have such an effect only in relation to adverse alterations to s. 9(2B) rights, or in relation to all alterations to such rights?

30. While issue 3 is likely to have only limited practical effect (and even less so if issue 2 is determined in favour of the claimant), I am asked to determine it whatever my conclusion on issue 2, to provide the trustees with all the information needed to enable them to administer the Plan in accordance with the legislation set out above.

31. More generally, I am told that the court's answers to the questions set out above will inform the further factual enquiries that may be made by the parties in relation to the question of whether an actuarial confirmation was in fact provided in relation to the 1999 Deed & Rules, and if so when.

Issue 1: consequences of failure to provide actuarial confirmation in respect of a scheme alteration

32. As set out above, in the versions applicable during the relevant time, the effect of s. 37 read together with Regulation 42(2) was that the rules of a contracted-out scheme "cannot be altered" unless the trustees of the scheme had informed the scheme actuary in writing of the proposed alteration, and the actuary had confirmed in writing that they were satisfied that the scheme would continue to satisfy the statutory standard (i.e. the reference scheme test).

33. The claimant's case is that failure to get an actuarial confirmation in accordance with Regulation 42(2)(b) gave rise to the risk that the Secretary of State might vary or cancel

the scheme's contracting-out certificate, but did not render the 1999 Deed & Rules automatically void. The third defendant's case by contrast is that the phase "cannot be altered" in s. 37 is clear and unambiguous, and must entail the invalidity of non-compliant amendments, particularly when considered together with the statutory context and purpose.

34. Mr Stallworthy's starting point was that the previous version of s. 37(3) had provided expressly that an alteration falling within subsection (1) would be void if made without the consent of the OPB. That provision was, however, deleted in the version as amended by the 1995 Act. The effect of that deletion must, he submitted, be that the new version no longer rendered a non-compliant alteration void.

35. That point was reinforced, he said, by the fact that s. 38 of the 1993 Act, which concerned alterations to contracted-out personal pension schemes (as opposed to salary-related schemes governed by s. 37), both before and after the 1995 Act amendments, provided in subsection (1) that "no alteration of the rules of the relevant scheme shall be made" where that had particular specified effects, and in subsection (3) provided that subject to specified exceptions "any alteration to which subsection (1) applies shall be void". Mr Stallworthy's submission was that this showed that if the legislative intent was for non-compliant alterations to be void, it was set out expressly in the wording of the statute.

36. I am not persuaded by those submissions. The original wording of s. 37(3), which provided expressly for the voidness of alterations falling within subsection (1) if made without the consent of the OPB, needs to be read in the context of the way in which subsection (1) was then framed, namely that "no alteration of the rules of the relevant scheme shall be made … without the consent of the [OPB]". The original subsection (3) set out clearly, for the avoidance of doubt, the consequence of failure to comply with subsection (1). The same is true of s. 38, which contained similar wording in its subsections (1) and (3) both before and after the 1995 Act amendments.

37. As amended by the 1995 Act, however, s. 37(1) was worded differently, providing that unless the alteration was of a prescribed description the rules of a contracted-out scheme "cannot be altered". There is no ambiguity in that wording: the effect is that a non-compliant alteration simply cannot be made. Nothing in any of the language of s. 37 (or, for that matter, Regulation 42) suggests that s. 37 can be interpreted so as to have the result that a non-compliant alteration can be regarded as valid and effective.

38. Moreover, as set out above, following the 1995 Act amendments s. 37(2) provided that regulations might be made so as to validate "any alteration of the rules which would otherwise be void under this section". That explicitly contemplated the possibility that certain alterations would be rendered void by s. 37(1), and would make no sense if s. 37(1) did not have that effect.

39. Mr Stallworthy suggested that the amended version of s. 37(2) was intended to be a transitional provision to cater for alterations which were void under the old s. 37 and could no longer be validated by the OPB (which no longer existed). He noted, in that regard, that the only regulations made under the new s. 37(2) were concerned with pre-6 April 1997 alterations. As Mr Short submitted, however, the fact that the regulations made under s. 37(2) in practice only addressed alterations made prior to the introduction of the new regime does not mean that s. 37(2) was intended to have solely transitional effect. Nothing in the wording of that provision – or the other subparagraphs of s. 37 –

suggests that the sanction of voidness "under this section" should be interpreted, contrary to the plain wording of s. 37(2), as applying only to alterations that were prohibited under the historic wording of s. 37.

40. I am likewise unconvinced by Mr Stallworthy's argument that s. 37 was not one of the provisions of the 1993 Act which were specified to be "overriding" under s. 129 of the Act, so as to override any provision of a scheme which conflicted with them. Section 37 did not need to be "overriding" because its effect was to render void and ineffective an alteration which did not comply with the requirements of that section and the regulations made thereunder. There was, in consequence, nothing to override.

41. Mr Stallworthy's next submission was that a comparison with s. 9 of the 1993 Act indicated that the words "cannot be altered unless …" in s. 37 did not render alterations void if they did not comply with the relevant conditions. Section 9(1), he noted, provided a scheme "can be contracted out … only" if it satisfied certain conditions. Notably, however, if a contracting-out certificate was mistakenly issued by the Secretary of State in circumstances where the scheme did not in fact meet those conditions, that did not automatically render the scheme a nullity in its entirety. Rather, the Secretary of State then had the power to cancel the certificate retrospectively pursuant to Regulation 47.

42. I do not, however, think that the mechanism for the grant of a contracting-out certificate under s. 9 can be used to construe s. 37 contrary to its plain and unambiguous meaning. The purpose of s. 9 is to set out the conditions for an initial certificate to be granted by the Secretary of State, in particular requiring the Secretary of State to be "satisfied" of various matters. The fact that there are then specific provisions in Regulation 47 enabling such a certificate to be cancelled, potentially with retrospective effect, does not suggest that the different wording of s. 37, addressing a different issue (alteration of a contracted-out scheme that has been approved), should be construed so as to avoid the sanction of voidness.

43. Turning to the purpose of s. 37, Mr Stallworthy referred to *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340, where the question was the validity of a confiscation order made under the Criminal Justice Act 1988, in circumstances where the order had been postponed beyond the time limit specified in s. 72A(3) of that Act. After referring to a passage from the judgment of Lord Hailsham in *London & Clydeside Estates v Aberdeen District Council* [1980] 1 WLR 192, 189–90, Lord Steyn commented at §15 (with similar comments repeated at §23) that this passage:

> "led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity."

44. Mr Stallworthy submitted, on that basis, that under the new contracting-out regime there was greater scope for an alteration to affect the conditions of contracting-out, because the scheme was assessed as a whole and could therefore cease to satisfy the reference scheme test due to demographic and other changes. It was, therefore, appropriate for the scheme to be supervised by the flexible discretionary powers vested in the Secretary of State (including the power to cancel certificates with retrospective effect), rather than by rendering automatically void any non-compliant amendments. Mr Stallworthy noted that by comparison with the old regime, under which the OPB could validate alterations

retrospectively, the new regime contained no provision permitting the validation of post-6 April 1997 alterations.

45. The change from an assessment of GMP for each scheme member to an assessment of whether the overall scheme met the reference scheme test does not, however, indicate that s. 37 should be construed contrary to its clear wording. That is particularly the case in circumstances where s. 37 *did* provide in subsection (2) a clear basis for regulations to be made enabling the validation with retrospective effect of alterations of the scheme rules that would otherwise be void under s. 37. The fact that the regulations made under that provision were (as discussed above) confined to pre-6 April 1997 alterations does not suggest that alterations after that date should be left to be enforced by the discretionary powers of the Secretary of State. Rather, it indicates a legislative decision to maintain the strict sanction of invalidity for alterations made on or after 6 April 1997 that did not meet the requirements of Regulation 42.

46. Both parties referred to actuarial guidance note GN28, which was provided for by Regulation 23, and a new version of which was approved by the Secretary of State effective from 17 March 1997. Section 5 of that note stated as follows:

> "5.1 Whenever the actuary is informed of any significant changes to the membership, including remuneration patterns, or to the terms of the scheme, consideration should be given as to whether such changes would adversely affect the ability of the scheme to pass the tests of equivalence. In such circumstances the actuary should be satisfied that it would have been possible to certify that the scheme satisfied the tests of equivalence immediately following the relevant change and, if not the Contributions Agency, the employer and the trustees should be notified, unless the situation has been rectified before notification takes place.
>
> 5.2 Before a proposed change in the rules of the scheme can be made, Regulation 42 requires the actuary to notify the trustees in writing that the scheme will continue to satisfy the statutory standard after the alteration is made."

47. Mr Stallworthy relied upon §5.1, contending that it contemplated an assessment by the actuary that took place after the relevant changes had occurred, hence the requirement for the actuary to be satisfied that it "would have been possible" to certify that the scheme satisfied the relevant tests immediately following the relevant change. If an alteration made without actuarial certification was automatically void, he said, there would be no change for the actuary to consider.

48. As Mr Short pointed out, however, §5.1 has to be read alongside §5.2. The latter made clear – consistent with s. 37 – that a proposed change in the rules of the scheme could not be made unless the scheme actuary had *already* provided the Regulation 42 confirmation that the scheme would continue to satisfy the statutory standard after the alteration is made. That being the case, §5.1 must have addressed changes that were not changes to the rules of the scheme, such as changes to the membership of the scheme. It is not clear what changes to the "terms of the scheme" were contemplated in that paragraph, but the juxtaposition of §§5.1 and 5.2 indicates that whatever was envisaged by that phrase did not include changes to the rules of the scheme, which were addressed in §5.2.

49. Mr Stallworthy also relied upon the Contributions Agency guidance CA14C, §10.9 of which stated that:

> "A contracting-out certificate may be cancelled where the actuary considers a proposed alteration of the scheme rules under [s. 37] and [Regulation 42] and where he/she finds that as a consequence the scheme no longer satisfies the scheme-based contracting out test, or the conditions of [s. 9(2B)]."

50. He submitted that if s. 37 disabled an alteration unless the scheme actuary had confirmed in advance that the scheme would continue to meet the reference scheme test, then it would never be the case that the alteration could result in the scheme no longer satisfying the test. On that basis, he said, §10.9 was consistent with an alteration made without actuarial confirmation still being valid and effective.

51. I do not accept that submission. Consistent with the requirements of s. 37 and Regulation 42, §10.9 of the guidance contemplated an actuarial assessment which was carried out before the alteration to the scheme rules was made (hence "proposed alteration"). In that context, the paragraph indicated that an assessment carried out at that stage could potentially lead to the cancellation of a contracting-out certificate, if the actuary found that the scheme no longer satisfied the relevant conditions. Cancellation may of course have been unnecessary if the only impediment to compliance was a rule change which could not in any event be made pursuant to s. 37 and Regulation 42. The drafters of §10.9 might, however, have contemplated other changes to the scheme – such as those referred to in §5.1 of GN28 – which did not constitute rule changes but which were related to the proposed alteration of the rules.

52. It is not, however, necessary to resolve the question of the precise scope of §10.9, because whatever situation was covered by that paragraph, what it did *not* do was to suggest that a rule change introduced without the actuarial certification required by s. 37 and Regulation 42 might be valid and effective.

53. Mr Stallworthy's final and overarching argument was that legislation should not, absent clear terms, be interpreted as abrogating pre-existing rights and powers. On that basis, he submitted that unless persuaded that the relevant legislation clearly disabled amendments absent actuarial confirmation, the court should incline against such an interpretation, which he said would be draconian in the absence of any discretionary power to cure matters retrospectively.

54. It follows from the analysis above, however, that the legislation does in my judgment clearly preclude amendments that have not obtained prior actuarial confirmation. It is the claimant's submission that produces a result that is inconsistent with the statutory language, by leading to a result where a non-compliant amendment could legitimately be made and given effect, contrary to the explicit wording of s. 37(1) ("cannot be altered").

55. My conclusion on issue 1 is that s. 37 of the 1993 Act did indeed render invalid and void an amendment to the rules of a contracted-out scheme which related to s. 9(2B) rights, in so far as the amendment was introduced without the actuarial confirmation required by Regulation 42(2)(b).

Issue 2: whether "section 9(2B) rights" included rights attributable to future service

56. Section 37, read together with Regulation 42(2), takes effect in relation to alterations to rules which relate to "section 9(2B) rights". As set out above, "section 9(2B) rights" were defined in Regulation 1(2) as being "rights to the payment of pensions and accrued rights to pensions" under a scheme contracted out by virtue of s. 9(2B), so far as those rights were attributable to the employee's employment on or after the principal appointed day, i.e. on or after 6 April 1997.

57. It is common ground that the reference to "accrued rights" in the Regulation 1(2) definition meant that the protected s. 9(2B) rights included benefits that were attributable to employment on or after 6 April 1997, up to the date of the alteration in question. The disputed issue is whether "section 9(2B) rights" also encompassed benefits earned *after* the date of the alteration.

58. The claimant's case is that s. 9(2B) rights solely comprised benefits accrued by the date of the alteration, i.e. "past service rights", such that the sanction of invalidity under s. 37 (if the claimant is wrong on issue 1) only affected alterations to such past service rights. The third defendant's case is that s. 9(2B) also protected the accrual of rights from employment *after* the date of the alteration, i.e. "future service rights".

59. I do not accept the claimant's submissions on this point. Starting with the statutory language, there is nothing in the Regulation 1(2) definition of "section 9(2B) rights" which restricts those rights to past service rights. On the contrary, the only temporal limitation is that the rights must be attributable to service on or after the appointed day, i.e. 6 April 1997.

60. Mr Stallworthy submitted that "rights to the payment of pensions" should be interpreted as meaning "present rights to the present payment of pensions", as juxtaposed with "accrued rights to pensions". I agree that the definition draws a distinction between rights to the payment of pensions and accrued rights to pensions. That distinction must be given meaning. On the plain wording of the definition, however, the distinction being made is a qualitative distinction between an immediate right to the payment of a pension, and an accrued right to a prospective pension (i.e. which does not give an immediate right to payment). What is being defined is the *type* of pension right that is protected under a provision of the Regulation referring to "section 9(2B) rights".

61. Save for the express stipulation in the Regulation 1(2) definition that the relevant rights were those attributable to service on or after 6 April 1997, nothing in the language of the Regulations either specified or implied any particular temporal limitation on the rights that were covered by that definition. Rather, it is apparent that where a particular provision in the Regulations was intended to protect only those rights acquired before a specified date, that was set out explicitly: see for example Regulation 42(2A) and (2B) concerning amendments to the rules of a money purchase contracted-out scheme, and amendments to GMPs under a contracted-out scheme. Both of those provisions included subparagraphs expressly dealing with alterations that would or might adversely affect rights "acquired before the alteration takes effect". Regulation 42(2), by contrast, contained no such wording. Instead it applied to "any section 9(2B) rights under the scheme".

62. To similar effect, Regulation 20 restricted the payment of a lump sum in respect of benefits "which have accrued in respect of an earner's s. 9(2B) rights under a scheme". Again, Regulation 42(2) contained no such wording. Moreover if (as Mr Stallworthy argued) s. 9(2B) rights by definition only encompassed rights that had already accrued, the addition of "which have accrued" in Regulation 20 would have been unnecessary.

63. Mr Stallworthy also submitted that in the instances where the Regulations referred to s. 9(2B) entitlements that might arise in the future, specific language was used to convey that. For example, Regulation 3(1) referred to a policy of insurance or annuity contract as a means of securing the protected rights, GMPs, "or any benefits arising in respect of section 9(2B) rights to be payable under the scheme". Regulation 28, which made provision for service in a contracted-out salary-related scheme which did not qualify for further benefits, likewise referred in subparagraph (2)(c) to "benefits arising in respect of section 9(2B) rights to which the earner would be entitled in respect of service in that employment".

64. Contrary to Mr Stallworthy's submissions, those references do not show that s. 9(2B) rights must by default and without further adornment be read as a reference to past service rights. On the contrary, if the definition of s. 9(2B) was temporally limited in the way contended for by the claimant, the concept of any future benefits arising in respect of s. 9(2B) rights would be an oxymoron. The fact that it is clear from the Regulations that at least some of the provisions concern s. 9(2B) rights arising in the future is, therefore, a strong indicator that the definition of s. 9(2B) rights was not temporally limited to past service rights, but rather described the protected rights in qualitative terms as discussed above.

65. As to the legislative history of the Regulation 1(2) definition, both parties relied upon the fact that the original form of Regulation 1(2), as made on 25 April 1996, defined s. 9(2B) rights as

> "rights (other than rights attributable to voluntary contributions within the meaning of section 111 of the 1993 Act) which are attributable to an earner's service on or after the principal appointed day in employment which is contracted out in accordance with section 9(2B) of the 1993 Act".

66. The amended version which took effect on 6 April 1997 referred to "rights <u>to the payment of pensions and accrued rights to pensions</u> (other than rights attributable to voluntary contributions) …" (emphasis added). That amended definition was introduced across the package of regulations dealing with contracted-out rights.

67. Mr Stallworthy's primary position at the hearing was that even under the original wording of Regulation 1(2), "rights" should be interpreted as meaning "rights accrued as a result of past service". He relied, in that regard, on *Wedgwood v Salt* [2018] EWHC 79 (Ch), [2018] Pens LR 9, where Penelope Reed QC considered the meaning of a rule of the Wedgwood Group Pension Plan which imposed a fetter on alterations to the rules which prejudiced or adversely affected "any pension or annuity then payable or the rights of any Member". Her conclusion as to the meaning of the words "the rights of any Member" in that rule was (§44):

> "They mean, at the time the amendment was introduced, the rights which had accrued to a Member as a result of past service. The word 'rights' does not,

> in my view, naturally cover benefits which might in the future be obtained as a result of future service with the employer. … I also bear in mind that it is important to avoid unduly fettering a power to amend the provisions of the scheme as it is important for the parties to be able to make changes which might be required by the exigencies of commercial life. A power of amendment which prevented the employer from curtailing the right of existing members to continue to accrue benefits in circumstances where the employer was in financial difficulties and finding it difficult to fund the Plan makes far less sense than a construction which protects rights which members have gained through past employment but enables the employer to stop those benefits accruing in the future."

68. Mr Stallworthy's submission was that the same meaning should be given to the word "rights" in Regulation 1(2).

69. I do not accept that submission. As Penelope Reed QC acknowledged at §§33–34 of her judgment, it is not of great assistance to refer to cases where the courts have found that future rights were or were not protected by a fetter to amendment powers, where the relevant clauses contained quite different wording to the wording in issue in the scheme in question. Still less, in my judgment, can the judicial consideration of a rule of a pension scheme, based on the context of that particular scheme, meaningfully inform the interpretation of a clause in regulations which formed part of an overarching statutory scheme, and which must therefore be considered in that (quite different) context. In the present case, unlike the rule at issue in *Wedgwood v Salt*, the Regulation 1(2) definition of "section 9(2B) rights" applied not only to the use of that phrase in Regulation 42, but also to the use of that phrase in numerous other contexts in the Regulations, including contexts in which (as Mr Stallworthy accepted) the reference was to entitlements that included future service rights. As set out above, that indicates an interpretation of the definition that was not temporally limited.

70. Mr Stallworthy's alternative submission was that the amendment to the wording of Regulation 1(2), in the version applicable from 6 April 1997, represented a deliberate decision to replace the original definition with a definition that was more narrowly drawn, thereby indicating an intention to exclude future service rights.

71. I do not accept that submission either. The Explanatory Notes to the Personal and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 1997 explained that the amendment "harmonise[d] the definitions of 'section 9(2B) rights'". Nothing in the Explanatory Notes suggested that, by doing so, the definition removed any protections provided for future service rights.

72. It would, moreover, be very surprising if the effect of s. 37 and Regulation 42 were to be that the sanction of invalidity for a non-compliant alteration would bite only in relation to benefits attributable to employment between 6 April 1997 and the date of the alteration in question, leaving untouched (and therefore presumptively effective) any alteration to the benefits arising from employment after the alteration, subject only to triennial review by the scheme actuary and the discretionary power of the Secretary of State to cancel the contracting-out certificate with retrospective effect. As Mr Short noted, the purpose of the actuarial confirmation mechanism under Regulation 42 was to ensure that the scheme continued to satisfy the statutory standard after an alteration was made. That is apparent from the wording of Regulation 42(2)(b) and GN28 §5.2 ("continue to satisfy the

statutory standard"). Continued compliance of a scheme with the statutory standard was, moreover, the *quid pro quo* for the reduction in national insurance contributions granted in relation to contracted-out schemes. In that context, it would be very odd if the interpretation of s. 37 and Regulation 42 permitted a situation where the scheme did *not* continue to satisfy the statutory standard for benefits accruing after the alteration was made. I do not think that the legislation can, sensibly, be given that interpretation.

73. Mr Stallworthy's final submission was that the subsequent amendments made to Regulation 42 with effect from 6 April 2013 indicated that the version of Regulation 42(2) applicable in this case (i.e. the version applicable from 6 April 1997) only described past service rights. Specifically:

i) The July 2012 public consultation paper which preceded the 2013 amendments noted (at §5) that the intention of Regulation 42(2) was to ensure that any benefits *to be accrued* would still meet the reference scheme test following a prospective rule change, and that benefits *already accrued* would still meet the test following any retrospective rule change. The existing wording was, however, thought to be unworkable, because of the prospective nature of the certification process by scheme actuaries under Regulation 23 and Schedule 3 §13(2) of the Regulations. The proposal was therefore to "clarify" Regulation 42, by amending the wording to reflect the prospective nature of the reference scheme test, and by providing specific further provisions for accrued section 9(2B) rights.

ii) The government response to that consultation stated that the definition of s. 9(2B) rights within the Regulations "refers to accrued rights", and explained that the proposed change to Regulation 42(2) would avoid confusion by referring to "rights which are to accrue" under the scheme.

iii) The Explanatory Memorandum to the 2013 amending Regulations noted that there was confusion about how Regulation 42 should be applied when a scheme had ceased to contract out and wished to change its rules, and that:

> "7.5 … The intention of the existing legislation is to protect accrued rights where schemes wish to alter their rules, so that those rights, accrued whilst the scheme met the standards set out in legislation, are not reduced. Those representatives were of the view that the legislation did not meet the policy intention and could not work in practice as the required test could not be applied to accrued rights, only to prospective rights.
>
> 7.6 … The amended regulation 42 will enable the actuary to undertake suitable tests of the effect of any proposed rule changes to those contracted-out rights that have already accrued and contracted-out rights that are to accrue in the future. In relation to changes to benefits to accrue in the future under a contracted-out scheme, the test remains the 'reference scheme test' (RST) as set out in s. 12A of the Pension Schemes Act 1993. In relation to retrospective scheme rule changes made by schemes to contracted-out rights that have already accrued, the RST is not appropriate. …"

iv) The Explanatory Note to the 2013 amending Regulations then stated:

> "Regulation 3 amends regulation 42 of the Contracting-out Regulations, to provide a new set of requirements that apply to the amendment of scheme rules in relation to accrued contracted-out rights (section 9(2B) rights). Regulation 42(2) is amended so that the conditions in that regulation now only apply to the alteration of rules in relation to accrued contracted-out rights that are to accrue in the future under the contracted-out scheme. New regulation 42(2ZA) and (2ZB) set out new restrictions on the amendment of rules in relation to accrued contracted-out rights. Amendments to such rights are not allowed unless the benefits provided to members and survivors are at least as good as those provided by a reference scheme ..."

v) The changes referred to in the Explanatory Memorandum and Explanatory Note are as set out at §§24–25 above.

74. Looking at the amending materials as a whole, the problem identified in the consultation and the explanatory material was a perceived mismatch between the identified intention of Regulation 42 (to protect both benefits already accrued and benefits to be accrued) and the prospective focus of the actuarial analysis. That, as the Explanatory Memorandum indicated, created confusion where contracting-out had ceased. The solution was to clarify the matter by introducing separate provisions for past and future service benefits. Nothing in the explanatory materials indicates that the amended provisions were intended to introduce, for the first time, protections for future service benefits that had not existed previously: on the contrary, the Explanatory Memorandum stated that for such benefits the test "remains" the reference scheme test.

75. The high point of Mr Stallworthy's analysis was the point that the wording of Regulation 42(2ZA) presupposed that s. 9(2B) rights referred only to accrued (or past service) rights. I agree that this does seem to be the premise of the new Regulation 42(2ZA). However, if that reflected a view that the definition of s. 9(2B) rights in the previous version of the Regulations was also so confined, it follows from the analysis above that I consider that view to have been wrong. In my judgment, the definition of s. 9(2B) rights in the Regulations applicable from 6 April 1997 included both past service rights and future service rights, in light of both the statutory language (on its own terms) and the context of the Regulations as a whole. The fact that a narrower interpretation is suggested by a subsequent iteration of the legislation, in the context of different provisions, cannot in my view undermine the considerations set out above.

76. My conclusion on issue 2 is therefore that the words "section 9(2B) rights" as used in Regulation 42(2), in the version of the Regulations applicable from 6 April 1997, included both past service rights and future service rights.

Issue 3: whether voidness under s. 37 applied only to adverse alterations or to all alterations

77. The claimant's case is that Regulation 42(2) only required actuarial confirmation where alterations would or might adversely affect s. 9(2B) rights, and not where alterations could only improve such rights. Accordingly, the claimant's position is that voidness under s. 37 applied only to adverse (or potentially adverse) alterations. The third defendant's case is that the legislation did not suggest any limitation of the role of the actuary, or the corresponding sanction under s. 37, to alterations that would or might be adverse.

78. The claimant's submissions on this point were made very briefly in its skeleton argument, and were not addressed further by Mr Stallworthy at the hearing. There is, in my judgment, no merit in this point. As Mr Short rightly submitted, nothing in Regulation 42(2) indicated that it was limited to adverse alterations to s. 9(2B) rights. On the contrary, Regulation 42(2) referred to alterations in relation to "any section 9(2B) rights", by contrast with the wording of Regulations 42(2A) and (2B) which referred to alterations that "would or might adversely affect" entitlements or accrued rights acquired before the alteration was to take effect.

79. Nor is there any reason to suggest that such a limitation, conspicuously absent from Regulation 42(2), should be read into the provision. The scheme of Regulation 42(2) provided, on its face, a straightforward and unambiguous mechanism requiring actuarial confirmation in relation to any alteration. Introducing a threshold test of adverse effects would have required a judgment by the employer or trustee as to whether that was the case. That would, however, have required an assessment that was supposed to be the subject of actuarial consideration under Regulation 42(2), leading to uncertainty and questions of practical workability. I would be very reluctant to infer such a result absent clear language suggesting that construction – which there is not.

80. In relation to issue 3, therefore, my conclusion is that the requirement for actuarial confirmation under Regulation 42(2), and the sanction of voidness under s. 37 absent such confirmation, applies to all amendments to the rules of a contracted-out scheme, and not merely those which would or might adversely affect s. 9(2B) rights.

Conclusions

81. For the reasons set out above, in relation to the versions of the legislation applicable during the period relevant to these proceedings, my conclusions on the questions in the claim form are as follows:

    i) Issue 1: s. 37 of the 1993 Act rendered void an amendment to the rules of a contracted-out scheme which related to s. 9(2B) rights, in so far as the amendment was introduced without the actuarial confirmation required by Regulation 42(2)(b).

    ii) Issue 2: the words "section 9(2B) rights" as used in Regulation 42(2) included both past service rights and future service rights.

    iii) Issue 3: voidness under s. 37 applied to all alterations to s. 9(2B) rights and not merely to alterations that would or might adversely affect such rights.