



Section 37 of the Pension Schemes Act 1993 & Regulation 42 of the Occupational Pension Schemes (Contracting-out) Regulations 1996: Virgin Media Limited v NTL Pension Trustees II Ltd & ors¹

By Jennifer Seaman

It finally arrived. The event the industry was waiting for....

No, not the final episode of “Succession”. But a judgment on the operation of s.37 of the Pension Schemes Act 1993 (the **1993 Act**) and Regulation 42 of the Occupational Pension Schemes (Contracting-out) Regulations 1996 (SI 1996/1172) (the **Regulations**), and whether a scheme needs written actuarial confirmation that it continues to satisfy the statutory standards for contracting-out in order for a scheme amendment to a contracted-out scheme to be valid.

Background

The case involves the interpretation of historical legislation on contracting-out. From April 1978, it was possible for pension schemes to contract-out of the Additional State Pension (**ASP**), so members would not build up additional pension under the State Earnings Related Pension Scheme (**SERPS**), and employers could pay NI contributions at a reduced rate on behalf of the employer and employee. However, in order to contract-out, the employer had to provide prescribed benefits in place of the ASP given up.

Before 6 April 1997, contracting-out required a scheme to provide a member with a guaranteed minimum pension (**GMP**).

On and after 6 April 1997, the system changed and in order to contract-out a scheme needed to provide the right to accrue benefits broadly equivalent to, or better than, the benefits set out by the ‘reference scheme’ (see s.9(2B) and s.12A of the 1993 Act).

Contracting-out was abolished on 6 April 2016, when the single-tier State Pension began.

As at the date of execution of the Deed and Rules in issue in this case (the Second Definitive Trust Deed and Rules dated 8 March 1999 (the **1999 Deed & Rules**)):

- s.37 of the 1993 Act stated:

¹ [2023] EWHC 1441 (Ch).

“ s.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.
- (4) The reference in subsection (3) to a person entitled to receive benefits under a scheme includes a person so entitled by virtue of being the widower of an earner only in such cases as may be prescribed.”

- Regulation 42 of the Regulations stated:

“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.

...

- (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 [PSA 1993] 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 (protection of increases in guaranteed minimum pensions) and 109 and 110 of the Act (annual increases of guaranteed minimum pensions) 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, or
 - ii. In the case of a Scheme contracted-out under section 9(3) of that Act, that section.

(3) Where the provisions of section 37 of the 1993 Act continue to apply after a scheme has ceased to be contracted-out, this regulation shall continue to apply so long as the circumstances provided for in subsections (3) or (4) of that section continue to apply.”

- Regulation 1(2) of the Regulations defined “section 9(2B) rights” as:

“(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 [6 April 1997]; 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 [6 April 1997].”

Regulation 16 of the Regulations required the employer to provide the Secretary of State with confirmation (normally every 3 years) that the scheme continued to satisfy the contracting-out requirements.

Regulation 47 gave the Secretary of State the power to cancel or vary a contracting-out certificate with retrospective effect, from the date on which the contracting-out requirements ceased to be met.

The structure of the proceedings

The proceedings were streamlined to focus on the operation of the 1993 Act, the Regulations and how these provisions affect the 1999 Deed & Rules of the National Transcommunications Limited Pension Plan (the **Plan**). No other issues were included in the Part 8 Claim Form. The parties asked the Court to give judgment on the assumed basis that no actuarial confirmation was given in respect of the 1999 Deed & Rules. The Plan was contracted out of SERPS.

Amongst other things, the 1999 Deed & Rules sought to amend the Plan's revaluation provisions by, broadly, reducing the rate of revaluation of deferred pensions under the Plan.

The principal employer brought the Claim under CPR Part 64, and argued for an interpretation of the legislation with the least "voiding" effect. The employer also represented beneficiaries of the Plan with the same interest. A representative beneficiary was appointed, in a Consent Order prior to the main hearing, to argue the alternative (for the invalidity of the 1999 Deed & Rules and to the greatest extent). The two trustee companies (D1 and D2) were neutral.

The 3 issues that were debated in the hearing were:

- a. 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) of the Regulations void to any extent?
- b. If so, did the words "section 9(2B) rights" as used in Regulation 42(2) of the Regulations mean that s.37 only has such an effect in relation to rights attributable to service prior to the execution of the 1999 Deed & Rules, or did s.37 also have such an effect in relation to rights attributable to service after that date?
- c. 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?

The Judgment

Mrs Justice Bacon heard 2 days of argument (2-3 May 2023) and gave judgment on 16 June.

Bacon J concluded that, in the context of the contracting-out provisions between 8 March 1999 (the date of the 1999 Deed & Rules in issue) and 21 June 2010 (the date of the Third Definitive Trust Deed and Rules, which appended a s.37 Confirmation), the answers to the issues in the Claim were:

- a. Issue 1: s.37 of the 1993 Act rendered 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);
- b. Issue 2: 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.
- c. Issue 3: voidness under s.37 applies to all alterations to s.9(2B) rights and not merely to alterations that would or might adversely affect such rights.

The Judge found there was no ambiguity in the wording of s.37 or Regulation 42: "*Nothing [in those provisions] suggests that s.37 can be interpreted so as to have the result that a non-compliant alteration [i.e. without a written confirmation by the scheme actuary] can be regarded as valid and effective*" [37]. The Judge reasoned that the wording in the legislation was "*clear*" and "*plain*", and that 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*" [45].

The Judge also said that *“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.”* [59] and [61]. The Judge reached this position *“in light of both the statutory language (on its own terms) and the context of the Regulations as a whole.”* [75].

Further, as to Issue 3, the Judge reasoned that:

“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.” [79].

What next?

The hearing at which Bacon J’s decision is made has been adjourned to [24/25 July]², and the time for the Claimant to make an application to appeal (if so advised) is extended to the same date, or such other subsequent date as the Court may order.

Further factual enquiries are being discussed 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.

Updates on this case will be made known when available.

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² Awaiting court confirmation.