

# Deeds of amendment potentially void

## High court ruling casts doubt on past practice for contracted out schemes

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### Introduction

A recent High Court judgment in the Virgin Media v NTL Pension Trustees means that historic rule amendments made between 1997 and 2016 that changed post 97 salary related contracted out rates (referred to as section 9(2B) rights) could be void if the amending deed was not accompanied by a section 37 certificate or other written confirmation from the Actuary.

### Summary of the issue

#### **Why is section 37 of the Pensions Scheme Act 1993 important?**

Section 37 of the Pension Schemes Act 1993 was put in place to ensure that contracting out requirements were followed. In particular, any changes to relevant benefits could not be made without written confirmation from the scheme actuary that the scheme still met the reference scheme test following the change.

#### **What is the consequence of failing to obtain actuarial confirmation?**

The ruling covered three main questions and gave the worst possible news for any schemes where historic documents do not clearly include this actuarial confirmation. Failure meant the amendment was invalid and void.

The ruling covered deeds executed between 6 April 1997 to 6 April 2013 (but the issue could run for deeds up to 6 April 2016).

## **Was the invalidity limited to changes in relation to past service rights or also future service rights?**

Past and future rights were void.

## **Is it only adverse changes that are invalid or all changes?**

All changes.

## **Does this mean that the changes were inappropriate?**

No. One of the frustrations with this ruling is that we are not likely to be uncovering inappropriate benefit amendments. Scheme actuaries were separately reviewing benefits against the reference scheme test for relevant schemes every three years and flagging any issues, so this is essentially a governance/paperwork issue relating to the appropriate signoff of a scheme amendment rather than a question of members being treated unfairly through the benefit changes.

Unfortunately, the ruling does not allow us to use any of those interim Scheme Actuary checks to retrospectively validate any amending deeds.

## **Potential Impact**

The impact of this could be large for some schemes where this written confirmation was either not completed or cannot be found. It could impact A-Day deeds, equalisation deeds, and benefit changes for past service and is most likely to arise on deeds that appear to have no detrimental effect. For example, it could affect benefit improvements, which intuitively might not have caused any concern when being introduced.

There is ongoing legal discussion over whether this impacts the closure of a scheme to future accrual, and whether deeds are invalid in their entirety or only the sections covering section 9(2B) rights.

## **Possible Resolution**

The written confirmation has usually been a specially prepared certificate, but a letter, email or potentially even trustee minutes referring to written confirmation may suffice. Your legal advisers should be consulted on whether any evidence you can find is adequate. Schemes governed by Scottish Law may also have more leeway to assume that due process was followed.

For those who don't have clear documentation from the time, there is also no easy answer as yet to retrospectively resolve it. The far-reaching consequences and possible scale of the sums involved (including potential implications for the PPF in terms of schemes it has already taken on) mean that Government intervention is one possible solution being mooted. This could allow Schemes to ask their actuaries for retrospective confirmation although this could take some time to be introduced and potentially have further complications.

### Next steps for the case

The employer has been given permission to appeal and it is possible a different ruling will be handed down, although this is not guaranteed. If the appeal is not successful it is possible that the Government could legislate to try and resolve this without major upheaval.

We will continue to watch as the situation develops, and further news is expected in the next few months.

## The big question – To look or not to look?

Given we don't know when this matter will be resolved it is potentially an open-ended issue that may remain hanging over trustees and sponsors for years. There is no certainty that when a final position arises what that outcome would be.

Therefore, the question of whether to look at your scheme documents now, in light of this ruling and the current position, is a live matter of discussion in the industry. There are potential pros and cons to both sides, with some of the arguments set out below. *[Please note, the position is ultimately a legal one and whilst these points are intended to aid consideration, they cannot be relied upon. You should take legal advice if you need any definitive guidance regarding this issue.]*

### Look

- Looking may provide comfort if all deeds are in order.
- Trustees are under a fiduciary obligation to run the scheme in accordance with the Trust Deed and Rules. Arguably this would mean investigating the issue to ensure you can evidence any amending deeds were properly executed and considering the implications of this.
- If any problems are identified, benefit payment errors can then be corrected as soon as possible.
- Employers may want to understand the potential for any (unwelcome) additional costs.
- Schemes looking to transact imminently on a bulk annuity deal face pressing concerns as they may no longer have complete certainty on the benefit structure. There is a danger that you need to secure additional benefits at a later date through a top up or separate transaction, either of which could be very costly.
- The above is even more urgent for schemes that have transacted and are in the process of finalising benefits in the data cleanse, or schemes in the final stages of winding up.

- Schemes preparing to approach the insurance market should review their Rules to uncover any potential areas of risk. If this appears large, you may need to consider pausing any transaction (e.g. it may no longer be affordable). However, we don't know how long this will take to resolve, so there could be a significant hiatus, and this risk is therefore one of many to be balanced.

### **Don't look**

- As noted, this is a live issue with little certainty. Incurring costs when not essential and where the final position is unsettled may not be desirable for the Trustees or the Employer and may arguably be unreasonable where there are funding concerns.
- If you discover that documents are not in order (or potentially might not be), then what to do next becomes a far harder judgment. What (further) searching of archive paperwork is viable? How quickly should you look to rectify benefits and secure additional funding?
- While you can assess in the context of the current position, should the appeal ruling or the government make further changes then the Trustees may have incurred extra costs (time spent looking, consideration of the position and even rectification with a need to amend again) for no gain to the members.
- In most cases it would seem reasonable to assume that deeds will have been executed in good faith as agreed appropriately between the employer and trustees, after taking appropriate advice. In the absence of anyone questioning or challenging the validity of a past deed, why should the trustees investigate?
- Is there sufficient doubt to justify members now receiving an unintended windfall (or even a reduction, unless other steps are taken to validate an augmentation)?

## Broadstone comment

As with GMP equalisation, those involved with contracted-in schemes will be breathing a huge sigh of relief and, if nearing buy out, may find they're more attractive to insurers.

On balance we expect most schemes to maintain a watching brief on this and we would not generally suggest incurring costs at this stage that may be to no end if the appeal or government changes the position again.

However, there could be good reasons to look into the position more urgently and these will be case sensitive, as noted above. While we are happy to help where appropriate, a legal view should generally be sought as your lawyers will be far closer to the case and able to advise you on the risks involved.

### **Contact us**

If you have any questions, please contact your usual Broadstone consultant.

## Find out more

**For more information on how Broadstone can help you, please contact your Broadstone consultant or use the details below.**



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