

## Court case raises uncertainty over historic rule amendments

*The Judge in the recent High Court case of Virgin Media v NTL Pension Trustees has ruled that historic amendments made to benefits accrued after 6 April 1997 in a contracted-out salary-related pension scheme are invalid if a "Section 37 Certificate" was not obtained at the time from the Scheme Actuary.*

### Background

In the period between 6 April 1997 and 5 April 2016, pension schemes could contract-out of the State Second Pension (previously the State Earnings-Related Pension Scheme, or SERPS) on a salary-related basis if they passed a "Reference Scheme Test" - meaning that they provided a level of benefits above a prescribed minimum. Benefits accrued under such schemes during this period are usually described as "Section 9(2B) Rights" in reference to the relevant section of the Pension Schemes Act 1993. Section 37 of the Pension Schemes Act 1993 provided that, if the rules of such a scheme were to be amended in a way that affected members' Section 9(2B) Rights, then the Scheme Actuary had to confirm that the scheme would continue to meet the Reference Scheme Test after the amendment had been made. This is commonly referred to as a "Section 37 Certificate", although the legislation itself is unspecific about what form this should take, other than it should be in writing.

### The Judgment

The High Court confirmed that, if a Section 37 Certificate was not obtained, then past amendments making changes to members' Section 9(2B) Rights are void. In addition, the judgment confirmed that:

- This affects all changes, i.e. improvements as well as benefit reductions; and
- In respect of changes made prior to April 2013, it affects all rights, both past and future service. (From April 2013 changes in legislation meant that it then explicitly only applied to future service changes).

### Further Developments

Because the legislation is unspecific about the form of the confirmation required from the Scheme Actuary, there could be a further hearing to ascertain whether, in the absence of an explicit Section 37 Certificate, other actuarial advice could suffice to validate any amendments made, e.g. confirmation at a later actuarial valuation that the Scheme continued to meet the Reference Scheme Test. There could also be an appeal of the judgment, and potentially if this is perceived to be a widespread problem, representations may be made to the Government to intervene by passing amending legislation, although of course this would take time.

### Action Required

The consequences of this judgment are still being considered, and so most schemes may wish to wait to see if there will be further hearings, court cases or amending legislation to clarify the position. In the meantime, trustees may wish to consider reviewing past rule amendments to see whether a Section 37 Certificate was obtained at the time, so that they are aware of whether this could be an issue for them, and if so what benefits might be affected.

More immediate action may be required if a scheme is about to enter into a buy-in or buy-out. These are usually permanent arrangements, so the absence of a Section 37 Certificate could mean locking into an incorrect level of benefits.

**If you would like to discuss any of these matters further, please get in touch with your usual contact at Cartwright.**

