

Introduction

In June 2023, the High Court ruled that amendments to benefits in schemes that were contracted out on the reference scheme test basis between 6 April 1997 and 5 April 2016 are void if they were made without written confirmation from the scheme actuary that the scheme would continue to meet the reference scheme test.

Part of the High Court decision was appealed, and the Court of Appeal has now handed down its judgment.

We summarise below the background to contracting out, what was decided by the court in 2023, the issue that was appealed, the outcome of the appeal and the possible next steps for trustees.

Contracting-out Background

Between 6 April 1997 and 5 April 2016, salary-related pension schemes could contract out of the state second pension if they met the conditions set out in the Pension Schemes Act 1993 (PSA 1993) and connected regulations. Schemes had to satisfy a reference scheme test standard, which was a quality test of scheme benefits, certified by the scheme actuary and subject to triennial recertification. Generally, the scheme had to provide benefits that were broadly at least as good as a hypothetical scheme providing a pension at age 65 of n/80 of average earnings between the lower and upper earnings limit. Members' contracted-out rights accrued on this basis from 6 April 1997 are commonly referred to as "section 9(2B) rights".

The PSA 1993 restricts the rule amendments that could be made to contracted-out schemes – broadly, to ensure that the amendment would not impact the scheme's ability to meet the reference scheme test. As part of the rule amendment process, trustees were required to inform the scheme actuary in writing of the proposed rule change, and the scheme actuary was required to confirm to the trustees in writing that the scheme would continue to satisfy the reference scheme test if the alteration were made.

The scheme actuary's written confirmation is commonly referred to as a "section 37 certificate", but the legislation refers to a written exchange between the trustees and the scheme actuary, without use of the word "certificate".

The High Court Judgment

In the High Court case of [Virgin Media v. NTL Pension Trustees](#), the judge ruled in June 2023 that:

- Amendments to the rules of a scheme that related to section 9(2B) rights were rendered void if a rule change was introduced without a section 37 confirmation.
- The term "section 9(2B) rights", as used in regulations from 6 April 1997 to 5 April 2013, encompassed benefits accrued in respect of service both before and after the date of an alteration. (From 6 April 2013, the regulations were amended to cover changes to benefits accrued in respect of future service only.)
- All changes to members' Section 9(2B) rights are impacted, even if the change resulted in a benefit improvement.

The Court of Appeal Judgment

The Court of Appeal was asked to consider whether the actuary's written confirmation was only required if an alteration to the rules of the scheme affected pension benefits attributable to past service at the date of the alteration (8 March 1999), or whether the actuary's confirmation was also required if the alteration affected the pension benefits that a member would earn by future service (issue 2 above).

In a unanimous decision handed down on 25 July 2024, the court [dismissed the appeal](#) and confirmed in relation to alterations made between 6 April 1997 and 5 April 2013, section 9(2B) rights included both past service rights and future service rights.



What Has Been Clarified?

Although the appeal takes us a step further forward, it does not address some of the practical questions that arise when assessing whether an alteration complied with the requirements of section 37 PSA 1993.

What Is Certain?	Practical Issue?
It is clear that there must be some form of written confirmation from the actuary in order for a rule alteration subject to section 37 PSA 1993 to be valid.	It is questionable whether actuarial confirmation could be valid if it was given after an alteration had already been made. If retrospective confirmation is not permitted, it has not been tested in court whether it would be possible for an amendment to subsequently become valid as at the later date that written confirmation was given, and/or the date of the next triennial recertification. This is a matter that was reserved for a future hearing, if necessary.
It has been confirmed that there is no requirement for written actuarial confirmation to be in the form of a certificate.	The format that written actuarial confirmation may take in order to be acceptable has not been specified (e.g. form of words to be used and/or means of communication).
It has been confirmed that for alterations made during the period from 6 April 1997 to 5 April 2013, section 9(2B) rights include benefits accrued in respect of service both before and after the date of an alteration.	The exact type of scheme alterations that would be subject to section 37 PSA 1993 has not been clarified. For example, is an amendment to close a scheme to future accrual subject to the confirmation requirements?
We know that the government has power under section 37 PSA 1993 to introduce regulations that would retrospectively validate rule amendments that would otherwise be void under section 37.	It remains to be seen whether there will be any intervention from the government to retrospectively validate rule amendments where written actuarial confirmation cannot be found but where those rule amendments would otherwise have been valid. The new government is planning a Pension Scheme Bill in 2025, so it is debateable how high up the priorities list this might feature, if at all, for a new government.
Finally, while it has been confirmed that any alterations to the rules of a scheme that related to section 9(2B) rights were rendered void if a rule change was introduced without a section 37 confirmation, we do not yet know whether there will be a further appeal or any further hearings on any other points arising out of the original decision, or indeed whether any other schemes may make their own applications to court.	



What Next?

The implications of the High Court judgment and the subsequent appeal decision are potentially widespread. In many cases, there will be clear evidence that a section 37 confirmation was obtained prior to a rule change – for example, it may be appended to the deed of amendment. In other cases, the paperwork may be more difficult to extract from scheme records, or there may be no evidence that a section 37 confirmation was obtained.

In the aftermath of the High Court ruling, some trustees sought legal advice as they needed urgent clarity on the validity of past rule amendments, typically those trustees that were undertaking de-risking plans such as a buy-in or buyout of benefits. Other trustees decided not to take action and to await future developments, including the outcome of this appeal.

Whether trustees need to take any action at this point is still likely to depend on whether they require short-term certainty of rule amendments, for example if their scheme is in the process of a de-risking exercise. For other trustees, it might remain a viable option to continue waiting in case there are follow-up court cases or government interventions that provide further clarity before they undertake any work.

For trustees who feel it would be appropriate to act now to consider the validity of any historic alterations, the following questions will be key:

- Has the scheme been amended in a way that results in an alteration (of any kind) of section 9(2B) rights?
- Did the trustees inform the scheme actuary of the proposed amendment prior to it being made?
- Did the actuary provide written confirmation that the reference scheme test would continue to be met?
- Do you have a copy of that written confirmation?
- Was the written confirmation provided before or after the amendment was made?
- For amendments made between 6 April 1997 and 5 April 2013, did the written confirmation cover benefits accrued in respect of service both before and after the date of the amendment?

Trustees who may wish to consider whether there are potential claims against third parties should be aware of potential limitation issues on bringing a claim – if in doubt, please seek advice.

Further Information

We are happy to help any of our clients to understand the implications of the case and to determine next steps.

Please contact your usual member of our Pensions team if you would like our support on this issue.



Matthew Giles

Partner

T +44 121 222 3296

E matthew.giles@squirepb.com

