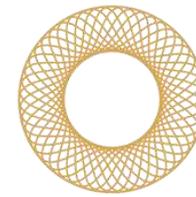


# Outer Temple

**Not the *Virgin Media* appeal ...  
How has the case changed prior thinking on  
actuarial confirmations and what are the  
implications for schemes looking to buy-out.**

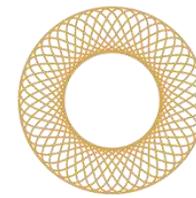
Nicolas Stallworthy KC

23.11.23



# Caveats and disclaimers

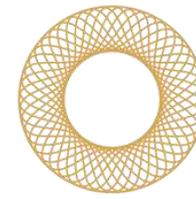
- *Virgin Media Ltd v NTL Pension Trustees II Ltd* [2023] EWHC 1441 (Ch), [2023] Pens. L.R. 12 – Bacon J – appeal pending
- Not discussing issues which are the subject of the appeal (*'sub judice'*)
- Chatham House rules ...



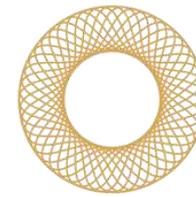
# Three issues at first instance

- (1) Did s.37 void alterations that were not of prescribed description ?
- (2) If so, did reg.42(2), with its use of the defined term "*section 9(2B) rights*", cause s.37 to void rights attributable to service only before the alteration; or also future accrual thereafter ?
- (3) Did reg.42(2) only apply s.37 to alterations adversely affecting 's.9(2B) rights' (i.e. benefit reductions); or did it apply to all alterations affecting 's.9(2B) rights' (even benefit improvements) ?

# Held:



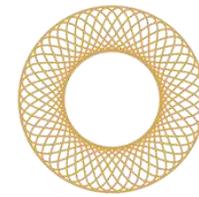
- (1) s.37 voided a rule alteration made without actuarial confirmation insofar as the alteration was in relation to 's.9(2B) rights': [55].
- (2) The term s.9(2B) rights, defined by reg.1(2) and used in reg.42(2), included both rights attributable to service before the alteration and future accrual thereafter [76].
- (3) The requirement for actuarial confirmation – and so the sanction of voidness – applied to all alterations to 's.9(2B) rights' (even benefit improvements): [80].



# Appeal

- Permission sought and granted on Issues (1) [s.37] & (2) [meaning of s.9(2B) rights in reg.42]
- Appeal pursued only on Issue (2)
- No permission sought/appeal pursued on Issue (3)
- No date for appeal hearing yet fixed

# Definition of "s.9(2B) rights"



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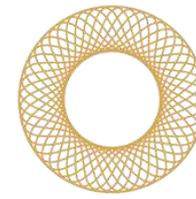
*"(a) **rights to the payment of pensions and accrued rights to pensions** (other than rights attributable to voluntary contributions) under a scheme contracted-out by virtue of section 9(2B) of the 1993 Act, so far as attributable to an earner's service in contracted-out employment on or after [06.04.97]; 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 [06.04.97]."*

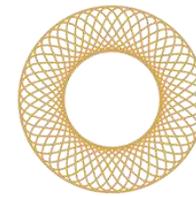
# Has the case changed prior thinking ? Market commentary:



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*" Up until now common practice has been for schemes to have discussed the requirement for certification ahead of making scheme changes. The starting point was 'Do the changes affect contracted out rights?'. Schemes, together with their advisers, including the scheme actuary, will have carefully considered this question together with the requirement for confirmation, not as a simple matter of a 'must have'. The judgment therefore brings usual processes and practices into question ... It is possible that amendments will have been made in good faith on the basis that no actuarial confirmation was required, for example where the changes impacted the future or where the contracted-out rights were not adversely impacted."*

# Implications if appeal successful



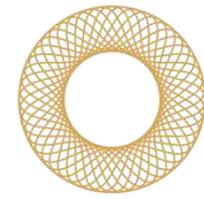
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- Most schemes had fetters which precluded reducing accrued rights, so no amendment engaging reg.42(2).
- Until 06.04.06 s.67 PA95 precluded reducing accrued rights.
- EU law invalidated amendments trying to equalize by reducing accrued rights.
- But amendments improving past accrual still invalid if expressed as amendment to rights attributable to past service [Issue 3]: cf. ? not invalid if expressed just as an augmentation of present/future rights. And could now amend to restore improvements anyway.

# Implications if appeal unsuccessful Outer Temple

- Windfalls for members; and exposure for employers/PPF.
- What would count as confirmation for reg.42(2) ?
- Closures to accrual ?
- Was confirmation given by next triennial recertification ?
- Could confirmation be given even now ?
- Evidential issues: recitals ? actuarial assurances as to practice ?
- Will DWP be persuaded to make regulations validating with retrospective effect ?
- Professional negligence claims.

# What counts as confirmation ?



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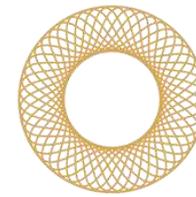
*"The rules of a salary-related contracted-out scheme cannot be altered **in relation to any section 9(2B) rights** under the scheme unless—*

*(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, and*

*(c) the alteration does not otherwise prevent the scheme from satisfying the conditions of section 9(2B) of that Act."*

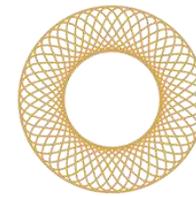
# What counts as confirmation ?



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- Should we also be looking for a document from the trustees informing the actuary of the proposed alteration ?
- As to actuarial "confirmation":
  - NB not a certificate (cf. e.g. RST certificate in CA form) – lesser formality
  - any writing (e.g. email suffices)
  - from actuary to trustees (even if via an intermediary:  $\approx$  for the trustees)
  - that the scheme would continue to satisfy the RST (e.g. probably any indication that new rules satisfactory for contracting-out)

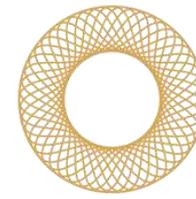
# Closures to accrual



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- Rights "*under a scheme contracted-out by virtue of s.9(2B) ... so far as attributable to contracted-out employment*"
- If contracting-out certificate surrendered, the alteration documenting closure was not re: a scheme which was contracted-out and/or any rights affected were not attributable to contracted-out employment ... so no problem
- Otherwise never possible to terminate future accrual in a contracted-out scheme, because not possible to confirm that future accrual in the scheme (= nil) met RST
- A final salary link & revaluation underpin post-closure not a problem, because such rights are "*attributable*" to employment pre-closure: see *G4S plc v G4S Trustees Ltd*

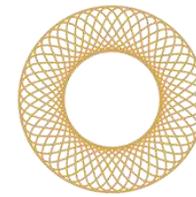
# Was confirmation given by next triennial recertification ?



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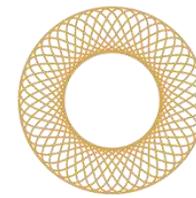
- RST depended not only on scheme rules, but also on the cohort of members and their pensionable salaries at assessment date.
- So may be argued that:
  - triennial recertification at date later than effective date of amendment does not provide the confirmation required ???
  - if s.37 rendered alteration void, any subsequent recertification comes too late ???
  - since reg.42(2) refers to "proposed alteration" and "if the alteration were made", confirmation must precede amendment ???

# Contrary arguments: and can confirmation be given now ?



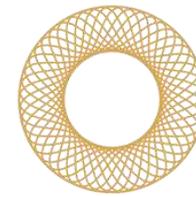
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- Recertification may have confirmed scheme satisfied RST if alteration made ?
- s.37(2): "Regulations ... may operate so as to validate with retrospective effect any alteration of the rules which would otherwise be void under this section" – does Reg.42(2) do so ?
- And cf. OPB practice, where consent after event validated amendment.
- Not being answered by the pending appeal ...



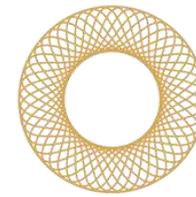
# Evidential issues: recitals ? actuarial assurances re: practice ?

- Court determines question of fact on balance of probabilities
- Inference permitted
- If recital records that actuarial confirmation given, likely to suffice, absent contrary evidence
- If evidence from actuary/consultancy as to their standard practice at the time, ? likely to suffice, absent contrary evidence
- If no evidence either way, ? presumption of regularity & validity
- May well depend on how many other documents from the time survive and any inference which may be drawn from an actuarial confirmation not being among them



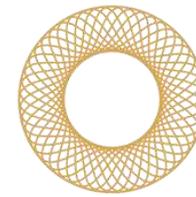
# Will DWP be persuaded to make regulations validating with retrospective effect ?

- Industry discussion about this as possibility
- Windfalls; but also invalidated improvements.
- Potentially massive impact on PPF



# Professional Negligence claims ?

- Obligation for actuaries to provide the confirmation: GN28
- Arguably a duty on solicitors to identify and advise as to the risk of the amendment being void without actuarial confirmation
- But ? hard to suggest anyone negligent for thinking the definition of 's.9(2B) rights', as used in reg.42, meant accrued rights (i.e. meant what it said !)



**Outer Temple**

**Any Questions?**