

The Omniscient draftsman – the answer to *Virgin Media*?

By Paul Newman

To describe the recent decision in *Virgin Media Ltd v NTL Pension Trustees II Ltd*¹ as controversial would be a considerable understatement. Bacon J's decision that amendments made to post-6 April 1997 benefits in a contracted-out salary related scheme will be void in the absence of a s.37 certificate, is likely (if not overturned) to cause great difficulties for trustees, employers and buy-out insurers alike.

This article is not intended to summarise that decision – for that, the reader is referred to Jennifer Seaman's [article](#) on this website. Instead, this article considers perhaps the most debatable aspect of the judgment, and suggests that the principle of “the omniscient draftsman” may provide a basis to challenge it.

Having decided that s.37 of the Pension Schemes Act 1993 rendered void an amendment made in the absence of the written actuarial confirmation contemplated by reg.42(2)(b) of the Contracting-out Regulations 1996, Bacon J went on to consider whether the words “*section 9(2B) rights*” as used in that regulation meant that s.37 only had such an effect in relation to pre-amendment rights, or whether it also had that effect in relation to post-amendment rights.

¹ [2023] EWHC 1441 (Ch).

This issue involved the interpretation of the definition of “*section 9(2B) rights*” in reg.1(2) of the Contracting-out Regulations which provided, in the version applicable from 6 April 1997, that such rights were:

“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 ...”

The Judge held that that definition applied to future service rights, as well as past service rights, because the phrase “*accrued rights*” did not incorporate any temporal limitation but simply identified a type of pension, being a right to a prospective pension, as contrasted with “*rights to the payment of pensions*” which is the right to the present payment of a pension.

The Judge rejected the company’s reliance on *Wedgwood Pension Plan Trustee Ltd v Salt*,² where words “*the rights of any member*” in a fetter in an amendment power were construed as limited to rights that had accrued to a member as a result of past service. The Judge did not consider that the judicial consideration of a rule of a pension scheme, based on the context of that particular scheme, could meaningfully inform the interpretation of a provision in regulations which formed part of an overarching statutory scheme, and which must therefore be considered in that, quite different, context.

In construing the definition, the Judge did not refer to the rule of statutory interpretation that attributes an omniscience to the draftsman, described as “*the irrebuttable ascription to Parliament of a draftsman’s knowledge of the law in relation to which Parliament is legislating*”.³ This is an important

² [2018] Pens LR 283.

³ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A.G.* [1975] AC 591 at 649 per Lord Simon of Glaisdale. The general principle that a draftsman is taken to know the law also applies more generally to trust deeds: an example familiar to pensions lawyers is that the draftsmen of tax-approved pension scheme provisions are to be taken to aware of applicable HMRC law and practice.

constitutional doctrine promoting public respect for the integrity of the law,⁴ and manifests itself in a number of relevant principles:

- (i) in order to understand the meaning and effect of a legislative provision, it is essential to take account of the state of the previous law so that, where a word or phrase has a well-established technical meaning in previous legislation, the court can infer an intention to apply the same meaning to that word or phrase in new legislation;⁵
- (ii) if a word or phrase has a technical meaning in a certain branch of law, and is used in a context that is dealing with that branch, it is to be given that meaning unless a contrary intention appears;⁶
- (iii) a word or phrase used in a context dealing with a particular branch of law is generally interpreted in light of the established meaning that it has in that area of the law;⁷
- (iv) where legislation is silent on an issue, the existing law is taken to apply unless expressly or implicitly excluded;⁸
- (v) where legislation uses a word or phrase that has been the subject of previous judicial interpretation in the same or similar context, it may be inferred that Parliament intended the word or phrase to bear the same meaning as it had in that context.⁹

⁴ *R (oao N) v Walsall Metropolitan Borough Council* [2014] PTSR 1365 at [65] per Leggatt J.

⁵ *R v Bristol City Council, ex p Everett* [1999] 1 WLR 1170 at 1179 per Mummery LJ.

⁶ *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed., 2020), s.22.5.

⁷ *ibid*, s.25.3.

⁸ *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 724-725 per Lord Wilberforce.

⁹ This is known as the *Barras* principle, after *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402.

The concept of “*accrued rights*”, in the context of provisions relating to the amendment of pension benefits, had an established legal meaning at the time the definition of “*section 9(2B) rights*” was introduced in April 1997, both in terms of its use in statute and its common law meaning.

As regards the use of “*accrued rights*” in other statutory contexts, it appeared most notably in the general restriction on the application of amendment powers in s.67 of the Pensions Act 1995, which applied where the power was “*exercised on any occasion in a manner which would or might affect any ... accrued right, of any member of the scheme acquired before the power is exercised*”.¹⁰ Whilst that provision expressly referred to pre-amendment rights, the phrase “*accrued rights*” was itself defined in similarly restrictive terms: “*the accrued rights of a member of an occupational pension scheme at any time are the rights which have accrued to or in respect of him **at that time** to future benefits under the scheme*”.¹¹

As to the applicable common law, the most recent authority on the scope of fetters in amendment powers at the time the definition of “*section 9(2B) rights*” was introduced, adopted the same meaning to the phrase “*accrued rights*”. In *Lloyds Bank Pension Trust Corp v Lloyds Bank plc*,¹² the Court had to construe a fetter, in r.9(1) of the relevant rules, that prohibited amendments “*which in the opinion of the Scheme Actuary may have the effect ... of decreasing the pecuniary benefits secured to or in respect of such Members under the Scheme ...*”. Rimer J held that the words “*pecuniary benefits secured*” applied to future service benefits as well as past service benefits, as there was no express or implicit temporal limitation in the fetter. However, the Judge referred to the concept of “*accrued rights*”, in contradistinction to future service benefits, when comparing the fetter in issue with the fetter contained in r.9(3) of the same rules:¹³

“In my view the drafting differences between rules 9(1) and (3) convey an obvious distinction as to the types of interest with which the two sub-paragraphs are respectively concerned. The latter is in terms concerned with “the pecuniary rights of [deferreds and pensioners]” being interests in the nature

¹⁰ s.67(2).

¹¹ s.124(2)(a) (emphasis supplied).

¹² [1996] Pens LR 263.

¹³ at [53].

of rights which have truly accrued, in the sense that the beneficiaries have become entitled to defined rights. By contrast, the "pecuniary benefits secured to or in respect of [actives]" in general rule 9(1) are not interests in the nature of accrued rights, either actual or notional, at all."

Applying the "omniscience" principle, the draftsman of the definition of "section 9(2B) rights" should be taken to have known that the phrase "accrued benefits" had an established technical meaning in pensions law at that time, as adopted by the definition of the same phrase in the Pensions Act 1995 and as recognised by the Judge in the *Lloyd's Bank* case. It is accordingly arguable that that principle ought to have led the Court in the *Virgin Media* case to apply that meaning to restrict that phrase to past service benefits.

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