Neutral Citation Number: [2024] EWCA Civ 843

Case No: CA-2023-001719

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST: PENSIONS (ChD)
Mrs Justice Bacon
[2023] EWHC 1441 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 July 2024

Before :

LORD JUSTICE PETER JACKSON
LADY JUSTICE ASPLIN
and
LORD JUSTICE NUGEE

- -

Between :

	VIRGIN MEDIA LTD	**Claimant / Appellant**
	- and -	
(1)	**NTL PENSION TRUSTEES II LTD**	**Defendants/ Respondents**
(2)	**ROSS RUSSELL LTD**	
(3)	**JOHN JARDINE**	

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Nicolas Stallworthy KC and **Philip Stear** (instructed by **Gowling WLG (UK) LLP**) for the **Appellant**
Jennifer Seaman (instructed by **Eversheds Sutherland (International) LLP**) for the **1st and 2nd Respondents**
Andrew Short KC and **Patrick Tomison** (instructed by **Squire Patton Boggs (UK) LLP**) for the **3rd Respondent**

Hearing dates: 26 and 27 June 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 25 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This appeal from the High Court is concerned with legislation formerly applicable to occupational pension schemes that were contracted out on the salary-related basis, and raises a single question of statutory construction.

2. Between 1997 and 2016 it was possible for a pension scheme to be contracted out on the salary-related basis under s. 9(2B) of the Pension Schemes Act 1993 (**"PSA 1993"**) by reference to what was called the "statutory standard" (namely that the pensions provided were broadly equivalent to or better than those that would be provided under a so-called "reference scheme" or benchmark). By s. 37 PSA 1993 there were restrictions on the alteration of the rules of a contracted-out scheme, s. 37(1) providing:

> "Except in prescribed circumstances, the rules of a contracted-out scheme cannot be altered unless the alteration is of a prescribed description."

The detailed restrictions were found in regulations, namely the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996 No 1172 (**"the Contracting-out Regulations"**), and specifically in reg 42. Between 1997 and 2013 this provided in reg 42(2) that the rules of a salary-related contracted-out scheme could not be altered "in relation to any section 9(2B) rights under the scheme" unless, among other things, the scheme 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".

3. The question raised in this appeal is whether the effect of s. 37 PSA 1993 and reg 42 of the Contracting-out Regulations was to require the actuary's confirmation only if an alteration to the rules of the scheme affected pension benefits attributable to past service at the date of the alteration, or whether the actuary's confirmation was also required if the alteration affected the pension benefits that a member would earn by future service. That depends on the definition of "section 9(2B) rights" which was found in reg 1(2) of the Contracting-out Regulations. This was as follows:

> "In these Regulations, unless the context otherwise requires–
>
> …
>
> "section 9(2B) rights" are–
>
> (a) rights to the payment of pensions and accrued rights to pensions … under a scheme contracted-out by virtue of section 9(2B) of the 1993 Act … "

4. The present case concerns a pension scheme called the National Transcommunications Limited Pension Plan (**"the Scheme"**) of which the Claimant, Virgin Media Ltd (**"Virgin"**), is the current Principal Employer, and the 1st and 2nd Defendants, NTL Pension Trustees II Ltd and Ross Russell Ltd, are the current Trustees. A deed of

amendment in 1999 purported to alter the rules of the Scheme for future service. No written confirmation by the actuary for the purpose of s. 37 PSA 1993 and reg 42 of the Contracting-out Regulations has been found to date. These proceedings were brought by way of Part 8 claim by Virgin to determine whether the relevant amendments were valid or not, joining as defendants the Trustees and a representative beneficiary, Mr John Jardine. Virgin contended that no actuary's confirmation was required as the amendments did not affect section 9(2B) rights since these were limited to past service rights. Mr Jardine contended that the actuary's confirmation was required as the amendments did affect section 9(2B) rights, the definition being wide enough to encompass future service rights. The Trustees adopted a neutral position.

5. The proceedings were heard by Bacon J. She handed down judgment on 16 June 2023 at [2023] EWHC 1441 (Ch). She preferred the arguments for Mr Jardine and concluded that the words "section 9(2B) rights" as used in reg 42(2) of the Contracting-out Regulations at the relevant time included both past service rights and future service rights.

6. Virgin appeals with the permission of Bacon J herself, who recognised that the question of construction was a difficult one and that the decision had potentially wide-ranging implications for many similar pension schemes.

7. We have had the benefit of well-argued submissions from Mr Nicolas Stallworthy KC, who appeared with Mr Philip Stear for Virgin, and from Mr Andrew Short KC, who appeared with Mr Patrick Tomison for Mr Jardine, as well as some helpful observations from Ms Jennifer Seaman for the Trustees.

8. For the reasons that follow, I have come to the conclusion that Bacon J was right and that the appeal should be dismissed.

Facts

9. The particular facts of this case (as to which there was no dispute) are not of great significance since what is in issue is the question of statutory construction that I have outlined above. But I should explain how the question arises.

10. The Scheme was established with effect from 1 January 1991 by a Definitive Trust Deed and Rules dated 6 December 1990 made between National Transcommunications Ltd as Principal Employer and two individuals as Trustees (**"the 1990 Deed"** and **"the 1990 Rules"**). It was a final salary scheme of the conventional type under which a member retiring at Normal Retirement Date (**"NRD"**), which in most cases was age 60, would be entitled to a Scale Pension calculated as n/60 of final Pensionable Salary (where n is the number of years of Pensionable Service). The 1990 Rules made provision for the payment of guaranteed minimum pensions (**"GMPs"**) to members, from which it is apparent that the Scheme was intended to be capable of being contracted out on the salary-related basis, and we were informed by Ms Seaman that the Scheme was in fact contracted out on the GMP basis from its inception on 1 January 1991: I explain below what such contracting out then involved.

11. The 1990 Rules provided in the usual way for those leaving Pensionable Service before NRD with sufficient Qualifying Service (effectively 2 years' service) to be entitled to a deferred pension at NRD, calculated in the same way as the Scale Pension (rule 9).

This was a statutory requirement, known as "preservation of benefit", which had been introduced by the Social Security Act 1973. From 1986 there was a further statutory requirement (initially found in sch 1A of the Social Security Pensions Act 1975 (**"SSPA 1975"**) and subsequently consolidated in the PSA 1993) that such deferred pensions be increased (or "revalued") in the period of deferment by a minimum amount. Rule 9(4) of the 1990 Rules duly provided for increases to deferred pensions in deferment, calculated by reference to RPI capped at 5% pa. That was similar to the increases required by statute (which were based on the increase in the general level of prices, for which RPI was then used, also capped at 5% pa), but because of the way the increases were calculated might in any particular case produce a lesser or greater increase than the revaluation required by the SSPA 1975. Rule 9(4) therefore contained an underpin under which the increased pension could not be less than required by the revaluation requirements of the SSPA 1975.

12. Power to amend the Deed and Rules was contained in clause 31 of the 1990 Deed in the following terms:

> "31. Alterations
>
> The Principal Employer may from time to time with the consent of the Trustees alter or add to the provisions of this deed or the Rules but no alteration or addition may be made which would:
>
> (1) alter the main purpose of the Plan, namely the provision of benefits (being benefits which can be provided by an Approved Fund) for employees of the Employers who are admitted into membership of the Plan; or
>
> (2) have the effect of varying prejudicially any benefits then already provided in respect of a Member, Early Leaver or Pensioner unless that person gives his written consent; or
>
> (3) result in any transfer of any portion of the Fund to any of the Employers.
>
> Any alteration or addition must be made by a deed executed by the Principal Employer and the Trustees."

13. A number of new statutory requirements were imposed on occupational pension schemes by the Pensions Act 1995 (**"PA 1995"**). These generally came into force on 6 April 1997 (referred to in the relevant legislation as "the principal appointed day"). That meant that schemes needed to review and update their deeds and rules to ensure compliance with the new requirements. In the case of the Scheme this was done by executing a Second Definitive Trust Deed and Rules dated 8 March 1999 which replaced the existing Deed and Rules in their entirety (**"the 1999 Deed"** and **"the 1999 Rules"**). Clause 2 of the 1999 Deed provided as follows:

> "The Definitive Trust Deed and Rules shall replace all documents governing the Plan. The Rules shall apply with effect from 6 April 1997 or from such other dates as are either specified in the Rules or required by law. However, they shall not change the benefits payable in respect

> of Members whose Pensionable Service ceased before that date."

The date of 6 April 1997 is a clear indication that the prompt for this replacement deed and rules was the PA 1995, and as can be seen, the amendments were purportedly retrospective to that date.

14. Rule 10.2 of the 1999 Rules contained the provisions for deferred pensions for Early Leavers. It provided that such deferred pensions would be increased between the date of leaving Pensionable Service and NRD "in accordance with the revaluation requirements of the PSA 1993". (There was an exception for certain members called DTELS Members who were entitled to a fixed rate of revaluation but the details do not matter).

15. The practical effect of this was that the increases in deferment under this rule might be less than the increases under rule 9(4) of the 1990 Rules, both because the 1990 Rules could in a particular case throw up a larger increase than the statutory requirements (due to both the index period being different, and the 1990 rules including revaluation for the part year preceding NRD), and because the statutory requirements could be revised downwards (and in due course were, as in 2010 RPI was replaced by CPI for the purposes of statutory revaluation, and CPI almost always produces lower figures for inflation than RPI), and under the 1999 Rules the increases payable would track the statutory requirements downwards.

16. On 1 December 2004 Virgin (under its then name of NTL Group Ltd) replaced National Transcommunications Ltd as the Principal Employer of the Scheme.

17. On 21 June 2010 a Third Definitive Trust Deed and Rules (**"the 2010 Deed"** and **"the 2010 Rules"**) was executed. This again replaced the existing Deed and Rules in their entirety, in this case with effect from the date of the 2010 Deed, and remains the current Definitive Deed. The relevant rule in the 2010 Rules dealing with deferred pensions (rule 10.3) was in the same terms as rule 10.2 of the 1999 Rules.

18. The 2010 Deed contained express reference to s. 37 PSA 1993 in clause 7 as follows:

> "The Trustees have obtained an actuarial certificate in respect of the amendments set out in this Definitive Trust Deed and Rules which comply with section 37 of the PSA 1993 and which is appended to this Definitive Trust Deed."

The certificate appended read as follows:

> "For the purposes of regulation 42 of the Occupational Pension Schemes (Contracting-out) Regulations 1996 (SI 1996 No 1172) I hereby confirm to the Trustees of the NTL Pension Plan that, in my opinion, the exercise of the power to modify the Plan in the manner made in this Deed (*reference: 2972130.11*) will not adversely affect the ability of the Plan to satisfy the statutory standard in accordance with section 12A of the Pensions Schemes Act 1993 if the alterations were so made."

It was signed by an actuary and dated 17 June 2010.

19. By Deed of Amendment dated 29 January 2014 the Scheme was closed both to new

entrants and to further accrual with effect from the end of 31 January 2014.

20. It is now possible to explain what the problem is. As set out above there was a change in the 1999 Rules to the way in which increases in deferment were calculated (from RPI capped at 5% subject to an underpin of the statutory revaluation requirements to a simple tracking of statutory revaluation). On the face of it this change applied retrospectively from the date of the 1999 Deed (8 March 1999) to 6 April 1997. But the power to amend that was used for the 1999 Deed and Rules was that in clause 31 of the 1990 Deed which by proviso (2) prevented any amendment which had the effect of varying prejudicially any benefits then already provided in respect of a Member, Early Leaver or Pensioner without his or her written consent (see paragraph 12 above). Reducing the increases payable on pension benefits already earned as at 8 March 1999 by Pensionable Service before that date would fall foul of that proviso, and Virgin has therefore accepted in these proceedings that the amendments which the 1999 Deed and Rules sought to make to the basis for revaluation of deferred pensions could not adversely affect benefits earned by Pensionable Service before 8 March 1999.

21. The practical effect of that is that (i) any Member leaving Pensionable Service before 8 March 1999 is entirely unaffected by the changes to the revaluation of deferred pensions and (ii) that for any Member still in Pensionable Service as at 8 March 1999, their benefits earned before that date would be revalued by the better of the revaluation provisions in the 1990 and 1999 Rules. In this way the 1999 rule change to revaluation could only adversely affect benefits attributable to service on and after 8 March 1999.

22. At the time of the 1999 Deed the Scheme was contracted out on the salary-related basis. This therefore raises the question whether the effect of s. 37 PSA 1993 and reg 42 of the Contracting-out Regulations was to require the actuary's written confirmation that the Scheme would continue to satisfy the statutory standard, and that in turn depends on whether those provisions applied where the only amendment was to benefits to be earned by future service.

23. It is not suggested that the actuary would have had any difficulty in giving such a confirmation: the amendments made to the revaluation of deferred pensions made no difference to the ability of the Scheme to satisfy the statutory standard. But unlike the 2010 Deed, the 1999 Deed did not contain any reference to, let alone append, a certificate given under s. 37 PSA 1993. If s. 37 did apply, it was not necessary for there to be a formal certificate appended to the Deed – all that was required was written confirmation – but to date no such written confirmation has been found.

24. The effect of s. 37 and reg 42 was that the rules of the Scheme "cannot be altered" in relation to any section 9(2B) rights without the actuary's written confirmation. Bacon J held that this meant that if the actuary's written confirmation was required but not given then a purported amendment would be void, and that has not been appealed. If the purported amendment made to the revaluation provisions in the Scheme in 1999 were void, it would mean that the revaluation provisions were not amended until the 2010 Deed. The result would be that any member in pensionable service between 8 March 1999 and 21 June 2010 would be entitled to have their benefits attributable to such service revalued in deferment in accordance with the 1990 Rules rather than the 1999

Rules.[1]

25. There are about 430 to 450 such members. In February 2021, the Scheme's actuarial advisers informed the Trustees that, on a buy-out basis, the financial impact for the Plan (and, indirectly, Virgin) of a finding that the amendments to revaluation in the 1999 Rules were void is likely to be around £10 million assessed as at 31 December 2020. We were subsequently informed after the hearing by the Trustees that on the basis of draft preliminary, updated calculations it equates to about 1-2% of the total liabilities of the Scheme.

Contracting out

26. Contracting out is a fiercely technical area of law, but the essence of it is not hard to state. I gave an account of its introduction recently in *Robins v Secretary of State for Work and Pensions* [2023] EWCA Civ 890 (see at [19]-[24]), but for present purposes can summarise it more briefly. In a White Paper dated September 1974 ("Better Pensions", Cmnd 5713) the Government proposed amending the state pension, which was then payable at a flat rate to those with sufficient contributions, so that it included an additional earnings-related component. Provisions to this effect were duly enacted in the SSPA 1975 and the new scheme, known as the State Earnings Related Pension Scheme or SERPS, came into force on 6 April 1978. The SERPS pension was based on a band of earnings between a lower earnings limit and an upper earnings limit, the intention being that an employed earner would qualify for a SERPS pension calculated as a proportion of their average lifetime revalued earnings in that band.

27. The White Paper recognised however that many employers already had occupational pension schemes which provided additional pensions to their employees, and proposed that such employers should be able to "contract out" of SERPS. In essence, in return for a reduction in the employer's and employee's National Insurance (**"NI"**) contributions, a contracted-out scheme had to meet certain minimum requirements, notably the provision of a GMP for the employee and his widow, and the employee's SERPS benefits were correspondingly reduced. The GMP was based on the same band of earnings as the SERPS pension and was intended to be of approximately the same value, but for technical reasons there were slight differences in calculation which meant that it was not identical to the SERPS pension. This did not affect the employee because the effect of contracting out was not that he accrued a GMP instead of SERPS; rather he continued to accrue a SERPS pension but when in payment his GMP was deducted from it – the so-called "contracting-out deduction". This meant that if his GMP was less than his SERPS pension (as it often was, not least because the SERPS pension was increased in payment in line with inflation and the GMP was not, or not fully), he would receive the shortfall from the state.

28. Contracting out was given effect to by Part III of the SSPA 1975, later consolidated into Part III of the PSA 1993. As originally enacted, these provisions only enabled schemes to contract out on the GMP basis. The provisions were substantially amended by the Social Security Act 1986 with effect from 6 April 1988 which among other things

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[1] This is subject to a possible argument that the 1999 amendments might have become valid when the actuary next re-certified the Scheme. This point was not argued either before Bacon J or us but has been reserved for future argument if necessary.

made it possible for schemes to contract out on a money purchase basis as an alternative.

29. The PA 1995 made significant changes to the way in which schemes could contract out on a salary-related basis, Part III of the PA 1995 amending Part III of the PSA 1993 with effect from 6 April 1997 so that it was no longer possible to contract out on a GMP basis. Instead a salary-related scheme could be contracted out if it met the so-called reference scheme test, that is if it provided benefits that were broadly at least as good as a scheme providing a pension at age 65 of n/80 of average earnings between the lower and upper earnings limit. This was not a demanding test, and most salary-related schemes met it without difficulty. If a scheme were contracted out on this basis the result was that the employee did not accrue a SERPS pension for the relevant period at all – this was rather simpler than the way in which contracting out on the GMP basis had worked where the employee continued to accrue a SERPS pension but his GMP was deducted from it when in payment.

30. With effect from 6 April 2002 the additional state pension was changed from SERPS to the State Second Pension or S2P. This affected the way in which the additional pension was calculated, but did not affect the ability to contract out. Contracting out was ultimately abolished with effect from 6 April 2016 on the introduction of the single tier state pension.

The SSPA 1975

31. I have referred above to the main enactments but I should now refer to some of the legislation in more detail.

32. I can start with the SSPA 1975 which introduced contracting out. Part III of the SSPA 1975 (ss. 26 to 52) was headed "Contracting-out", and had effect for the purpose of reducing the rates of both the NI contributions payable by and in respect of an employed earner, and of the state retirement pensions payable, where an occupational pension scheme provided for the earner and his widow to be entitled to "requisite benefits" and the earner's employment was contracted-out by reference to the scheme (s. 26). Provision for reduction in contributions was made in ss. 27 and 28, and for reduction in state pension (by the amount of SERPS pension or if less the GMP) in s. 29. By s. 30 an earner's employment was contracted-out employment if he was a member of an occupational pension scheme providing requisite benefits, the scheme was a contracted-out scheme in relation to that employment and (by s. 30(1)(c)):

> "there is in force a certificate, issued by the Occupational Pensions Board and known as a "contracting-out certificate", that the employment is contracted-out employment by reference to the scheme."

The Occupational Pensions Board (**"the OPB"**) was then the regulator of occupational pension schemes, and s. 31 contained further provisions in relation to certificates, including (by s. 31(6)) a power to make regulations enabling the OPB to cancel or vary a certificate where they had reason to suppose that any employment to which it related ought not to be treated as contracted-out employment.

33. By s. 32(1) an occupational pension scheme was a contracted-out scheme in relation to an earner's employment if it was for the time being specified in a contracting-out certificate as a scheme by reference to which that employment was contracted-out. By

s. 32(2) a scheme could only be contracted-out if it complied in all respects with ss. 33 to 41 in respect of the requisite benefits to be provided for the earner and his widow and the other matters there mentioned, and if the rules of the scheme as to requisite benefits complied with the requirements of regulations and of the OPB. The following provisions contained detailed requirements as to the provision of a GMP for the earner (ss. 33 to 35) and of a widow's GMP for his widow (ss. 36 and 37), for other matters affecting GMPs such as transfers, commutation and forfeiture (ss. 38 and 39) and for the source and adequacy of the resources used to finance schemes (ss. 40 and 41).

34. After a number of other provisions, including provision for the OPB to continue to exercise powers of supervision over schemes that had ceased to be contracted-out but where members were still entitled to GMPs (s. 49), s. 50 imposed restrictions on the amendment of schemes as follows:

> "**50 Alteration of rules of contracted-out schemes**
>
> (1) Where in respect of any employment a contracting out certificate has been issued, no alteration of the rules of the relevant contracted-out scheme shall be made so as to affect any of the matters dealt with in this Part of this Act without the consent of the Occupational Pensions Board; and subject to subsection (2) below any such alteration made without that consent shall be void.
>
> (2) A consent given by the Board for the purposes of this section shall, if and to the extent that the Board so direct, operate so as to validate with retrospective effect any alteration of the rules which would otherwise be void under this section.
>
> (3) This section shall continue in force in relation to a scheme after it has ceased to be contracted-out so long as any person is entitled to receive, or has accrued rights to, a guaranteed minimum pension under the scheme."

35. Pausing there, there is no indication here that the restrictions imposed by s. 50(1) SSPA 1975 would only apply to an amendment affecting GMPs already accrued and not to an amendment affecting the continued future accrual of GMPs. Indeed it was common for schemes to contain their own restrictions on altering benefits that had already been earned by past service, so the restriction in s. 50(1) was in practice probably more significant in relation to amendments affecting future service benefits.

The PSA 1993 (as at 5 April 1997)

36. Part III of the SSPA 1975 was consolidated into Part III of the PSA 1993. By then there had been a number of changes to contracting out, not least the introduction of the ability of schemes to contract out on a money purchase basis, but the essential structure of the provisions relating to contracting out on a GMP basis was much the same.

37. We were helpfully provided with a version of Part III of the PSA 1993 as it stood on 5 April 1997, that is just before amendment by the PA 1995. Part III (ss. 7 to 69) was then headed "Certification of Pension Schemes and Effects on Members' State Scheme Rights and Duties". Chapter 1 (ss. 7 to 39), headed "Certification", provided for the

OPB to issue contracting-out certificates stating that the employment of an earner was contracted-out employment by reference to an occupational pension scheme (s. 7), and specified the requirements for certification of schemes. By s. 9(1) an occupational pension scheme could be contracted-out in relation to an earner's employment only if it satisfied s. 9(2) (contracting out on the GMP basis) or s. 9(3) (contracting out on the money purchase basis), s. 9(2) providing as follows:

> "(2) An occupational pension scheme satisfies this subsection only if—
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> (a) it complies in all respects with sections 13 to 24 or, in such cases or classes of case as may be prescribed, with those sections as modified by regulations; and
>
> (b) the rules of the scheme applying to guaranteed minimum pensions are framed so as to comply with the relevant requirements."

The relevant requirements were the requirements of any regulations prescribing the form and content of rules of contracted-out schemes or imposed by the OPB (s. 9(6)).

38. The requirements of ss. 13 to 24 were similar to those originally specified in the SSPA 1975 (with some later additions): thus they covered the provision and calculation of GMPs for earners and their widow(er)s (ss. 13 to 18), other matters affecting GMPs such as transfers and commutation (ss. 19 to 21) and financing and securing of benefits and sufficiency of resources (ss. 22 to 24). Some reliance was placed on s. 20 which read as follows:

> "**20 Transfer of accrued rights**
>
> (1) Regulations may prescribe circumstances in which and conditions subject to which—
>
> (a) a transfer of or a transfer payment in respect of—
>
> (i) an earner's accrued rights to guaranteed minimum pensions under a contracted-out scheme;
>
> (ii) an earner's accrued rights to pensions under an occupational pension scheme which is not contracted-out, to the extent that those rights derive from his accrued rights to guaranteed minimum pensions under a contracted-out scheme; or
>
> (iii) the liability for the payment of guaranteed minimum pensions to or in respect of any person who has become entitled to them,
>
> may be made by an occupational pension scheme to another such scheme or to a personal pension scheme;
>
> (b) a transfer of or a transfer payment in respect of an earner's accrued rights to guaranteed minimum pensions which are

appropriately secured for the purposes of section 19 may be made to an occupational pension scheme or a personal pension scheme.

(2) Any such regulations may be made so as to apply to earners who are not in employment at the time of the transfer.

(3) Regulations under subsection (1) may provide that any provision of this Part (other than sections 18, 19 and 43 to 45, and sections 26 to 33 so far as they apply to personal pension schemes) or of Chapter III of Part IV or Chapter II of Part V shall have effect, where there has been a transfer to which they apply, subject to such modifications as may be specified in the regulations.

(4) Regulations under subsection (1) shall have effect in relation to transfers whenever made unless they provide that they are only to have effect in relation to transfers which take place after they come into force.

(5) The power conferred by subsection (1) is without prejudice to the generality of section 182(2).

(6) In the provisions mentioned in subsection (3) "accrued rights", in relation to an earner, means the rights conferring prospective entitlement under the scheme in question to the pensions to be provided for the earner and the earner's widow or widower in accordance with sections 13 and 17, and references to an earner's accrued rights to guaranteed minimum pensions shall be construed accordingly."

39. The power to make regulations enabling the OPB to cancel or vary a certificate was continued by s. 34. The restrictions on amendment of the rules were continued by s. 37. This provided as follows:

"**37 Alteration of rules of contracted-out schemes**

(1) Subject to subsection (2), where a contracting-out certificate has been issued, no alteration of the rules of the relevant scheme shall be made so as to affect any of the matters dealt with in this Part (other than sections 18, 19 and 43 to 45, and sections 26 to 33 so far as they apply to personal pension schemes) or Chapter III of Part IV or Chapter II of Part V without the consent of the Board.

(2) Subsection (1) does not apply—

(a) to an alteration consequential on a provision of the Health and Social Security Act 1984, the Social Security Act 1985 or the Social Security Act 1986 (or any provision of this Act derived from any such provision); or

(b) to an alteration of a prescribed description.

(3) Subject to subsection (4), any alteration to which subsection (1) applies shall be void if it is made without the consent of the Board.

(4) A consent given by the Board for the purposes of this section shall, if and to the extent that the Board so direct, operate so as to validate with retrospective effect any alteration of the rules which would otherwise be void under this section.

(5) This section shall continue in force in relation to a scheme after it has ceased to be contracted-out so long as—

(a) any person is entitled to receive, or has accrued rights to, a guaranteed minimum pension under the scheme, or

(b) any person has protected rights under it or is entitled to any benefit giving effect to protected rights under it.

(6) The reference in subsection (5) to a person entitled to receive a guaranteed minimum pension includes a reference to a person so entitled by virtue of being the widower of an earner only in such cases as may be prescribed."

Although rather more elaborate than s. 50 SSPA 1975 this continued the basic provision that no amendment to a contracted-out scheme which affected any of the matters dealt with in the relevant Part of the Act should be made without the consent of the OPB (referred to in the PSA 1993 as "the Board"). As with s. 50 SSPA 1975 there is no indication that this was limited to amendments which affected past service rights.

The PSA 1993 (as at 6 April 1997)

40. Part III of the PA 1995 made significant changes to Part III of the PSA 1993. Again we have been helpfully provided with the text of the latter as it stood immediately after the amendments came into force on 6 April 1997.

41. The OPB ceased to exist and so s. 7 now provided for the Secretary of State to issue contracting-out certificates instead. By s. 9(1) it remained the case that an occupational pension scheme could only be contracted-out if it satisfied s. 9(2) or s. 9(3), but s. 9(2) was amended and replaced by new s. 9(2)-(2C) as follows:

"(2) An occupational pension scheme satisfies this subsection only if—

(a) in relation to any earner's service before the principal appointed day, it satisfies the conditions of subsection (2A), and

(b) in relation to any earner's service on or after that day, it satisfies the conditions of subsection (2B).

(2A) The conditions of this subsection are that—

(a) the scheme complies in all respects with sections 13 to 23 or, in such cases or classes of case as may be prescribed, with

those sections as modified by regulations, and

(b) the rules of the scheme applying to guaranteed minimum pensions are framed so as to comply with the relevant requirements.

(2B) The conditions of this subsection are that the Secretary of State is satisfied that—

(a) the scheme complies with section 12A,

(b) restrictions imposed under section 40 of the Pensions Act 1995 (restriction on employer-related investments) apply to the scheme and the scheme complies with those restrictions,

(c) the scheme satisfies such other requirements as may be prescribed (which—

(i) must include requirements as to the amount of the resources of the scheme and,

(ii) may include a requirement that, if the only members of the scheme were those falling within any prescribed class or description, the scheme would comply with section 12A); and

(d) the scheme does not fall within a prescribed class or description,

and is satisfied that the rules of the scheme are framed so as to comply with the relevant requirements.

(2C) Regulations may modify subsection (2B)(a) and (b) in their application to occupational pension schemes falling within a prescribed class or description."

42. The practical effect therefore of these amendments was that an occupational pension scheme that was contracted out on a salary-related basis had to comply with the former requirements as to GMPs and the like for benefits attributable to pre-6 April 1997 service (s. 9(2A)), but for service on or after that date had to meet the new requirements found in s. 9(2B).

43. The main one of these was the requirement to comply with s. 12A. This and s. 12B provided as follows:

"**12A The statutory standard**

(1) Subject to the provisions of this Part, the scheme must, in relation to the provision of pensions for earners in employed earner's employment, and for their widows or widowers, satisfy the statutory standard.

(2) Subject to regulations made by virtue of section 9(2B)(c)(ii), in applying this section regard must only be had to—

(a) earners in employed earner's employment, or

(b) their widows or widowers,

collectively, and the pensions to be provided for persons falling within paragraph (a) or (b) must be considered as a whole.

(3) For the purposes of this section, a scheme satisfies the statutory standard if the pensions to be provided for such persons are broadly equivalent to, or better than, the pensions which would be provided for such persons under a reference scheme.

(4) Regulations may provide for the manner of, and criteria for, determining whether the pensions to be provided for such persons under a scheme are broadly equivalent to, or better than, the pensions which would be provided for such persons under a reference scheme.

(5) Regulations made by virtue of subsection (4) may provide for the determination to be made in accordance with guidance prepared from time to time by a prescribed body and approved by the Secretary of State.

(6) The pensions to be provided for such persons under a scheme are to be treated as broadly equivalent to or better than the pensions which would be provided for such persons under a reference scheme if and only if an actuary (who, except in prescribed circumstances, must be the actuary appointed for the scheme in pursuance of section 47 of the Pensions Act 1995) so certifies.

12B Reference scheme

(1) This section applies for the purposes of section 12A.

(2) A reference scheme is an occupational pension scheme which—

(a) complies with each of subsections (3) and (4), and

(b) complies with any prescribed requirements.

(3) In relation to earners employed in employed earner's employment, a reference scheme is one which provides—

(a) for them to be entitled to a pension under the scheme commencing at a normal pension age of 65 and continuing for life, and

(b) for the annual rate of the pension at that age to be—

(i) 1/80th of average qualifying earnings in the last three tax years preceding the end of service,

multiplied by

(ii) the number of years service, not exceeding such number as would produce an annual rate equal to half the earnings on which it is calculated.

(4) In relation to widows or widowers, a reference scheme is one which provides—

(a) for the widows or widowers of earners employed in employed earner's employment (whether the earners die before or after attaining the age of 65) to be entitled, except in prescribed circumstances, to pensions under the scheme, and

(b) for entitlements to those pensions to commence on the day following the death of the earners, and

(c) except in prescribed circumstances, for the annual rate of those pensions to be–

(i) if the earners die on or after their normal pension age, 50 per cent. of the annual rate which a reference scheme was required to provide to the deceased earners immediately before their death, or

(ii) if the earners die before their normal pension age, 50 per cent. of the annual rate which a reference scheme would have been required to provide to the deceased earners if the date of their death had been their normal pension age, and

(d) if those pensions are payable in respect of earners who die–

(i) otherwise than in pensionable service under the scheme, and

(ii) before their own entitlements to pensions under the scheme have commenced, for those pensions to be revalued in accordance with section 84 as though they were such benefits as are mentioned in section 83(1)(a).

(5) For the purposes of this section, an earner's qualifying earnings in any tax year are 90 per cent. of the amount by which the earner's earnings—

(a) exceed the qualifying earnings factor for that year, and

(b) do not exceed the upper earnings limit for that year multiplied by fifty-three.

> (6) Regulations may modify subsections (2) to (5).
>
> (7) In this section—
>
> *"normal pension age"*, in relation to a scheme, means the age specified in the scheme as the earliest age at which pension becomes payable under the scheme (apart from any special provision as to early retirement on grounds of ill-health or otherwise),
>
> *"qualifying earnings factor"*, in relation to a tax year, has the meaning given by section 122(1) of the Social Security Contributions and Benefits Act 1992, and
>
> *"upper earnings limit"*, in relation to a tax year, means the amount specified for that year by regulations made by virtue of section 5(3) of that Act as the upper earnings limit for Class 1 contributions."

44. It can be seen that the effect of s. 12A(1) and (3) was that a scheme could be contracted out if it provided benefits that were broadly equivalent to, or better than, the benefits to be provided under a reference scheme; that s. 12B specified what the reference scheme benefits were; and that the effect of s. 12A(6) was that it was for an actuary (normally the scheme actuary) to certify whether the scheme did provide benefits that were broadly equivalent to or better than reference scheme benefits. So although it was by s. 7 for the Secretary of State to provide contracting-out certificates, responsibility for ensuring that the scheme met the statutory standard was in fact placed on the scheme actuary.

45. Amendments were also made to s. 34 relating to cancellation of contracting-out certificates. As so amended s. 34(1)(a) now provided as follows:

> "**34 Cancellation, variation, surrender and refusal of certificates**
>
> (1) Regulations shall provide for the cancellation, variation or surrender of any contracting-out certificate or appropriate scheme certificate, or the issue of an amended certificate—
>
> (a) in the case of a contracting-out certificate—
>
> (i) on any change of circumstances affecting the treatment of an employment as contracted-out employment, or
>
> (ii) where the scheme is a salary related contracted-out scheme and the certificate was issued on or after the principal appointed day, if any employer of persons in the description or category of employment to which the scheme in question relates, or the actuary of the scheme, fails to provide the Secretary of State, at prescribed intervals, with such documents as may be prescribed for the purpose of verifying that the conditions of section 9(2B) are satisfied…"

46. Amendments were also made to s. 37 relating to restrictions on amending a scheme. It

now provided as follows:

> "**37 Alteration of rules of contracted-out schemes**
>
> (1) Except in prescribed circumstances, the rules of a contracted-out scheme cannot be altered unless the alteration is of a prescribed description.
>
> (2) Regulations made by virtue of subsection (1) may operate so as to validate with retrospective effect any alteration of the rules which would otherwise be void under this section.
>
> (3) References in this section to a contracted-out scheme include a scheme which has ceased to be contracted-out so long as any person is entitled to receive, or has accrued rights to, any benefits under the scheme attributable to a period when the scheme was contracted-out.
>
> (4) The reference in subsection (3) to a person entitled to receive benefits under a scheme includes a person so entitled by virtue of being the widower of an earner only in such cases as may be prescribed."

This was the form in which s. 37 stood at the date of the execution of the 1999 Deed and Rules on 8 March 1999.

The Contracting-out Regulations (as made)

47. In preparation for the changes to contracting out due to come into effect on 6 April 1997 the Contracting-out Regulations were made on 25 April 1996 and were due to come into force on 6 April 1997.

48. Reg 42 supplemented s. 37 PSA 1993 in relation to the amendment of contracted-out schemes. As originally made it provided as follows:

> "**42 Alteration of rules of contracted-out schemes**
>
> (1) For the purposes of section 37(1) of the 1993 Act (prohibition on alteration of rules of contracted-out scheme unless the alteration is of a prescribed description) the rules of a salary-related contracted-out scheme cannot be altered—
>
> (a) in relation to any section 9(2B) rights under the scheme unless—
>
> (i) the trustees of the scheme have informed the actuary in writing of the proposed alteration to the scheme rules, and
>
> (ii) the actuary has considered the proposed alteration and has confirmed to the trustees of the scheme in writing that he is satisfied that the scheme will continue to satisfy the statutory standard in accordance with section 12A of the

1993 Act after the alteration is made, and

(iii) the alteration is not one which would otherwise prevent the scheme from satisfying the conditions of section 9(2B) of that Act; and

(b) in relation to any guaranteed minimum pensions under the scheme unless the alteration will not affect any of the matters dealt with in Part III of the 1993 Act and sections 87 to 92 (protection of increases in guaranteed minimum pensions) and 109 and 110 of that Act (annual increases of guaranteed minimum pensions) and any regulations made under those provisions which relate to guaranteed minimum pensions and that the alteration will not otherwise prevent the scheme from satisfying the conditions of section 9(2A) of that Act.

(2) For the purposes of section 37(1) of the 1993 Act the rules of a scheme contracted-out under section 9(3) of that Act (a money purchase contracted-out scheme) cannot be altered in relation to any protected rights, unless the alteration will not affect any of the matters dealt with in Part III of the 1993 Act or any regulations made under those provisions which relate to protected rights and the alteration will not otherwise prevent the scheme from satisfying the conditions of section 9(3) of that Act.

(3) Where the provisions of section 37 of the 1993 Act continue to apply after a scheme has ceased to be contracted-out, this regulation shall continue to apply so long as the circumstances provided for in subsections (3) or (4) of that section continue to apply."

49. This refers (as do a number of the other regulations) to "section 9(2B) rights". This is not an expression used as such in Part III of the PSA 1993, but was originally defined in reg 1(2) of the Contracting-out Regulations as follows:

"(2) In these Regulations, unless the context otherwise requires—

…

"section 9(2B) rights" are rights (other than rights attributable to voluntary contributions within the meaning of section 111 of the 1993 Act) which are attributable to an earner's service on or after the principal appointed day in employment which is contracted-out in accordance with section 9(2B) of the 1993 Act".

50. I come back below to the question whether in this iteration of the regulations reg 42(1)(a) only applied to amendments affecting past service rights at the date of the amendment or also applied to rights to be earned by future service. No assistance on this question can be obtained from the Explanatory Notes to the regulations which simply refers to reg 42 as making provision for requirements concerning alteration of scheme rules.

The Contracting-out Regulations (as at 6 April 1997)

51. Before they came into force, the Contracting-out Regulations were amended by the Personal and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 1997, SI 1997 No 786 (**"the 1997 Amendments Regulations"**), which were made on 11 March 1997 and came into force on 6 April 1997.

52. These amended a number of regulations, including the Contracting-out Regulations. In particular (by sch 1 para 4(8)) they amended reg 42 of the Contracting-out Regulations by substituting new paragraphs (1) and (2). As so amended reg 42 read as follows:

> "**42 Alteration of rules of contracted-out schemes**
>
> (1) For the purposes of section 37(1) of the 1993 Act (prohibition on alteration of rules of contracted-out scheme unless the alteration is of a prescribed description), the alterations which are prescribed are any alterations which are not prohibited by paragraph (2), (2A) or (2B).
>
> (2) 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.
>
> (2A) The rules of a scheme contracted-out under section 9(3) of that Act (a money purchase contracted-out scheme) cannot be altered in relation to protected rights if the alteration would—
>
> (a) affect any of the matters dealt with in Part III of that Act or any regulations made under that Part which relate to protected rights in a manner which would or might adversely affect any entitlement or accrued rights of any member of the scheme acquired before the alteration takes effect, or
>
> (b) otherwise prevent the scheme from satisfying the conditions of that section.
>
> (2B) The rules of a contracted-out scheme cannot be altered in relation to any guaranteed minimum pensions under the scheme if the alteration would—

(a) affect any of the matters dealt with in Part III of that Act or any regulations made under that Part which relate to guaranteed minimum pensions in a manner which would or might adversely affect any entitlement or accrued rights of any member of the scheme acquired before the alteration takes effect,

(b) affect any of the matters dealt with in sections 87 to 92 (protection of increases in guaranteed minimum pensions) and 109 and 110 of that Act (annual increases of guaranteed minimum pensions) or in any regulations made under those provisions which relate to guaranteed minimum pensions, or

(c) otherwise prevent the scheme from satisfying—

(i) in the case of a salary-related contracted-out scheme, section 9(2) of that Act, or

(ii) in the case of a scheme contracted-out under section 9(3) of that Act, that section.

(3) Where the provisions of section 37 of the 1993 Act continue to apply after a scheme has ceased to be contracted-out, this regulation shall continue to apply so long as the circumstances provided for in subsections (3) or (4) of that section continue to apply."

53. The 1997 Amendments Regulations also (by sch 1 para 4(2)) amended the definition of "section 9(2B) rights" in reg 1(2) of the Contracting-out Regulations. As so amended this now read:

"(2) In these Regulations, unless the context otherwise requires—

…

"section 9(2B) rights" are—

(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 the principal appointed day; 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 the principal appointed day".

54. The only explanation given in the Explanatory Notes to the 1997 Amendments Regulations for these changes is a reference to the schedule as containing miscellaneous amendments, including amendments which harmonised the definitions of "section 9(2B) rights". Indeed the 1997 Amendments Regulations amended a number of other regulations due to come into force on 6 April 1997 by substituting an identically worded definition of "section 9(2B) rights". These were the Protected Rights (Transfer Payment) Regulations 1996, SI 1996 No 1461, the Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996 No 1462, and the Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996 No 1537.

The Contracting-out Regulations (as at 6 April 2013)

55. The Contracting-out Regulations were further amended by the Occupational and Stakeholder Pension Schemes (Miscellaneous Amendments) Regulations 2013, SI 2013 No 459 (**"the 2013 Amendments Regulations"**), which were made on 28 February 2013 and came into force on 6 April 2013.

56. Among other things these amended reg 42 of the Contracting-out Regulations. As so amended, reg 42 provided as follows:

"**42 Alteration of rules of contracted-out schemes**

(1) For the purposes of section 37(1) of the 1993 Act (prohibition on alteration of rules of contracted-out scheme unless the alteration is of a prescribed description), the alterations which are prescribed are any alterations which are not prohibited by paragraph (2), (2ZA) or (2B).

(2) The rules of a salary-related contracted-out scheme cannot be altered in relation to any rights which are to accrue under the scheme in so far as such rights are attributable to an earner's service in contracted-out employment on or after the date on which the alteration to the rules takes effect (other than rights attributable to the payment of voluntary contributions) 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.

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

(a) following the alteration, the scheme provides benefits for the member and for that member's widow, widower or surviving civil partner, in respect of the period of pensionable service to which the alteration relates and in which the member's employment was contracted-out under section 9(2B) of the 1993 Act (requirements for certification of schemes: general) which are at least equal to the benefits that would be provided by a reference scheme (within the meaning of section 12B(2) of the 1993 Act (reference scheme)),

(b) the alteration is one to which section 67 of the 1995 Act (the subsisting rights provisions) does not apply,

(c) the alteration is one which is not a protected modification or a detrimental modification within the meaning given in section 67A of the 1995 Act (the subsisting rights provisions: interpretation), or

(d) if the alteration is a detrimental modification within the meaning of section 67A of the 1995 Act, the actuarial equivalence requirements provided for in sections 67C and 67D of that Act (the actuarial equivalence requirements and further provisions) are met in relation to the proposed modification of those rights.

(2ZB)(a) This paragraph applies in the case of alterations falling within paragraph (2ZA)(c) or (d), but not falling within (2ZA)(a) or (b).

(b) Subject to sub-paragraph (c), the altered scheme must provide for a pension to be paid to the member's widow, widower or surviving civil partner in respect of the period in which the member's employment was contracted-out under section 9(2B) of the 1993 Act ("relevant survivor's post-1997 pension") which is at least as generous, either as regards the amount of the pension or as regards the circumstances in which it will be paid, as it would have been before the alteration.

(c) In relation to a member who is an active member of the scheme immediately before the alteration takes effect, the requirement in sub-paragraph (b) shall be deemed to be satisfied if the relevant survivor's post-1997 pension which the scheme would provide in respect of the member if the member left pensionable service immediately after the alteration is at least as generous as the relevant survivor's post-1997 pension which the scheme would have provided in

respect of the member had the member left service immediately before the alteration.

(d) In sub-paragraph (c), "active member" means a person who is in pensionable service under the scheme.

(2B) The rules of a contracted-out scheme cannot be altered in relation to any guaranteed minimum pensions under the scheme if the alteration would—

(a) affect any of the matters dealt with in Part III of that Act or any regulations made under that Part which relate to guaranteed minimum pensions in a manner which would or might adversely affect any entitlement or accrued rights of any member of the scheme acquired before the alteration takes effect,

(b) affect any of the matters dealt with in sections 87 to 92 (protection of increases in guaranteed minimum pensions) and 109 and 110 of that Act (annual increases of guaranteed minimum pensions) or in any regulations made under those provisions which relate to guaranteed minimum pensions, or

(c) otherwise prevent the scheme from satisfying section 9(2) of that Act.

(3) Where the provisions of section 37 of the 1993 Act continue to apply after a scheme has ceased to be contracted-out, this regulation shall continue to apply so long as the circumstances provided for in subsections (3) or (4) of that section continue to apply."

The issue

57. From this survey of the legislation it is now possible to see how the issue arises. With effect from 6 April 2013 reg 42(2) clearly applied to a proposed amendment which would affect benefits attributable to future service ("rights which are to accrue under the scheme in so far as such rights are attributable to an earner's service in contracted-out employment on or after the date on which the alteration to the rules takes effect"), and required the trustees to obtain written confirmation from the scheme actuary that the scheme would continue to satisfy the statutory standard if the proposed alteration were made.

58. The issue is whether the same was the case between 6 April 1997 and 5 April 2013. It can be seen that reg 42(2) then applied to an alteration "in relation to any section 9(2B) rights under the scheme", and that by reg 1(2) "section 9(2B) rights" were defined as "rights to the payment of pensions and accrued rights to pensions … so far as attributable to an earner's service in contracted-out employment on or after the principal appointed day." It is common ground that "rights to the payment of pensions" refers to the rights of existing pensioners to pensions currently in payment. So the question is the scope of "accrued rights to pensions". Virgin's contention is that this naturally

refers to pensions already earned by service to date, and hence does not include rights which are to accrue by virtue of future service.

The Judgment

59. There were in fact three issues raised in the proceedings. They were summarised by Bacon J in her judgment at [29] as follows:

    (1) Did s. 37 PSA 1993 render an amendment made in the absence of the written actuarial confirmation contemplated by reg 42(2) of the Contracting-out Regulations void to any extent?

    (2) Did the words "section 9(2B) rights" as used in reg 42(2) mean that s. 37 only had such effect in relation to rights attributable to service prior to execution of the 1999 Deed and Rules (8 March 1999), or did s. 37 also have such an effect in relation to rights attributable to service after that date?

    (3) Did s. 37 have such an effect only in relation to adverse alterations to section 9(2B) rights, or in relation to all alterations to such rights?

60. The answers she gave to these questions were:

    (1) The effect of s. 37 PSA 1993 was to render invalid and void an amendment to the rules of a contracted-out scheme which related to section 9(2B) rights in so far as the amendment was introduced without the actuarial confirmation required by reg 42(2)(b) (Judgment at [55]).

    (2) The words "section 9(2B) rights" as used in reg 42(2) in the version of the Contracting-out Regulations applicable from 6 April 1997 included both past service rights and future service rights (Judgment at [76]).

    (3) The requirement for actuarial confirmation under reg 42(2), and the sanction of voidness under s. 37 PSA 1993 absent such confirmation, applies to all amendments to the rules of a contracted-out scheme in relation to section 9(2B) rights, and not merely those which would or might adversely affect section 9(2B) rights (Judgment at [80]).

61. She made an Order dated 16 June 2023 giving effect to these decisions, and by a subsequent Order dated 20 July 2023 gave Virgin permission to appeal.

The appeal

62. Virgin only appeals Bacon J's decision on Issue (2) and contends by its grounds of appeal that "section 9(2B) rights" should be interpreted as comprising rights accrued only by past service in contracted-out employment after 6 April 1997 so that reg 42(2) of the Contracting-out Regulations did not apply to an alteration to the rules of a salary-related contracted-out scheme insofar as that alteration affected benefits accruing from future service.

Principles of statutory interpretation

63. Save for one point which I consider later (the principle against doubtful penalisation),

there was no substantial dispute between counsel as to the principles of statutory interpretation. They have been elucidated in a series of decisions of the House of Lords and Supreme Court. We were referred to relevant passages in the most well-known of these, namely *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd* [2001] 2 AC 349 at 396-8 per Lord Nicholls, *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 (***"Quintavalle"***) at [8] per Lord Bingham, *R (O) v Home Secretary* [2022] UKSC 3, [2023] AC 255 at [28]-[31] per Lord Hodge DPSC, and *R (PACCAR Inc and others) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594 (***"PACCAR"***) at [40]-[41] per Lord Sales JSC.

64. It is not necessary to cite extensively from these very familiar passages. Mr Stallworthy drew our attention in particular to the statement by Lord Hodge in *R (O) v Home Secretary* at [29] that the words which Parliament has chosen to enact are the "primary source" by which meaning is ascertained, and his reference to the constitutional importance of citizens, with their advisers, being able to rely on what they read in an Act of Parliament; Mr Short for his part referred to the need to ascertain the meaning of the words used in their context and in the light of their purpose.

65. These principles may appear to be in tension but I do not think that in truth they are. As Lord Sales said in the most recent summary we were referred to, that in *PACCAR*, the basic task for the Court interpreting a statutory provision is clear, namely to identify the meaning of the words in question in the particular context (at [40]). He went on at [41] to refer to the numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose, concluding as follows:

> "The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it."

66. The same point was made even more forcefully in one of the passages which he cites, namely the statement by Lord Mance JSC in *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] UKSC 25, [2011] 1 WLR 1546 at [10] as follows:

> "In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance. They represent the context in which individual words are to be understood. In this area as in the area of contractual construction, "the notion of words having a natural meaning" is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme."

67. These statements were made in the context of interpretation of primary legislation, but there was no dispute that the same principles apply to the interpretation of secondary legislation, with the added consideration that delegated legislation must be interpreted in light of the enabling Act, the legislative purpose of delegated legislation being assumed to be the purpose of that Act: see *Bennion, Bailey & Norbury on Statutory Interpretation* (8th edn, 2020) §3.17.

68. So although Mr Stallworthy began his submissions by identifying the natural meaning of the words used in the definition of section 9(2B) rights, I consider, in accordance with the guidance from the Supreme Court, that we should first orientate ourselves by reference to the legislative purpose and scheme before considering the meaning of the words to be construed. As Lord Bingham said in *Quintavalle* at [8] this not only means construing the words in the context of the statute as a whole, but reading the statute as a whole "in the historical context of the situation which led to its enactment."

The historical context: the legislative scheme from 1978

69. The historical context in which the Contracting-out Regulations were made includes the fact that contracting out of salary-related occupational pension schemes was not new in 1997, but had been in place since 1978. I think it is therefore helpful to look at the position under the original provisions for contracting out as enacted in the SSPA 1975 and continued in Part III of the PSA 1993.

70. As explained above, the basic idea was a simple one, which was that in return for both employer and employees being permitted to pay reduced NI contributions, a contracted-out scheme had to provide the employee members (and their widows) with a GMP, and that when a member retired and received their pension their GMP was deducted from their SERPS pension.

71. The practical effect was that the State was foregoing a certain amount of NI contributions but could expect to pay correspondingly reduced SERPS pensions to the employees concerned. But because of the way that the contracting-out deduction worked, this would only be the case if the employees were actually entitled to their GMPs when they reached pensionable age. If they no longer had an entitlement to their GMPs, the employees would receive payment from SERPS (and hence the State) instead.

72. Against this background it is not difficult to understand the legislative scheme of Part III of the SSPA 1975. To qualify for reduced contributions, an earner's employment had to be contracted-out (s. 27); for employment to be contracted-out the earner had to be in service which qualified him for requisite benefits in a contracted-out scheme (s. 30); and for a scheme to be contracted-out it had to comply in all respects with the requirements of ss. 33 to 41 (s. 32). These not only contained requirements to provide GMPs to earners and their widows and detailed provisions as to how they were to be calculated (ss. 33 to 37), but also other provisions designed to ensure so far as possible that the GMPs would actually be received by the members. Thus if an employee left service before pensionable age it was possible for a scheme to provide for the transfer of his accrued rights to GMPs to another scheme, but only if that other scheme was itself contracted-out (and so subject to the same statutory restrictions) (s. 38(1)); a scheme could provide for any part of a member's pension in excess of GMP to be forfeited or surrendered or subject to a charge, lien or set-off, but could not provide for the GMP part to be suspended or forfeited save in prescribed circumstances (s. 39(4)); schemes were required to have a rule according priority on a winding-up to GMPs over other benefits (s. 40(3)); and the OPB had to be satisfied that schemes had sufficient resources to meet the liability for GMPs (s. 41(1)), with power to require employers to make payments to bring the resources of a scheme to a satisfactory level (s. 41(4)).

73. Two features of this legislative scheme are apparent. One is that the purpose of the

various statutory requirements was to reduce the risk that employers and employees might benefit from paying reduced NI contributions but that the employees might not in the end actually receive their GMPs in full. The other is that the OPB played a central role in the close supervision of every contracted-out scheme.

74. Another provision in this legislative scheme was s. 50 SSPA 1975 which prevented alteration of the rules of a contracted-out scheme so as to affect any of the matters dealt with in Part III without the consent of the OPB. The purpose of this provision seems to me to have been self-evidently the same as the other provisions I have referred to. It was to help ensure that if a scheme were contracted-out (so that reduced NI contributions were paid) the scheme would actually provide the members with the GMPs that they should have. Given this purpose it would make no sense to have restrictions on amending the scheme in respect of past service rights but not in respect of future service rights: the whole point was that if a scheme was going to continue to be contracted-out the OPB as the regulator had to be satisfied that the GMPs would still accrue and would still in fact be paid. And as I have already said (see paragraph 35 above), there is nothing in the language of s. 50 which could confine its operation to amendments affecting past service rights.

75. Although the provisions of Part III of the SSPA 1975 were thereafter the subject of a number of amendments (and later consolidated into Part III of the PSA 1993) the basic features of the legislative scheme remained unchanged up to April 1997. In particular (see paragraph 39 above) it remained the case by s. 37 PSA 1993 that the rules of a contracted-out scheme could not be altered so as to affect any of the matters dealt with in the relevant Part of the Act without the consent of the OPB, and as with s. 50 SSPA 1975 there is no indication that this was limited to amendments which affected past service rights. Nor for the reasons I have given would it have made any sense for s. 37 to be so confined.

The legislative purpose and scheme of Part III PSA 1993 from April 1997

76. As explained above Part III PA 1995 made significant amendments to the way in which schemes could be contracted out on a salary-related basis as from April 1997, the main change being that schemes were no longer required to provide GMPs but would have to meet the statutory standard or reference scheme test, and that instead of members of such schemes continuing to accrue SERPS benefits from which their GMPs would be deducted when in payment, members would now simply accrue their contracted-out benefits instead of SERPS.

77. The reasons for this change were set out by the Government in a White Paper in June 1994 ("Security, Equality, Choice: the Future for Pensions", vol 1, Cm 2594-1). Chapter 2 explains that the background was the ruling of the European Court of Justice in *Barber v Guardian Royal Exchange Assurance Group* (Case C 262/88) [1991] 1 QB 344 that occupational pensions constituted pay and therefore should be equalised between men and women (§2.2). This caused difficulties for contracting out on the GMP basis as SERPS pensions were payable at state pension age, which was 65 for men and 60 for women, and hence were inherently unequal, and GMPs, being a partial substitute for SERPS, were therefore also unequal, having different accrual rates and being paid at different ages (§2.3). In those circumstances the Government had decided that the best way forward was to break the links between contracted-out salary-related schemes and SERPS, which would remove the obstacle to scheme equalisation (§§2.5,

2.6). The Government was also conscious that contracting out was complicated both to operate and explain, and considered that the proposal to break the links should ease the complexities considerably (§2.7). Hence (§2.9):

> "In future, schemes will not have to guarantee that each individual will receive benefits at least equal to SERPS. Instead, salary related schemes will have to satisfy a more general test of overall quality. This will be based on requisite benefits, which will be defined in legislation, and will mean that the value of overall future benefits offered by schemes should be superior to those offered in SERPS."

78. Another proposal put forward in the White Paper was a change to the way in which occupational schemes were regulated. The thrust of the changes was to place clearer responsibility on trustees for the administration of schemes, thereby achieving an improved level of security for scheme members whilst avoiding over-regulation: trustees would be responsible for ensuring that schemes were properly administered, that assets were safeguarded and appropriately invested, that contributions were received from employers and that schemes were adequately funded, with scheme professionals advising and reporting to the trustees (§1.14). A new regulator (which in due course became the Occupational Pensions Regulatory Authority) would be put in place. Unlike the OPB, which had closely supervised all contracted-out schemes, the new regulator was intended to act only in cases of concern, focusing on schemes with difficulties rather than interfering with well-run schemes (§1.38).

79. The combination of the new reference scheme test instead of prescriptive rules as to how GMPs should be calculated and the replacement of the OPB by a very different kind of regulator meant that responsibility for ensuring that contracted-out schemes met the statutory requirements had to be placed on someone else. That person was the scheme actuary. This was explained in a technical paper issued in May 1995 by the Department of Social Security for consultation ("The Pensions Bill: secondary legislation. Paper 2: The new scheme-based contracting-out test"). This proposed (para 7) that:

> "For the purposes of the new contracting-out test, we intend to use the certificate signed by the scheme actuary, in accordance with the Guidance Note, to satisfy the Secretary of State of the scheme's compliance with section (12A)."

In order to remain contracted-out schemes would have to take part in a triennial re-certification exercise (para 5). The actuary would also have to re-certify if there were changes to the scheme rules which left the actuary in some doubt whether the quality test would still be met (para 6).

80. This last point was expanded on in para 20 as follows:

> "Schemes will re-certify every three years, or more frequently if there are changes in the proportion of pensionable pay or significant changes to the scheme rules which leave the actuary in some doubt as to whether the quality test will still be met. We are considering how best to provide for this requirement, in relation to scheme rules, either by exercising a power under section 37 of the Pension Schemes Act or by using the

> power in new section 12A(5) under clause 124… We expect the process to be that the employers must tell the actuary of any proposed change. The actuary would then consider the change (with the help of the Guidance Note) and assess whether the scheme can still meet the contracting-out requirements if the change is introduced. If the actuary is content, the change can be made. If the actuary is doubtful, and therefore has to undertake detailed calculations, and is then satisfied that the scheme can still meet the requirements, the change can be made and in addition, the actuary may re-certify the scheme."

81. The PA 1995 was passed on 19 July 1995. I have summarised above (see paragraphs 41 to 46) the amendments that it made to contracting out in Part III of the PSA 1993. It can be seen that consistently with the pre-legislative material the role of the scheme actuary is central to the operation of the new contracting-out test. As Mr Short pointed out, the key provision is the new s. 12A (see paragraph 43 above) and in particular s. 12A(6). By s. 12A(3) a scheme satisfied the statutory standard if the pensions to be provided were broadly equivalent to or better than the benchmark provided by the reference scheme; but by s. 12A(6) this was so "if and only if" the scheme actuary so certified. So even if the benefits were in fact objectively better than the reference scheme benefits, that would not enable a scheme to be contracted out unless and until the scheme actuary had given the certificate – and that was so regardless of how obviously the test was met.

82. That provision in s. 12A(6), which Mr Short rightly described as at the heart of the new regime, is supplemented by s. 12A(4) and (5) which provide for the power to make regulations and in particular for determinations to be made in accordance with a guidance note to be prepared by a prescribed body and approved by the Secretary of State. Such regulations were in due course made, and the guidance note prepared. This was Guidance Note 28 "Retirement Benefit Schemes — Adequacy of Benefits for Contracting-out on or after 6 April 1997" (**"GN 28"**) issued by the Board for Actuarial Standards. I will have to look at its details below but the essential point for the moment is the responsibility placed on the actuary for ensuring that the scheme met the statutory standard both when initially applying for a contracting-out certificate and when re-certifying every 3 years.

83. That being the legislative scheme of the new provisions, I agree with Mr Short that it would be surprising if during the life of a contracted-out scheme benefit changes could be introduced without them having to be passed by the actuary. Since responsibility was squarely placed on the scheme actuary to satisfy himself that the package of benefits in a scheme met the statutory standard both at the outset and every 3 years thereafter, one would expect the scheme actuary also to have a role to play in considering any proposed benefit changes in the same way as the OPB had under the previous version of the legislation. Certainly there is nothing in the new version of s. 37 PSA 1993 (see paragraph 46 above) to indicate any intention to restrict its scope. It imposes an entirely general prohibition on alteration of rules of a contracted-out scheme, leaving it to regulations to prescribe exceptions.

The Contracting-out Regulations (as made)

84. That brings me to the first iteration of the Contracting-out Regulations as originally made (see paragraphs 47 to 50 above). Reg 42(1)(a) provided that the rules of a salary-

related contracted-out scheme could not be altered "in relation to any section 9(2B) rights under the scheme" unless the actuary had been informed of the proposed alteration and given written confirmation that the scheme would "continue to satisfy the statutory standard … after the alteration is made" (paragraph 48 above).

85. Even without looking at the definition of "section 9(2B) rights" a well-informed reader would I think understand this as probably not intended to be limited to alterations to past service rights, but to apply to alterations to benefits for the future. The reference to "continu[ing] to satisfy the statutory standard" looks far more like a forward-looking provision concerned with the value of the benefit package that would be earned going forward than one that is merely concerned with whether benefits already earned by past service would continue to meet the test.

86. Moreover in practical terms, as I have already referred to, many schemes contained their own provisions restricting the amendment of schemes in such a way as to adversely affect benefits already earned by past service, and from 6 April 1997 s. 67 PA 1995 imposed a statutory restriction on the exercise of a power to alter a scheme in a manner which would or might affect any entitlement, or accrued right, of any member of the scheme acquired before the power was exercised. It is true that this restriction was not absolute, as such amendments could still be made with the consent of each member affected, but the practical difficulties of securing such consent in schemes of any size made it inherently unlikely that employers would seek to reduce the value of benefits already earned by past service; it was far more likely that employers would seek to reduce the value of future benefits.

87. If the reader then turned up the definition of "section 9(2B) rights" in reg 1(2) they would find that that this meant "rights … attributable to an earner's service on or after [6 April 1997] in employment which is contracted-out in accordance with section 9(2B) of the 1993 Act" (paragraph 49 above).

88. I do not think the reader would interpret or understand that definition as limited to past service rights. The natural meaning of the words is that it refers to all rights attributable to post-5 April 1997 service whether already earned or to be earned in the future. And that, for the reasons already given, is exactly what one would expect from the provision in reg 42(1)(a) that what is required is the actuary's confirmation that the scheme will continue to satisfy the statutory standard if the alteration were made.

89. Mr Stallworthy submitted that the word "rights" by itself referred to existing rights that one already had and hence was limited to rights already earned. He referred to two cases where such a limited interpretation had been given to the word "rights", namely *Bradbury v BBC* [2017] EWCA Civ 1144, [2018] ICR 61 (***"Bradbury"***) and *Wedgwood Pension Plan Trustee Ltd v Salt* [2018] EWHC 79 (Ch), [2018] Pens LR 9 (***"Wedgwood"***).

90. In *Bradbury* the question concerned a decision by the BBC to cap at 1% the part of a pay rise that would be used to calculate pensionable pay in the final salary sections of the BBC Pension Scheme. Among other things it was argued that the claimant's agreement to the cap infringed s. 91 PA 1995, which applies "where a person is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme" and prevents such a right being surrendered. It was argued that the right to a future pension included the right to a pension based on the member's final

pay. Gloster LJ (with whom Henderson and Lewison LJJ agreed) did not accept this argument. She said that s. 91 only protects the actual accrued rights of employees and that the claimant did not have a right to any future pay increases or any increase in pensionable salary (at [45]). This is to my mind simply a decision on the meaning of the words "has a right to a future pension" in s. 91 PA 1995. I do not think it lays down any more general proposition than that, and I do not find it of any assistance on the question whether "rights" can include rights yet to be earned.

91. *Wedgwood* was concerned with a fetter on a power of amendment in the rules of a scheme which prevented any alteration which should prejudice or adversely affect the rights of any member. Ms Penelope Reed QC held that this did not prevent amendments which affected benefits which might be earned in the future, the natural meaning of "the rights of any member" being the rights which had accrued as a result of past service (at [44]). That was I think an understandable view to take in the particular context of the scheme rule in question, but again I do not think it assists more generally on whether rights can extend to future rights.

92. In an expression such as "section 9(2B) rights" or "rights attributable to service attributable to contracted-out employment" I see no reason to confine it strictly to rights already earned by past service. "Rights" is a very general word which takes its meaning from its context, and it is a natural use of language to understand these expressions as referring to rights whether already earned or yet to be earned. To take a simple example put forward by Mr Stallworthy, suppose I am employed at a salary. Do I have a right to next year's salary? Mr Stallworthy said that I do not. I do not think that is quite right. It is true that I do not yet have a right to *payment* of next year's salary as I have not yet earned it, and may never do so. But it is an entirely natural use of language to say that I do have a right to be paid my salary next year provided that I continue in employment; and if my employer purported to reduce my salary for next year by 20%, it would to my mind be natural to say that that was an attempt to take away my rights. In the same way a member of a contracted-out pension scheme who is currently entitled to accrue pension rights at 1/60 per year would I think regard (and rightly regard) an amendment that reduced accrual for the future to 1/80 a year as one that adversely affected his rights, and specifically as an amendment that related to the "rights … attributable to [his] service on or after [6 April 1997] in employment which is contracted-out in accordance with section 9(2B) of the 1993 Act".

93. I therefore consider that under the Contracting-out Regulations as originally made reg 42(1)(a) was not confined to amendments that affected past service benefits but also applied to amendments in relation to future service benefits.

94. This is consistent with the fact that there is no hint in the pre-legislative material that I have referred to, or in the terms of Part III of the PSA 1993 as amended, of any intention to confine the scope of s. 37 PSA 1993 to amendments affecting past service rights. Indeed as we have seen (see paragraphs 79 to 80 above), the technical paper of May 1995 envisaged that alterations to scheme rules would be passed by the actuary for him to check whether the scheme would still meet the quality test if the change were introduced, with no suggestion that this would be limited to alterations affecting past service rights only.

The Contracting-out Regulations (as amended)

95. I can now come to the words that actually fall to be construed which are those found in the amended definition of "section 9(2B) rights" in reg 1(2) of the Contracting-out Regulations as substituted by the 1997 Amendments Regulations and brought into force on 6 April 1997. I have set these out above (see paragraph 53) and repeat here the relevant words:

> "rights to the payment of pensions and accrued rights to pensions … 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".

As I have already said there is no dispute that "rights to the payment of pensions" refers to the rights of current pensioners. So what is in issue is what does "accrued rights to pensions" mean?

96. Mr Stallworthy's first submission was that the very word "rights" (both in the defined expression "section 9(2B) *rights*" and in the definition "accrued *rights*") indicated that this was limited to rights already earned. I have already addressed this submission above in the context of the previous iteration of the Contracting-out Regulations and rejected it.

97. Mr Stallworthy was on considerably stronger ground in his next submission which is that "*accrued* rights" refers naturally to those already earned at any particular point in time. As a general proposition I agree. It is a commonplace that in a scheme of the familiar final salary type the member in pensionable service builds up or accrues his pension while in service. At any point in time, the pension he has accrued will be that attributable to service to date, so in an n/60 scheme he will have accrued a pension of 10/60 after 10 years and 20/60 after 20 years. All of this is well understood by those familiar with defined benefit pension schemes. Thus for example, the Goode Report[2] contained a glossary which reproduced definitions prepared by the Pensions Management Institute. This included a definition of "Accrued Rights" as follows:

> "A term sometimes used to describe accrued benefits"

and "Accrued Benefits" was itself defined as follows:

> "The benefits for service up to a given point in time, whether vested rights or not. They may be calculated in relation to current earnings or projected earnings."

98. Mr Stallworthy also referred us to *South West Trains v Wightman* [1998] PLR 113 at [79] per Neuberger J where he said:

> "Expressions such as 'entitlement' and 'accrued right' suggest a right or bundle of rights as at a specific date…"

[2] The report of the Pensions Law Review Committee chaired by Professor Roy Goode and published in September 1993, which led to the PA 1995.

99. So if one asks what at any particular date are a member's accrued rights, I accept that the obvious answer is those that have been earned by service to date – or in other words his then past service rights.

100. It is not therefore difficult to see why Mr Stallworthy submits that the natural meaning of "rights to the payment of pensions and accrued rights to pensions" is "rights to pensions in payment and rights to future pensions already earned by past service to date".

101. But this is I think a good illustration of the danger of approaching a question of statutory construction by starting with giving words their natural meaning before orientating oneself by reference to the legislative purpose and scheme (see paragraphs 65 to 68 above). If one approaches the question by asking what the purpose of s. 37 and reg 42 is, then it becomes very difficult to believe that the change to the definition of "section 9(2B) rights" made by the 1997 Amendments Regulations could really have been intended to cut down the scope of reg 42 so that it would no longer apply to amendments reducing the benefits package going forward and that only amendments to past service benefits would now have to have the actuary's confirmation.

102. First, there is no hint in the Explanatory Notes to the 1997 Amendments Regulations that this was the purpose of the amendment. The explanation there given was that it was intended to harmonise the definition of "section 9(2B) rights" across a number of different regulations (see paragraph 54 above). That does not suggest an intention to effect any significant change to the substance of the regulations.

103. Second, we have been shown no other material indicating or even hinting at a desire to cut down the scope of reg 42 as originally made. If there had really been a change of policy resulting in a decision to confine the scope of reg 42 to amendments affecting past service rights, then one might expect that to have left some trace in the available record. But it has not been suggested that there is any material of that kind.

104. Third, if there had been a decision to redraw the scope of reg 42 in this way, the obvious way to do it would have been to make changes to reg 42 itself. It would have been both simple and clear to add suitable words into what became reg 42(2) along the following lines:

> "The rules of a salary-related contracted-out scheme cannot be altered in relation to any section 9(2B) rights under the scheme *acquired before the alteration takes effect* unless…"

The addition of the italicised words would have been a particularly obvious way of confining the scope of reg 42 to past service rights as these very words were used by the draftsperson in the new reg 42(2A) and (2B) added by the 1997 Amendments Regulations at the same time. It seems a peculiarly perverse way of redrawing the scope of reg 42 for the draftsperson to leave the text of what became reg 42(2) unchanged (from its previous iteration as reg 42(1)(a) of the Contracting-out Regulations as made), but instead to alter the definition of "section 9(2B) rights" in reg 1(2).

105. Moreover if it had been intended to cut down reg 42 so that it only applied to amendments affecting past service rights, one would have expected some consequential alteration to reg 42(2)(b) which requires the actuary to confirm that the scheme would

continue to satisfy the statutory standard if the alteration were made. As I have suggested above (see paragraph 85), these words give every appearance of being forward-looking and hence concerned with the benefit package going forward. They do not sit easily with the suggestion that all that the actuary is now going to be concerned with is the value of past service benefits.

106. Fourth, it is difficult to think of any rational explanation why it might have been desired to cut down the scope of reg 42 in this way. As I have suggested above, s. 37 PSA 1993 (like its predecessor s. 50 SSPA 1975) was one of a number of sections designed to ensure that schemes that were contracted out did in fact deliver the benefits to their members that they were required to as the *quid pro quo* for reduced NI contributions. That was something that the State had a very direct interest in, as it would be unacceptable for employers to contract out their employment and pay reduced NI contributions without providing the GMPs that would reduce the State's obligations under SERPS. The State's interest in seeing that members received what they should was not quite the same after the link between contracting out and SERPS was broken, but I see no reason to think that Government was any less concerned to see that members of contracted-out schemes should actually receive the pension benefits that they were intended to have – that is pension benefits that were at least broadly equivalent to SERPS pensions – and there is as I have said nothing in s. 37 itself which would suggest that its scope was limited to past service benefits. So it would be an odd thing for reg 42, which was made to give effect to s. 37, to cut down the protection for members in this way.

107. Fifth, if this had been the intention, then one might have expected to find it reflected in the guidance given to actuaries in GN28. This was the guidance referred to in s. 12A(5) and approved by the Secretary of State. It contains no suggestion that there is intended to be any radical difference of treatment between amendments affecting past service rights and those affecting future service rights. On the contrary in Version 1.1 (effective from 17 March 1997 and the version in force when reg 42 came into force on 6 April 1997), it included the following (para 2.5):

> "The actuary must reconsider the scheme's ability to meet the statutory standard whenever informed, in accordance with GN29 or Regulations made under section 47(9) of the Pensions Act 1995 or section 37 of the Pension Schemes Act 1993, of a change which might affect the scheme's ability to satisfy the test and, in carrying out such reconsideration, must comply with part 5 of this Guidance Note."

Part 5 (under the heading "Ongoing Supervision") provided as follows:

> "5.1 Whenever the actuary is informed of any significant changes to the membership, including remuneration patterns, or to the terms of the scheme, consideration should be given as to whether such changes would adversely affect the ability of the scheme to pass the tests of equivalence. In such circumstances the actuary should be satisfied that it would have been possible to certify that the scheme satisfied the tests of equivalence immediately following the relevant change and, if not the Contributions Agency, the employer and the trustees should be notified, unless the situation has been rectified before notification takes place.

> 5.2 Before a proposed change in the rules of the scheme can be made, Regulation 42 requires the actuary to notify the trustees in writing that the scheme will continue to satisfy the statutory standard after the alteration is made."

108. There was some debate before us as to quite what these provisions envisaged, and whether for example there was any difference between a change to "the terms of the scheme" (in para 5.1) and a change in "the rules of the scheme" (in para 5.2). I do not think it necessary to seek to resolve these questions. What seems to me clear is that GN28 nowhere draws the distinction between changes to past service rights being covered by reg 42 and changes to future service rights not being so covered. That is a striking omission if the intention behind the amendment to the definition of section 9(2B) rights made by the 1997 Amendments Regulations at almost exactly the same time (the 1997 Amendments Regulations were made on 11 March 1997 and Version 1.1 of GN28 was introduced from 17 March 1997) had been to cut down the scope of reg 42.

109. In these circumstances I approach the construction of reg 42 on the basis that it is to be interpreted if possible in a way consistent with the previous iteration of reg 42, that is as applying to amendments affecting future service rights as well as past service rights.

110. So the next question is whether the provisions can be interpreted in this way. It is fair to say that Mr Short, under a certain amount of questioning from the bench, did not find it entirely easy to articulate how his interpretation could be squared with the ordinary meaning of "accrued rights". He said however that "accrued rights to pensions" in the definition included rights that you will earn in the future whilst the scheme is contracted-out.

111. That does for the reasons given above seem an unusual use of the expression "accrued rights". But I have come to the conclusion that it is not an impossible one. The starting point is to understand what the problem with the previous definition was. This was (see paragraph 49 above) "rights … which are attributable to an earner's service on or after the principal appointed day in employment which is contracted-out in accordance with section 9(2B) of the 1993 Act". But this was both too broad and too narrow a definition. It was too narrow as it did not include rights that had been transferred in from another scheme, unlike the corresponding definitions in two of the other regulations that were harmonised (the Protected Rights (Transfer Payment) Regulations 1996, and the Contracting-out (Transfer and Transfer Payment) Regulations 1996) which did include reference to rights arising from transfers in. This was corrected by the addition of paragraph (b) to the definition (see paragraph 53 above).

112. But it was also too broad because the only benefits which are relevant to the reference scheme test are pension benefits for members and their widow(er)s (see s. 12B(3) and (4) set out at paragraph 43 above), whereas "rights attributable to service" could, as Mr Short pointed out, include other types of benefit such as long-term sickness benefits. So the definition was narrowed to confine it to pension benefits. So what the draftsperson was trying to do was find a form of words that captured the rights to pension that members of a scheme have. What pension rights do members of a scheme have? The answer – or at any rate an answer – is that once they retire they have a right to present payment of pension, but until they retire they have a right to future payment of pension. And the way in which the draftsperson has sought to express these two

types of right is "rights to the payment of pensions" and "accrued rights to pensions".

113. In other words the force of the words "accrued rights to pensions" is to identify the type of rights concerned, not to identify those that have been earned by service to date. This leads to the apparently paradoxical submission of Mr Short that "accrued rights to pensions" includes rights which you either have earned to date or will earn during contracted-out service, or in other words that "accrued" means "accrued or to accrue in the future". But in the end, despite the paradox, I accept this submission. I think the concept might have been better expressed by saying that section 9(2B) rights were rights to pension benefits whether those pension benefits were already in payment or not yet in payment, but that is how I think the words must be understood.

114. Read in this way, the definition is not limited to pension rights that have already been earned by service to date at the date of the proposed alteration, but can naturally include rights to pension benefits that a member could continue to earn. The requirements of the definition are (i) that the rights are rights to pensions; (ii) that they are accrued under a scheme contracted-out by virtue of section 9(2B) PSA 1993; and (iii) that they are attributable to an earner's service in contracted-out employment on or after 6 April 1997. Requirement (ii) is in my judgement not to be read as "have already been earned by past service in a contracted-out scheme at the date the alteration takes effect" but as "earned by service in a contracted-out scheme", that is whether already earned by past service or to be earned by service in the future. Or, more simply, "accrued rights" here means "rights accrued now or accrued in the future".

115. This was the view taken by Bacon J who said that the definition of "section 9(2B) rights" described the rights in "qualitative" terms rather than temporal terms (Judgment at [64]), and that what is being defined is the *type* of pension right that is being protected (Judgment at [60]). For the reasons I have given, I agree.

116. That makes it unnecessary for Mr Short to rely on what was called the "stem" of the definition, namely the introductory words "unless the context otherwise requires…". The effect of such words was considered in *Melville v IRC* [2001] EWCA Civ 1247, [2002] 1 WLR 407 at [32] per Peter Gibson LJ, who summarised the position as being that the statutory interpretation has to be adopted unless the context compels the adoption of another interpretation. Since it does not on the view I take arise, I do not propose to say anything more than that if I had not thought it possible to interpret "accrued rights" in the way I have suggested, then I think this would be one of those cases where the context would indeed otherwise require. In the words of Lawrence LJ in *re Gaul and Houlston's Contract* [1928] Ch 689 at 700 which are cited by Peter Gibson LJ, I do not think this would be a case where effect could be given to the words of the statutory definition "sensibly and properly" if they had the effect of limiting the scope of reg 42 to past service rights.

Other matters

117. That is sufficient, if the other members of the Court agree with me, to dispose of the appeal. There were a number of other matters raised in argument, but none of them affect the conclusion that I have come to, and I can refer to them quite briefly.

118. Mr Stallworthy placed some reliance on s. 20(6) PSA 1993 (paragraph 38 above). He suggested that the effect of that was to define "accrued rights" for the purposes of Part

III of the PSA 1993 generally; and that s. 20(6) made it clear that "accrued rights" meant existing rights conferring a prospective entitlement to payment of a future pension; it did not include future accrual. Mr Stallworthy may be right on both points, although if we had to decide the point I think it would be necessary to look with some care at each of the provisions cross-referred to in s. 20(6). I will assume he is right. Nevertheless this does not change the view I have reached as to the scope of reg 42.

119. Mr Stallworthy also referred to the changes made by the 2013 Amendments Regulations (paragraphs 55 and 56 above). I think little reliance can be placed on amendments made in 2013 to regulations introduced in 1997 – at best this can indicate what the sponsoring department in 2013 thought the earlier regulations did or did not do. In fact the Department of Work and Pensions (**"DWP"**) issued a public consultation document on the draft regulations in July 2012. Under the heading "Intention of Regulation 42(2) of the Contracting-out Regulations" this stated:

> "5 The intention of Regulation 42(2) of the Contracting-out Regulations is to ensure that any benefits to be accrued will still meet the RST [ie reference scheme test] following a prospective rule change, and also to ensure that benefits *already accrued* will still meet the RST following any retrospective rule change. This latter protection is in addition to the protection provided by section 67 of the Pensions Act 1995 (PA 95) — restrictions on powers to alter schemes.
>
> 6 However, it has recently been brought to our attention that as it is worded, this regulation is unworkable. This is because scheme actuaries can only certify that changes to *prospective* rights over the forthcoming three years meet the RST, as set out in Regulation 23 and Schedule 3 (paragraph 13(2)) of the Contracting-out Regulations."

120. What is noticeable about this is that DWP refer to the intention of reg 42(2) being to protect both future service benefits ("benefits to be accrued") and past service benefits ("benefits already accrued"), and do not suggest that the problem is that reg 42(2) as drafted in fact fails to protect future service rights. What is suggested is that reg 42(2) is unworkable as regards past service rights. None of that seems to me to cast doubt on the interpretation I favour, and if anything tends to confirm that it is line with the policy intention.

121. We were referred by both counsel to various other regulations in the Contracting-out Regulations which refer to section 9(2B) rights. It is not necessary to go through them all. Mr Short said that they show that certain regulations anticipate ongoing accrual; Mr Stallworthy that what they refer to is a future perfect – that is rights that at a point in the future will by then have been earned. I did not myself find consideration of these other regulations of much assistance on the meaning and effect of reg 42(2).

122. Mr Stallworthy relied on the structure of reg 42(2A) and (2B) which in each case refers to any alteration "which would or might adversely affect any entitlement or accrued rights of any member of the scheme acquired before the alteration takes effect". He suggested that that was the parallel to the reference in reg 42(2) to "section 9(2B) rights", and showed that the intention was to limit the impact of reg 42 to past service rights. I do not think he gets any assistance from reg 42(2B) which is concerned with GMPs: since GMPs ceased to accrue on 6 April 1997, they were necessarily all past

service rights. Reg 42(2A) is less easy to explain and I confess I have not understood why in reg 42(2A)(a) there is reference specifically to past service rights. Mr Short was however I think right when he said that in a contracted-out money purchase scheme future service rights would be protected by reg 42(2A)(b), and I have already made the point that if reg 42(2) had been intended to be confined to past service rights, it would have been much easier to include equivalent words in reg 42(2) rather than amending the definition of "section 9(2B) rights".

123. Mr Stallworthy said that it was not necessary to interpret reg 42(2) as extending to future service rights as there were other mechanisms under which the actuary should have been told of amendments, specifically an obligation imposed on employers and trustees to notify the actuary of material events affecting the contracting-out requirements. That may be so but it does not explain why the protection originally given by reg 42 to both past and future service rights should have been cut down to past service rights by the 1997 Amendments Regulations.

124. Finally Mr Stallworthy relied on the principle against doubtful penalisation. This principle is referred to in *Halsbury's Laws* (vol 96 (2024), Statutes and Legislative Process) at §723 as follows:

> "It is a principle of legal policy that a person should not be penalised except under clear law, or in other words should not be put in peril upon an ambiguity; so the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which subjects a person to any detriment where the legislator's intention to do so is doubtful, or penalises the person in a way which was not made clear by the legislation in question."

125. Mr Stallworthy said that depriving employers of the right to amend their pension schemes was to subject them to a detriment and that a construction which had this effect should therefore be avoided.

126. I agree with Mr Short that this principle does not apply. Virgin (or its predecessor as Principal Employer) were not deprived of their right to amend the scheme. They chose to take advantage of a statutory regime which conferred a benefit on them (in the shape of reduced NI contributions) but which came with a series of statutory restrictions. The particular restriction in reg 42 did not bar them from amending, but required them to follow a particular process to do so. That was all imposed in the interests of the members of the scheme to ensure that they in fact received benefits that were broadly equivalent to or better than the reference scheme benefits. In those circumstances I do not think this is a case of penalisation at all or that the principle has any application.

Conclusion

127. I think Bacon J came to the right conclusion in her impressive judgment and would dismiss the appeal.

Lady Justice Asplin:

128. I agree.

Lord Justice Peter Jackson:

129. I also agree.