[2023] AACR 12
Anne Dumbreck Robins v Secretary of State for Work and Pensions
[2023] EWCA Civ 890

CA (Nugee, Whipple and Asplin LJJ)
17 August 2023 **UA/2020/000635-RP**

Contracting out; Deductions; Guaranteed minimum pension; Married women; Pension benefits; SERPS; State pension; Widows

The respondent, Mrs Robins, was married, and both she and her husband received a Category A old-style state pension that included a basic pension and extra amounts including an additional pension based on contributions under the state earnings-related pension scheme (SERPS).

Mr and Mrs Robins also both received an occupational pension. Mr Robins' pension was 'contracted out' of the state scheme, with the effect that the national insurance contributions payable in respect of his employment were reduced in order to build up entitlement under the occupational pension scheme, which was required to provide, amongst other benefits, a guaranteed minimum pension (GMP). The GMP, up to the amount of the additional component of state pension, was then deducted from Mr Robins' Category A state pension. Mrs Robins' pension was not 'contracted out' of the state scheme.

Following the death of Mr Robins in 2018, Mrs Robins became entitled to a pension from her husband's occupational scheme as his widow (paid at the rate of half of his pension entitlement). This amount included half of Mr Robins' GMP, paid to the claimant as a widow's GMP. The Secretary of State decided to deduct this amount from the claimant's own additional pension in her Category A pension, pursuant to section 46(1) of the *Pension Schemes Act 1993* (the PSA 1993).

The respondent appealed to the First-tier Tribunal who dismissed the appeal. On appeal to the Upper Tribunal (UT), however, the UT found that the contracting-out deduction was wrongly made from the appellant's category A pension since her pension did not include any element of benefit earned by reduced contributions as it had not been contracted out and she was already entitled to the maximum Category A pension, meaning that she had received no increase in that pension as a result of being widowed.

The Secretary of State for Work and Pensions appealed against the Upper Tribunal's decision.

Held, allowing the appeal, *that:*

1. the contracting-out deduction produces a coherent, workable and comprehensible scheme that delivers to members of contracted-out schemes and their widows the same overall benefits by way of a combination of SERPS pension and GMP as they would have received had the member's employment (and where relevant the widow's own employment) not been contracted out. That is a rational and readily understandable policy objective, and is, foreshadowed in the White Paper. To apply it consistently to the case of a widow such as Mrs Robins who has an untopped-up Category A pension and a widow's GMP requires the GMP to be deducted from her Category A pension. This is precisely what s. 46(1) PSA 1993 provides on its face. (paragraph 64)

2. 'The effect of section 46(1) is indeed to 'make provision concerning the payment of certain social security benefits payable in respect of members and former members of schemes that were contracted-out pension schemes' [section 40(c)]. This is precisely what it does in the paradigm case where what is in issue is the contracted-out earner's own pension; and it is probably also the case where a widow has a Category B pension or a Category A pension that has been topped-up (the layer of sand case) as such pensions are derived (in whole or in part) from the widow's husband and hence can be said to be 'payable in respect of' him. The wording of section 40(c) cannot therefore be said to be inaccurate. The fact that it does not precisely cover a case such as Mrs Robins where her Category A pension is so large already that she derives none of it from her husband does not seem to be a reason for giving to the words of section 46(1) anything other than the plain meaning that they bear.' (paragraph 84)

DECISION OF THE COURT OF APPEAL

Sir James Eadie KC and Julia Smyth, instructed by the Treasury Solicitor appeared for the appellant

Julian Milford KC, instructed by direct access appeared for the respondent

APPROVED JUDGMENT

Lord Justice Nugee:

Introduction

1. This second appeal from the Upper Tribunal (Administrative Appeals Chamber) concerns the operation of contracting out in relation to pension schemes, and specifically the so-called contracting-out deduction (or COD) under which guaranteed minimum pensions (**"GMPs"**) are deducted from state pensions. It raises one point of statutory construction.

2. The statutory provision under which the contracting-out deduction is made is s. 46(1) of the Pension Schemes Act 1993 (**"PSA 1993"**), which provides as follows:

> "**46 Effect of entitlement to guaranteed minimum pensions on payment of social security benefits**.
>
> (1) Where for any period a person is entitled both—
>
> (a) to a Category A or Category B retirement pension, a widowed mother's allowance, a widowed parent's allowance or a widow's pension under the Social Security Contributions and Benefits Act 1992; and
>
> (b) to one or more guaranteed minimum pensions,
>
> the weekly rate of the benefit mentioned in paragraph (a) shall for that period be reduced by an amount equal—
>
> (i) to that part of its additional pension which is attributable to earnings factors for any tax years ending before the principal appointed day
>
> (ii) to the weekly rate of the pension mentioned in paragraph (b) (or, if there is more than one such pension, their aggregate weekly rates),
>
> whichever is the less."

3. The Respondent to this appeal, Mrs Robins, is a widow and a pensioner. A new state pension was introduced by the Pensions Act 2014 for those reaching pensionable age on or after

6 April 2016, but Mrs Robins attained pension age before then and we are concerned exclusively with the operation of the rules applicable to the old state pension.

4. Under these she is entitled to a Category A retirement pension by virtue of her own contribution record. She is also entitled to a GMP by virtue of her late husband's membership of an occupational pension scheme. The Secretary of State for Work and Pensions (**"the Secretary of State"**) contends that the plain effect of s. 46(1) PSA 1993 is that the weekly rate of her Category A pension is to be reduced by an amount equal to the weekly rate of her GMP (the amount specified under s. 46(1)(ii), this being less in her case than the amount under s. 46(1)(i)).

5. That was the view taken by Tribunal Judge W J Rolt in the First-tier Tribunal (**"the FTT"**) in a decision dated 19 February 2020. On appeal to the Upper Tribunal (**"the UT"**), however, Upper Tribunal Judge Elizabeth Ovey allowed Mrs Robins' appeal and held that no such deduction should have been made.

6. The Secretary of State now appeals to this Court, with the permission of Judge Ovey herself.

7. We have had the benefit of submissions of very high quality from both Sir James Eadie KC and his junior, Ms Julia Smyth, on behalf of the Secretary of State, and from Mr Julian Milford KC on behalf of Mrs Robins. Despite the latter, however, I have come to the clear conclusion that those on behalf of the Secretary of State are to be preferred and that the appeal should be allowed.

Facts – Mrs Robins' state pension

8. Mrs Robins was born on 22 September 1943. Her state pension age was 60, so she became entitled to a state pension on 22 September 2003.

9. Old-style state pensions are payable under the Social Security Contributions and Benefits Act 1992 (**"SSCBA 1992"**). Part 2 of the SSCBA 1992 (ss. 20 to 62) concerns contributory benefits. These are listed in s. 20, and include (by s. 20(1)(f)) two categories of retirement pensions, namely Category A pensions (payable to a person by virtue of their own contributions) and Category B pensions (payable to a person by virtue of the contributions of a spouse (or since 2005 a civil partner)).

10. Mrs Robins had made her own contributions and so was entitled to a Category A pension. By s. 44(3) SSCBA 1992 a Category A pension consists of (a) a basic pension payable at a fixed weekly rate and (b) an additional pension if the pensioner qualifies for it. The additional pension is earnings-related. Provision for the additional pension was first made by the Social Security Pensions Act 1975 (**"SSPA 1975"**) with effect from 6 April 1978, which introduced the state earnings-related pension scheme (or SERPS). Changes were made to SERPS from 6 April 1997, and from 6 April 2002 SERPS was replaced by a new form of additional pension, known as the state second pension or S2P. Mrs Robins qualified for not only a basic pension but also an additional pension. She was also entitled to a benefit called graduated retirement benefit, an earlier form of supplement to the basic state pension, which resulted in a comparatively small increase in her overall entitlement.

11. Mrs Robins married her husband in 1971. He had been born on 5 December 1932, and

his state pension age was 65, and he therefore attained pension age in 1997. He too was entitled to a Category A Pension, consisting of the basic pension and additional (SERPS) pension, and to a comparatively small graduated retirement benefit.

12. By s. 48A of the SSCBA 1992 (as it stood in September 2003) Mrs Robins also qualified for a Category B retirement pension on attaining 60 because (i) she had attained pension age; (ii) she was then married; (iii) her husband had attained pensionable age and become entitled to a Category A pension; and (iv) he satisfied the contribution conditions: see s. 48A(1) and (2). But so long as her husband was alive the Category B retirement pension was payable at a fixed rate (see s. 48A(3)) that was considerably less than Mrs Robins' own Category A pension. Thus, in September 2003 the weekly rate of a Category B pension payable to a pensioner whose spouse was alive was £46.35 (see sch 4 part 1 para 5 SSCBA 1992), whereas the weekly rate of Mrs Robins' basic pension alone was then £75.50 (see s. 44(3)). By s. 43(1) SSCBA 1992 a person could not be entitled at the same time to both a Category A and a Category B pension, and by s. 43(3)-(5) a person who would otherwise be entitled to both a Category A and a Category B pension was given a right to specify by notice to the Secretary of State which they wished to receive, but otherwise would be entitled to whichever was the most favourable to them. There is no suggestion that Mrs Robins gave a notice under s. 43(3) and when she turned 60 she therefore received her Category A pension and not the Category B pension.

13. Mr Robins died on 13 May 2018. By the time of his death the weekly Category A pension payable to Mrs Robins was as follows:

Basic state pension		£125.95
Additional pension		
6 April 1978 to 5 April 1997	£152.68	
6 April 1997 to 5 April 2002	£ 34.53	
From 6 April 2002	£ 6.92	
	£194.13	
Graduated retirement benefit	£ 7.18	
	£327.26	

14. Following her husband's death, Mrs Robins became entitled to a Category B pension as his widow. This was the effect of s. 48B(1) SSCBA 1992. By s. 48B(2) the rate of such a pension was (a) the weekly rate of the basic pension (then £125.95) and (b) the weekly rate of her husband's additional pension. (On the wording of s. 48B(2) itself, the second element was only half her husband's additional pension, but this was increased to 100% by reg 2(1) of the Social Security (Inherited SERPS) Regulations 2001 SI 2001/1085 as he had attained pensionable age before 6 October 2002.) At the date of his death the Category A pension payable to him was as follows:

Basic state pension			£125.95
Additional pension (pre 6 April 1997)			
£162.68 Less:	pre 88 GMP		
£51.67			
post 88 GMP	£54.74		
	£106.41		
		£ 56.27	
Graduated retirement benefit		£ 11.59	
Age addition		£ 0.25	

£194.06

(I explain the GMP deduction below.)

15. It can be seen that Mrs Robins' entitlement to a widow's Category B pension was therefore less than her own Category A pension, as her husband's additional pension of £162.68 was less than her own of £194.13. As already explained, the effect of s. 43 SSCBA 1992 was that she could not receive both but only the more favourable one. She therefore continued to receive her Category A Pension. She did receive a small uplift to her graduated retirement benefit which was increased from £7.18 to £12.98, the increase of £5.80 representing half her husband's graduated retirement benefit.

16. Under s. 52 SSCBA 1992 special provision is made for surviving spouses who would, but for s. 43, be entitled to both a Category A pension and a Category B pension by virtue of their deceased spouse's contributions. The effect of this is to enable the surviving spouse to top up their Category A pension by reference to their deceased spouse's pension in certain cases, that is if either the basic pension in their Category A pension falls short of the full amount (s. 52(2)), or the additional pension in their Category A pension falls short of the maximum specified in regulations (s. 52(3)). But neither of these applied to Mrs Robins: the basic pension in her Category A pension (£125.95) was already at the full amount; and the additional pension in her Category A pension (£194.13) was more than the maximum amount specified in the relevant regulations (the Social Security (Maximum Additional Pension) Regulations 2010 SI 2010/426), which was in May 2018 £172.26 (reg 3A). So she did not receive any increase under s. 52 SSCBA 1992.

17. The effect was that the only increase she received in her state pension after the death of her husband was the increase in graduated retirement benefit from £7.18 to £12.98 (as to which there is no dispute).

18. But she also became entitled to a widow's pension from her husband's occupational pension scheme. As explained below, this included a GMP at a weekly rate of £53.21. The Secretary of State deducted this as a contracting-out deduction from Mrs Robins' own pre-97 additional pension under s. 46(1) PSA 1993 (set out at paragraph 2 above) on the basis that she had both a Category A retirement pension and a GMP (as she undoubtedly did), and calculated the pension payable to her as follows:

Basic state pension			£125.95
Additional pension			
6 April 1978 to 5 April 1997			
	£152		
.68 Less COD for GMP	£		
53.21			
		£99.47	
6 April 1997 to 5 April 2002		£34.53	
From 6 April 2002		£ 6.92	
			£140.92
Graduated retirement benefit			£ 12.98
			£279.85

This calculation was set out in a letter of 28 June 2018. It is the deduction of £53.21 which is

in issue in these proceedings.

Contracting out and GMPs

19. I should now explain what Mrs Robins' GMP is. The additional SERPS pension was, as already referred to, introduced by the SSPA 1975 with effect from 6 April 1978. The Government's intentions in introducing it can be seen from a White Paper dated September 1974 ("Better Pensions", Cmnd 5713) (**"the White Paper"**), which was presented to Parliament by the then Secretary of State for Social Services, Mrs Barbara Castle, and this provides a more accessible introduction to contracting out and GMPs than the legislation, which is very technical. It is of course no substitute for the legislation later enacted, the precise effect of which can only be found by considering, and if necessary interpreting, the detailed statutory provisions. But it is a helpful starting point.

20. The weekly pension for a single person was then a flat rate of £10. Under the Government's proposed new scheme, pensions would be earnings-related, with the new pension having a base level of the amount of the single flat-rate pension when the scheme was introduced, and building up, on earnings above that level, over 20 years so as to provide in addition a quarter of average earnings between the base level and a ceiling of 7 times the base level (paragraph 8). Using an illustrative base level of £10, a contributor with weekly earnings of £20 would thus after 20 years' contributions receive a pension of £12.50 (ie £10 + (25% of £10)), and one with weekly earnings of £70 a pension of £25 (ie £10 + (25% of £60)) (paragraph 9). The new pension would be protected against inflation, with the base element increased in line with earnings and the remainder receiving full protection against price increases (paragraph 14).

21. Chapter 3 of the White Paper addressed the relation between the new scheme and occupational pension schemes. Many employers already had occupational pension schemes providing additional income to their members in retirement, some two-thirds of employed men and one-third of employed women being members of such schemes, albeit the benefits in many cases were very modest, particularly for manual workers as opposed to salaried staff (paragraphs 50-53). Increasingly however occupational schemes had adopted a final salary basis for pensions, and of the 8 million people who were members of final salary schemes in 1971, over 7½ million were earning pensions of at least 1/80 of salary per year (paragraphs 56-57). That made possible a new and more effective kind of partnership between state and occupational schemes in which all employees would have the opportunity of building up entitlement to a worthwhile pension based on their earnings, some entirely through the state scheme, and others by a combination of state and occupational provision (paragraph 57).

22. The White Paper then explained how this "contracting out" would work, as follows:

> "**Conditions for contracting out**
>
> 58. It will therefore be open to employers who have occupational schemes to contract their members out of a part of the state cover on the terms described below and to enter into partnership with the state in providing pensions for them. It is proposed that members of contracted out schemes and their employers shall pay the full state contribution on earnings up to the base level and that they will be fully covered for personal pension at that level from the state scheme. On earnings between the base level and the state scheme's ceiling, they and their employers will pay a reduced contribution. In return they

> will retain full coverage under the state scheme for short-term benefits and invalidity pension and partial coverage for earnings-related widow's pensions (see paragraph 62). **For personal retirement pension on this band of earnings, they will look to their occupational scheme but there will be arrangements to ensure that at pension age their total pension is at least as much as if they had been fully in the state scheme throughout and that they receive comparable protection against inflation after pension age.**
>
> 59. The Government propose that if it is to be used for contracting out an occupational pension scheme will have to satisfy two main complementary conditions in the provision of personal pensions. First, a scheme will have to provide a pension based on final salary… Second, a contracted out scheme will be required to provide a pension which will be at least as much as the state scheme would have paid on the upper band of earnings in respect of the period of contracting out, had those same earnings been used to calculate the state pension for that period. This amount, which is referred to as the guaranteed minimum pension, would be in practice the pension for which contracted out schemes would take over responsibility from the state scheme. After retirement its value will, as paragraph 65 describes, be guaranteed by the state.
>
> …
>
> **Cover for widowhood**
>
> 62. The Government propose that each contracted out scheme will also be required to satisfy two main conditions in the provision of widow's pensions. First, a contracted out scheme will have to provide widow's pensions based on final salary… Second, a contracted out scheme will be required to provide a widow's pension which is at least half the amount of the husband's guaranteed minimum pension at the time of his death. **The balance of the widow's pension will be made up by the state scheme, so that the widow receives in total at least as much as if her husband had never been contracted out at all.** This division of responsibility for widowhood cover is proposed partly because it is consistent with the present level of widowhood provision in good occupational schemes, but also because it makes possible a degree of flexibility in the type of benefit to be provided."

I have added the emphasis in paragraphs 58 and 62 because they are in my view helpful in understanding the policy objectives behind contracting out. This is a point I return to below.

23. The proposals in the White Paper were given effect to in the SSPA 1975. Part II (ss. 6 to 25) concerned benefits, of which ss. 6 to 12 concerned Category A and Category B retirement pensions. These provisions did not deal with entitlement to such pensions, for which (slightly awkwardly) reference had to be made to another Act, the Social Security Act 1975, which set out the conditions for entitlement, including in particular the contribution conditions; but they did deal with the rates of such pensions. Thus for example s. 6(1) SSPA 1975 provided that the weekly rate of a Category A retirement pension was (a) a basic component of £11.60 and (b) an additional component, calculated at 1¼% of an earner's surpluses in his earnings factors in the relevant years (or the 20 best years).

24. Part III of the SSPA 1975 (ss. 26 to 52) concerned contracting out. It provided for the

employment of an earner to be capable of being contracted-out employment if their employment qualified them for benefits under a contracted-out pension scheme (s. 30). The effect was that both national insurance contributions payable on that employment, and the additional component of state pensions, were reduced (ss. 27 and 29). In order to qualify as a contracted-out scheme, an occupational pension scheme had to comply with the requirements in ss. 33 to 41, which included the requirement that if an earner had a guaranteed minimum (as calculated in accordance with s. 35), the scheme had to provide the earner with a pension the weekly rate of which was not less than his guaranteed minimum (s. 33(1)(b)), and the earner's widow with a pension of not less than her guaranteed minimum, which was half that of the earner (s. 36(3)).

25. These provisions were consolidated into Part III of the PSA 1993 (ss. 7 to 68), originally headed "Certification of Pension Schemes and Effect on Members' State Scheme Rights and Duties". Chapter I of Part III (ss. 7 to 39), headed "Certification", set out the requirements for an occupational pension scheme to be contracted-out. Such schemes could either be contracted out on a GMP basis or a money purchase basis. A scheme contracted out on a GMP basis had to comply with the requirements of ss. 13 to 24 (s. 9(2)). This included the requirement that it had to provide for an earner to be entitled on reaching pensionable age to a pension whose weekly rate was not less than his guaranteed minimum (s. 13(1)), calculated in accordance with ss. 14 to 16, and for the earner's widow to be entitled to a guaranteed minimum that was half that of the earner's (s. 17). By s. 8(2) a GMP was defined to mean:

> "any pension which is provided by an occupational pension scheme in accordance with the requirements of sections 13 and 17 to the extent to which its weekly rate is equal to the earner's or, as the case may be, the earner's widow's or widower's guaranteed minimum as determined for the purposes of those sections respectively".

26. Mr Robins was a member of the Principal Civil Service Pension Scheme (**"PCSPS"**). The PCSPS is an occupational pension scheme which was contracted out on the GMP basis. Hence Mr Robins had a guaranteed minimum calculated in accordance with the legislation, and his PCSPS pension had to be at least sufficient to provide him with a GMP of that amount. In practice, as with most occupational pension schemes, his PCSPS pension was more than enough to provide him with his GMP, a GMP not being a separate pension but in the nature of a calculation factor in what is one indivisible scheme pension: see *Marsh & McLennan Companies UK Ltd v The Pensions Ombudsman* [2001] Pens LR 51 at [83] per Rimer J. We were not told what Mr Robins' overall PCSPS pension was, but what we do know is that at the date of his death the weekly rate of his GMP was at set out in paragraph 14 above, namely £51.67 for pre-88 GMP and £54.74 for post-88 GMP, making a total of £106.41. As also there set out, that was deducted from the additional pension in his Category A pension pursuant to s. 46(1) PSA 1993.

27. When Mr Robins died, Mrs Robins became entitled to a pension from the PCSPS as his widow at the rate of half his PCSPS pension. Again we do not know what the total pension payable to her was, but we do know that as a contracted-out scheme the PCSPS had to provide her with a pension at least equal to her widow's guaranteed minimum, which was half that of her husband, and thus that her PCSPS pension included a widow's GMP at a weekly rate of £53.21 (although her total PCSPS pension will again have exceeded that). Hence the deduction by the Secretary of State of that sum from her additional pension in her Category A pension as set out in paragraph 18 above.

Appeals to the FTT and UT

28. Mrs Robins appealed the decision of the Secretary of State to the FTT. In a decision dated 19 February 2020 Judge Rolt dismissed the appeal. He gave brief reasons adopting the Secretary of State's response, and on 26 March 2020 gave her permission to appeal to the UT.

29. She duly appealed and the appeal was heard in the UT by Judge Ovey. In her decision dated 5 August 2022 (**"the Decision"**) she allowed Mrs Robins' appeal. She pointed out that since Mrs Robins' own employment had not been contracted out, the only part of the state pension received by either Mr Robins or Mrs Robins in respect of which reduced national insurance contributions were made was his additional (SERPS) pension, that being, in the language of the White Paper, the part of their pension benefits for which his contracted-out scheme took over responsibility from the state scheme, and that s. 46 PSA 1993 was properly applied to that element of his benefit during his life. But on his death Mrs Robins had not inherited any part of his additional pension, receiving (from the state) only the pension benefit which she had paid for by her own contributions, and that despite that the Secretary of State applied s. 46 to make a contracting-out deduction from her own additional pension: Decision at [29]-[30]. At [38] she concluded that there was no policy justification for the contracting-out deduction.

30. At [43]-[47] she referred to s. 40 PSA 1993, both as originally enacted, and in its current form. This is the first section in Chapter II of Part III of the PSA 1993 (ss. 40 to 49) and in its current form provides:

> "**40 Scope of Chapter II**
>
> This Chapter has effect for the purpose—
>
> (b) of providing for contributions to be paid by the Inland Revenue in respect of earners who are members of contracted-out money purchase schemes or members of appropriate personal pension schemes; and
>
> (c) of making provision concerning the payment of certain social security benefits payable in respect of members and former members of schemes that were contracted-out pension schemes."

Judge Ovey's reasoning was that s. 46 is the section which makes provision as referred to in s. 40(c) and should be construed so as to give effect to the purpose there referred to. But s. 40(c) only refers to making provision concerning the payment of social security benefits in respect of members (or former members) of contracted-out schemes, and so when s. 46 refers to a Category A pension being reduced, it only means Category A pensions payable to members (or former members) of contracted- out schemes (at [46]). That would not include Mrs Robins' Category A pension, as she was never a member of a contracted-out scheme. Hence s. 46 did not apply to her (at [48]).

31. Having considered, and rejected, some arguments put forward by the Secretary of State, and having also considered the predecessor to s. 40 PSA 1993, which was s. 26 SSPA 1975, she expressed her conclusion at [71] that, subject to any authority to the contrary, the contracting-out deduction was wrongly made from Mrs Robins' Category A pension after the death of her husband, since it did not include any element of benefit earned by reduced

contributions. She then considered whether there was any authority against her conclusion and concluded that there was not.

32. She therefore allowed Mrs Robins' appeal, and revised the Secretary of State's decision as contained in the letter issued on 26 June 2018 by removing from the calculation of her pension entitlement the widow's contracting-out deduction of £53.21 per week.

Ground of Appeal

33. The Secretary of State appeals, with the permission of Judge Ovey, on a single ground which is that she erred in the construction of s. 46 PSA 1993 and as a result erred in concluding that a deduction could not be made from Mrs Robins' state pension to reflect the GMP she inherited from her husband.

The contracting-out deduction

34. Before coming to the particular arguments relied on by Mr Milford, it is helpful to consider the general scheme of contracting out.

35. The ability to contract out on a GMP basis was available between the introduction of SERPS on 6 April 1978 and its remodelling with effect from 6 April 1997 under the Pensions Act 1995. Contracting out, and the interaction between contracted-out occupational pension schemes and the state pension scheme, is a fiercely technical subject, but the essence of it is not difficult to state: in return for a reduction in the employer's and employee's national insurance contributions a contracted-out scheme had to provide certain minimum benefits, notably a GMP for the employee and his widow, and the employee's SERPS benefits were correspondingly reduced.

36. A central feature of the legislation, however, present from the outset, is that the member of a contracted-out scheme did not accrue a GMP *in place of* his SERPS benefit, but that the member's GMP when in payment was *deducted* from his SERPS benefit. (This can be contrasted with the rather simpler type of contracting out brought in in 1997 under which a salary-related scheme could contract out by satisfying certain minimum standards and the effect of doing so was that during such period the members of the scheme did not accrue a SERPS pension at all.)

37. This deduction is the contracting-out deduction provided for by s. 46 PSA 1993, and this is probably the key provision for understanding contracting-out on the GMP basis. I have set it out above at paragraph 2, but I repeat it here for convenience:

> "**46 Effect of entitlement to guaranteed minimum pensions on payment of social security benefits**.
>
> (1) Where for any period a person is entitled both—
>
> (a) to a Category A or Category B retirement pension, a widowed mother's allowance, a widowed parent's allowance or a widow's pension under the Social Security Contributions and Benefits Act 1992; and

(b) to one or more guaranteed minimum pensions,

the weekly rate of the benefit mentioned in paragraph (a) shall for that period be reduced by an amount equal—

(i) to that part of its additional pension which is attributable to earnings factors for any tax years ending before the principal appointed day

(ii) to the weekly rate of the pension mentioned in paragraph (b) (or, if there is more than one such pension, their aggregate weekly rates),

whichever is the less."

We were not addressed on why the legislation took this form rather than simply providing that an employee who accrued a GMP did not accrue a SERPS pension for the same period. Nor is this explained in the White Paper (which contains no reference to the contracting-out deduction at all, simply saying at paragraph 58 that "there will be arrangements to ensure that at pension age their total pension is at least as much as if they had been fully in the state scheme throughout" and at paragraph 73 that working out the arrangements "will inevitably involve the study of many technical details"). But I think at least part of the explanation is likely to be as follows.

38. It was a feature of the new state scheme proposed in the White Paper that it should be fully protected against inflation (see the reference to paragraph 14 of the White Paper in paragraph 20 above). But outside the public sector it was not common for occupational pension schemes to provide full protection against inflation: there was then no statutory requirement for schemes to provide increases to pensions in payment, and although many schemes did provide increases these were often discretionary rather than mandatory, and when they were paid were very often only a partial increase, not fully matching the high rates of inflation that the UK was then experiencing. That gave rise to a technical problem. The basic idea behind contracting out was, as referred to in paragraph 59 of the White Paper (cited in paragraph 22 above), that a contracted-out scheme would provide a pension at least as good as the state scheme would have paid on the upper band of earnings in respect of the period of contracting out, and that this amount (the GMP) "would be in practice the pension for which contracted out schemes would take over responsibility from the state scheme". But if occupational pension schemes did not provide for pensions in payment to be increased, the GMP would not be as good as the additional pension that it replaced. In times of high inflation, this would be a noticeable problem.

39. The problem was addressed in the White Paper as follows:

"**Protecting the pension against inflation**

65. In the state scheme that part of the pension based upon earnings between the base level and the ceiling will, as indicated in paragraph 14, receive full price protection. At present only occupational schemes in the public sector guarantee price protection, although it is also achieved in practice by certain schemes in the private sector. In these circumstances the Government have thought it right not to require contracted out schemes

> to guarantee to provide any increase in pensions after award. Instead the state scheme will provide for the guaranteed minimum pension on upper band earnings (see paragraphs 59 and 62) to be increased in line with prices. An alternative would have been to require schemes to provide a fixed measure of post-award increase and for the balance to be paid by the state scheme. In the Government's view a mixed arrangement of this kind would have been unnecessarily complex.
>
> 66. A problem arises as to how the increases mentioned above should be paid to the pensioner. One way would be for the increases to be paid direct to the pensioner as part of the state scheme pension. The alternative would be to pay the increases through contracted out schemes as part of the occupational pension. This would be dependent upon it proving possible to devise satisfactory administrative arrangements for the payments through occupational schemes to be made and monitored. Subject to this, the payment of the increases through the occupational scheme has much to commend it, but the Government would welcome the views of those concerned with occupational pension schemes on this point."

40. In practice the suggestion in paragraph 66 of the White Paper that increases might be paid through occupational pension schemes was not taken up, no doubt proving too complex. Instead increases were paid through the state scheme. As foreshadowed in paragraph 65, the legislation as originally enacted did not require occupational pension schemes to provide any increases in GMP. (A requirement for such schemes to provide a measure of increases to GMPs was later introduced by the Social Security Act 1986, but such increases were (i) capped at 3% per year and (ii) only applicable to GMP accrued after 6 April 1988, and so were still very far from full indexation.) That means that even if an earner's GMP precisely matched the corresponding SERPS pension for the years he was contracted out, they would necessarily diverge after coming into payment. Suppose for example that an earner retired with a GMP, all pre-1988, of £50 a week, and that his SERPS pension for the same period would also have been £50 a week. In year 1 both his GMP and the corresponding SERPS pension would be £50 and he would in fact receive it all by way of GMP. But in year 2 his GMP would remain £50, while the corresponding SERPS pension would be increased by the annual rate of inflation to say £55. In those circumstances the intention was that he would receive £50 by way of GMP and £5 through the state scheme.

41. One way of providing for this would have been to enact provisions under which the earner did not accrue a SERPS pension for the contracted-out period but nevertheless accrued a right to have the state scheme pay increases on the GMP. But another way, and the technique actually adopted, was to provide for the earner to continue to accrue a SERPS pension (which would then increase in line with other state pensions), but for the GMP to be deducted from it. In this way in the example above, the earner would have a SERPS pension in year 2 of £55, from which the GMP of £50 would be deducted, leaving £5 SERPS pension to be paid as part of the state pension.

42. I should add for the sake of completeness that technically s. 46 provides that the GMP is deducted from the whole of the earner's Category A pension, not just from the SERPS pension. This was explained by Mr Commissioner Turnbull in *R(P) 1/03* (CP/4504/2001) (***"R(P) 1/03"***) at [9(2)(a)] as follows:

> "However, that in turn assumes that the section 46 deduction should be treated as made only from the part of the Category A pension which consists of the additional pension.

> But that is not what section 46 provides. It provides simply for the total pension to be reduced by the GMP, without purporting to apportion that reduction to any particular element of the pension. It is true, as Miss Harris submitted, that it is natural to attribute the deduction to the additional pension, because a GMP is a substitute for the earnings-related element, and indeed the Secretary of State's own workings did so attribute it (albeit at the end of the process). But there is nothing in section 46 which in fact justifies any such attribution."
>
> But as Mr Commissioner Turnbull says the deduction is naturally attributed to the additional pension, not only for the reason he gives but also because the effect of the latter half of s. 46(1) is that the amount deducted can never exceed the amount specified in (i), namely the additional pension for all tax years up to the principal appointed day (that is, 6 April 1997 – see definition in s. 181(1) PSA 1993) or in other words the pre-97 SERPS pension. So even if an earner's GMP exceeds his total SERPS pension, it cannot be deducted from his basic pension (nor indeed from any part of his additional pension accruing after 6 April 1997). In practical terms therefore it is easiest to think of the GMP as reducing the pre-97 SERPS pension and this is how the Secretary of State's calculations in fact treat it (see for example the calculation of Mrs Robins' pension at paragraph 18 above).

43. The contracting-out deduction provided for by s. 46 therefore caters for the fact that SERPS pensions increase each year in payment in line with inflation, and GMPs do not, either (in the case of post-1988 accruals) increasing at no more than 3%, or (in the case of pre-1988 accruals) not increasing at all. But this is not the only effect of the section, and it has a number of other consequences that go well beyond that.

Earner's Category A pension – effect of s. 46(1) PSA 1993

44. I will start by considering the paradigm case where all that is in issue is an earner's own pension rights. Where an earner was in contracted-out employment in the relevant years he will have accrued a GMP. This would be based on the same band of earnings as would be used for calculating his SERPS pension, and they were intended to be calculated in much the same way, but in practice there were differences between them (for technical reasons which it is not necessary to go into) with the result that an earner's GMP would often be slightly smaller than the SERPS pension for the same period. Here too the effect of s. 46(1) is that his GMP is effectively deducted from his SERPS pension, with the result that the state will pay him the amount by which the SERPS pension exceeds the GMP. So if his GMP were £50 per week, and his SERPS pension £52, he would receive £50 by way of GMP and a further £2 as SERPS pension.

45. Conversely however there were circumstances in which an earner's GMP might exceed the SERPS pension for the same period. This could happen in particular if an earner left contracted-out service before normal pension age with a right to a deferred pension. In such circumstances his GMP would be revalued in deferment (the period between leaving service and normal pension age), but it was open to the occupational scheme to choose between different methods of revaluation; and if the scheme chose a fixed rate of revaluation, that might exceed the rate used for SERPS (which was linked to earnings). In such a case the revalued GMP at pension age would exceed the SERPS pension. Suppose for example that an earner had a number of years of contracted-out employment, which entitled him to a GMP of £50 but for which his SERPS pension was only £46, and a number of years of employment that was not

contracted out (conveniently referred to as "contracted-in employment" although this is not a statutory term), for which his SERPS pension was a further £20. The effect of s. 46(1) in such a case is that his GMP is not only deducted from his SERPS pension for the contracted-out years but from the entirety of his SERPS pension, so that in the example the GMP reduces his total SERPS pension from £66 to £16. That means that he not only does not receive any SERPS pension for the contracted-out years but his SERPS pension for the contracted-in years is also reduced (despite the fact that for these years he has paid full contributions).

46. That this is the effect of s. 46(1) has been consistently held to be the law, as follows:

(1) In *CP 1318 2001*, the earner had an entitlement to SERPS pension attributable to periods both of contracted-out and contracted-in service. The Secretary of State's calculation set off his GMP entitlement against the SERPS pension earned by both contracted-out and contracted-in contributions; the claimant argued that that was wrong and that there should be an offset only against the SERPS pension earned by contributions in the years of contracted-out employment, and that the SERPS pension earned by contributions in his period of contracted-in employment should be paid in full, without any adjustment for a GMP (see at [5]). That was rejected (at [16]) by Mr Commissioner Mesher on the basis that on the plain words of s. 46(1):

> "There is no scope within the legislation for there to be a separation of periods in which a person was not contracted out of SERPS and for additional pension earned in those periods to be taken out of the operation of section 46 and paid without any deduction."

(2) In Pearce v Secretary of State for Work and Pensions [2005] EWCA Civ 453 ("Pearce") Lloyd LJ came to the same conclusion in refusing permission to appeal from a decision of Deputy Commissioner White. This is only a decision on permission to appeal but it is a fully reasoned judgment and was later endorsed by Patten LJ in Wilkinson v Secretary of State for Work and Pensions [2009] EWCA Civ 1111 ("Wilkinson"). Again the claimant had periods of both contracted-out and contracted-in employment and contended that the GMP should only be deducted from the SERPS pension for the contracted-out years. Lloyd LJ rejected this (at [20]), saying:

> "Illogical as it may be to deduct GMP from additional pension for the whole period 1978 to 1997, however long or short the period of contracted-out employment has been, and despite its inconsistency with the Department's booklet, I agree with Commissioner Mesher that there is no basis in section 46 for distinguishing between additional pension attributable to contracted-out periods on the one hand and additional pension attributable to other periods on the other. The section is quite clear and there is no scope for interpreting it as Ms Pearce contends it should be read."

Whether this is quite as illogical as Lloyd LJ thought is a point I come back to below.

(3) In *Head v Social Security Commissioner* [2009] EWHC 950 (Admin), the claimant again had periods of contracted-out and contracted-in employment. His complaint was that the calculation of his pension did not allow for the fact that during his contracted-in employment he had paid full contributions. He failed before the Social Security Appeal Tribunal and was refused permission to appeal by the Commissioner. On an application for judicial review of the Commissioner's decision he accepted through his counsel that

as a matter of purely domestic law he could not challenge that, but sought to rely on an argument under the European Convention on Human Rights (see at [1]). Nicol J dismissed the claim, commenting that contracting out of SERPS had a number of consequences, including the fact that the additional state pension to which he would become entitled would be reduced under s. 46(1) (see at [30], [32]).

(4) *Wilkinson* was a decision on appeal to this Court from the Upper Tribunal (which had replaced the Social Security Commissioners). Mr Wilkinson again had periods of contracted-out and contracted-in service and contended that s. 46 required his GMP to be deducted from his SERPS pension for the contracted-out years. That was rejected both by Judge Rowland in the Upper Tribunal (although he described the position as "anomalous") and by Patten LJ (with whom Longmore and Smith LJJ agreed) in this Court. Indeed Mr Wilkinson's counsel accepted that the Secretary of State's decision was consistent with the literal interpretation of s. 46 (something that Patten LJ said was "obviously right" (at [16])), but contended that this was a drafting mistake that could be corrected under the principle in *Inco Europe v First Choice Distribution* [2000] 1 WLR 586. But as Patten LJ pointed out, not only was there nothing to suggest that Parliament intended to limit the set-off to only that part of the additional pension which was referable to contracted-out years, but the notes to the clause in the bill that became s. 29 SSPA 1975 showed that it was contemplated that the GMP might exceed the SERPS pension (or additional component as it was then called) for all relevant tax years. Indeed this is precisely why s. 46(1) limits the deduction to the lesser of the GMP and the total pre-97 SERPS pension, thereby ensuring that the basic pension (or basic component) is ring fenced against any reduction on account of GMP: see at [23]-[24].

Mr Milford did not suggest that these cases were wrongly decided, and *Wilkinson* is of course binding on us for what it decides. When asked what this was, Mr Milford said that it was the proposition that if s. 46(1) applies at all, then the calculation has to be carried out in accordance with its terms, his case being that s. 46(1) does not apply at all to Mrs Robins' pension as she does not have a "Category A pension" of the type referred to.

47. In this way it can be seen that the relationship between GMPs and SERPS is a complex one. It is no doubt true to say in broad terms that a contracted-out pension scheme "take[s] over responsibility" from the state scheme for the contracted-out period (as envisaged by the White Paper at paragraph 59 (set out at paragraph 22 above)); or that GMPs "replace" SERPS benefits (as the Goode Report[1] did at §2.3.34 ("GMPs are calculated in broadly the same manner as the SERPS benefits they replace")); or that a GMP is intended as a "substitute" for a SERPS pension (as Mr Commissioner Turnbull did in *R(P) 1/03*, referring to a GMP at [9(2)(a)] as "a substitute for the earnings-related element" and at [9(3)] as "supposed to be a substitute for the additional element of state retirement pension"). But statements such as this, while adequate as a general description, cannot capture the full complexity of the relationship between GMPs and SERPS pensions. That can only be found by a careful consideration of the precise terms of the statutory provisions enacted to give effect to what the White Paper referred to as the "partnership" between employers and the state in providing pensions for their employees (see paragraph 58, cited in paragraph 22 above).

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[1] "Pension Law Reform", the Report of the Pension Law Review Committee chaired by Professor Roy Goode, presented to Parliament in September 1993 (CM 2342-1).

48. To my mind what the cases in paragraph 46 above demonstrate is that it is wrong to think of GMP as a straightforward replacement of the additional SERPS pension for the contracted-out years. If one thinks of it this way it may seem "anomalous" (as Judge Rowland said in *Wilkinson*) or "illogical" (as Lloyd LJ said in *Pearce*) that s. 46 can lead to the SERPS pension for the contracted-in years, for which the earner has paid full contributions, being reduced as well. But I think it is more consistent with the legislation, and more helpful, to regard a GMP as if it were an alternative method of delivering (in part) the new state pension envisaged by the White Paper so that an earner would receive in total, in part from the state and in part from the GMP(s) provided by his contracted-out occupational scheme(s), no less than he would have done if his employment were all contracted-in. This is the principle stated in the White Paper at paragraph 58 which I have emphasised in paragraph 22 above and which I repeat here:

> "For personal retirement pension on this band of earnings, they will look to their occupational scheme but there will be arrangements to ensure that at pension age their total pension is at least as much as if they had been fully in the state scheme throughout and that they receive comparable protection against inflation after pension age."

GMPs would never be a complete replacement for SERPS as GMPs would not increase in payment but the new state pension would. But in principle a GMP could be used to deliver *any* part of the SERPS pension, because the earner would still receive from the state the balance needed. The only qualification was that the GMP, however large, could not affect the basic pension.

49. Seen in this way, there is to my mind nothing particularly anomalous or illogical in the GMP being deducted from the total SERPS pension, even though this means that the GMP could replace some of the SERPS pension for contracted-in years for which the earner had paid full contributions. What the full contributions for those years entitled the earner to was a pension of the relevant SERPS amount; but if this is in the result delivered in part by his GMP(s), he has no cause for complaint as he still receives overall what he would have done by way of SERPS pension had he not been contracted-out at all, or in the words of the White Paper "at least as much as if [he] had been fully in the state scheme throughout".

50. It can be seen therefore that the effect of s. 46 is that it does not matter, at any rate to the earner, whether his GMP is exactly the same as, slightly smaller than, or slightly larger than his SERPS pension for the contracted-out period. He will in all circumstances receive (at least) the total SERPS pension that he would have had if his employment had all been contracted-in. Save in the case where his GMP exceeds the entirety of his pre-97 SERPS pension (in which case he is better off because the deduction under s. 46 cannot exceed the total pre-97 SERPS pension, and he will keep the excess) the only practical effect of his GMP being larger or smaller is that it affects how much of the overall SERPS pension is delivered by the occupational pension scheme, and how much is left to be picked up by the state scheme. That is a matter that would affect those responsible for paying it (the occupational pension scheme and the state respectively) but would not affect the earner.

Pensions payable to widows

51. So far I have only considered the impact of s. 46(1) PSA 1993 on what I have called the paradigm case of the earner's own pension. But the White Paper envisaged, and the legislation duly enacted, provision for married women and widows as well. These provisions add a further level of complexity. (There was also some provision for widowers but it was not then identical,

and in the discussion which follows I propose to ignore the position of widowers and deal only with the position of wives and widows. To consider widowers as well would add a yet further layer of complexity, without adding anything of significance to the analysis.) It is easiest to look first at the state pension on its own, and then to consider the impact of contracting-out.

52. I have already summarised the position above, but to recap:

(1) A woman who was herself an earner would qualify for a Category A state pension in her own right, calculated in similar fashion to that of a male earner (and so consisting of the basic pension and additional pension), save for the fact that the pension became payable at 60 rather than 65. For single women, there was no need to make any further provision.

(2) But for married women it was necessary for the scheme to cater for the fact that married couples do not usually live financially independent lives. Some married women, of whom Mrs Robins is an example, were themselves earners with a full record of contributions (thus qualifying for a full basic pension), and sufficient earnings to qualify for a significant SERPS pension on top. But many married women of course were not in this position. Some were not earners at all, and those who were often did not have a full record of contributions so as to qualify for a full basic pension, or the same level of earnings for the purposes of the SERPS pension as their husbands did.

(3) Hence the legislation made special provision for married women, both during their marriage and in widowhood, enabling them to benefit from their husband's contribution record, instead of their own, by way of Category B pension.

(4) The legislation distinguished between the case where the woman's husband was still alive, and the case where he had died. A woman who reached pensionable age, and whose husband was himself alive and had reached pensionable age, was entitled to a flat-rate weekly sum by way, in effect, of supplement to her husband's pension. This was explained in the White Paper at paragraph 19 as follows:

> "19. A pensioner who has a wife under 60 will as at present be entitled to an increase of his pension for her and the pension will become hers when she reaches 60. At present the rate of this pension is £6 … Where a married woman has contributed under the new scheme she will receive either the £6 or her own base level entitlement, whichever is the higher. But in any case her pension on earnings above the base level will be payable in addition."

The way this was given effect to in the legislation was (i) to confer a right to a Category B pension on a woman who attained pensionable age and was then married to a husband who had himself attained pensionable age and had made sufficient contributions (now found in s. 48A(1) SSCBA 1992); (ii) to specify the amount of such Category B pension at a flat rate (now found in s. 48A(4) SSCBA 1992); (iii) to provide that a woman who was entitled to both a Category A and a Category B pension could have the better of the two but not both (now found in s. 43 SSCBA 1992); and (iv) to include a special provision for married women increasing the basic pension in their Category A pension up to at least the level of the flat-rate Category B pension (now found in s. 51A SSCBA 1992). In Mrs Robins' case she was married when she reached pensionable age in September 2003 and was therefore entitled to this Category B pension under s. 48A

SSCBA 1992, which then stood at £46.35. But this was less than her own Category A pension, the base pension alone of which was then £75.50, and she could not receive both: see paragraph 12 above. So she received her own Category A pension, which included her SERPS pension in addition to her base pension. And since her base pension was already higher than the Category B level she did not receive any increase under the special provision for married women in s. 51 SSCBA 1992 either.

(5) A woman whose husband died was entitled to a pension[2]. The details depended on whether her husband died before or after reaching pensionable age, and whether she herself was over 60 or not when widowed. In the case where both parties were over pensionable age when the husband died, the White Paper explained the position as follows (at paragraph 23):

> "23. The widow's full pension and … are at present at the flat rate of £10. Under the new scheme they will be replaced by earnings-related pensions. These will comprise the whole of the single rate of retirement pension which the husband was receiving when he died…"

The way this was given effect to in the legislation was (i) to confer a right to a Category B pension on a woman who had attained pensionable age and whose husband died after himself attaining pensionable age (now found in s. 48B(1) SSCBA 1992); and (ii) to provide that the rate of such Category B pension should be determined in the same manner as a Category A pension but based on her husband's contributions and earnings (now found in s. 48B(2) SSCBA 1992[3]). But under s. 43 SSCBA 1992 a widow who was entitled to this Category B pension and also had a Category A pension of her own could again have the better of the two but not both. In Mrs Robins' case her Category A pension was higher than her husband's and she therefore kept her own (paragraph 15 above).

(6) Finally, special provision was made enabling a widow who was receiving a Category A pension rather than a Category B pension to (i) increase her basic pension to the full amount or (ii) increase her additional pension up to a maximum level by reference to the contributions or earnings of her husband (now found in s. 52 SSCBA 1992). But in Mrs Robins' case her Category A pension already comprised a full basic pension and an additional pension above the relevant maximum so this special provision did not apply: see paragraph 16 above.

53. It can be seen that the overall effect of these arrangements was to ensure that widows could benefit from the new pension whether they were themselves earners and had their own pension, or whether they were financially dependent on their husband and had to rely on his, and could take advantage of whichever was better. But they could not claim both (although in the cases covered by s. 52 SSCBA 1992 they could use their husband's record to increase their own pension up to certain limits, something nicely described by Asplin LJ in argument as adding a different coloured layer of sand to the bottle).

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[2] For the avoidance of doubt, not all such pensions would be a "widow's pension" as that term is used in the legislation, as some would be "retirement pensions". But they would all be pensions payable to widows.

[3] As explained at paragraph 14 above, s. 48B(2) SSCBA 1992 itself provides for this Category B pension to only include half the husband's SERPS pension but this has to be read with the Inherited SERPS Regulations under which this is increased to 100% where the husband died before 2002.

54. That inevitably means that there were cases where those who had made contributions did not receive the same benefit from them as others, or indeed in some cases any benefit at all. Take the case of a woman who had worked for many years in contracted-in employment paying full contributions, but whose contribution record was not a full one, and whose earnings were less than her husband's, something that one imagines was not unusual. Suppose her husband died just after she turned 60. She would be entitled to a widow's Category B pension based on his record, and since that would be better than her own Category A pension, she would not be entitled to the latter and would obtain no benefit from her own contributions. But she would nevertheless be as well off in overall terms (indeed better off) than if she had simply relied on her own record.

55. Or take the case of three men with the same earnings and same contribution record, each of whom dies after retirement leaving a widow of pensionable age. Suppose that in one case his widow never worked. His contribution record would entitle her to a Category B pension of the same amount as his own. Suppose that in another case his widow had her own Category A pension but could use his record to top-up her Category A pension under the special "layer of sand" provision in s. 52 SSCBA 1992, so that she would obtain some benefit from his contributions but nothing like as much as the first. And suppose that in the third case the widow, like Mrs Robins, had her own pension that was both better than his and already at such a level as not to be topped up under s. 52; she would see no benefit at all from his contributions. Each man would have paid the same contributions, but the benefit their respective widows would derive from them would vary from a full Category B pension to nothing.

Pensions payable to widows – effect of s. 46(1) PSA 1993

56. Against this background, it is now possible to consider how the contracting-out deduction in s. 46 PSA 1993 applies to pensions payable to widows:

(1) In the case where the widow had a Category B pension the position is simple. She would have inherited her husband's state pension (as originally enacted this was both his base pension and 100% of his SERPS pension). If he had contracted-out employment he would also have had a GMP and she would acquire on his death a widow's GMP equal to half his GMP. That would be deducted from the SERPS pension in her Category B pension. The practical effect therefore would be that her widow's GMP would cover (roughly) half the SERPS element of her Category B pension and the state the other half. This was what was envisaged by the White Paper at paragraph 62 as follows (see paragraph 22 above), which I repeat here:

> "a contracted out scheme will be required to provide a widow's pension which is at least half the amount of the husband's guaranteed minimum pension at the time of his death. The balance of the widow's pension will be made up by the state scheme, so that the widow receives in total at least as much as if her husband had never been contracted out at all."

As this shows the intention was that the combination of the widow's GMP and the balance of the SERPS pension would deliver the same as if her husband had not been contracted out. This is precisely what is achieved by s. 46. And as with the husband's own pension, this is so whether the husband's GMP is precisely the same, slightly smaller or slightly larger than his SERPS pension. If his SERPS pension was £100 a week, then so would hers be; and it would not matter to her whether her husband's GMP was £90, £100 or £110. She would receive half of this by way of her widow's GMP (£45, £50, or £55) and the balance from the state (£55, £50 or £45).

(2) Take next the case where the widow's own Category A pension is more favourable to her than the Category B pension and so she draws the Category A pension, but it is topped up under the layer of sand provision in s. 52 SSCBA 1992 in such a way that her SERPS pension is increased by her husband's SERPS up to the maximum allowable amount. In May 2018 when Mr Robins died this figure was £172.26 (see paragraph 16 above). Suppose that the widow's own SERPS pension was £152.26 (all contracted-in), and that she inherited a top-up of £20.00 from her husband's SERPS pension. Suppose also that he had a GMP of £50.00, with the result that she acquired a widow's GMP of £25 on his death. The plain effect of s. 46(1) PSA 1993 is that she is then in receipt of both a Category A pension and a GMP and hence that the amount of the GMP falls to be deducted from her Category A pension. That means that she receives only £147.26 by way of SERPS pension from the state. That is so even though the effect is that her widow's GMP derived from her husband not only extinguishes the top-up SERPS pension she inherits from him, but erodes her own SERPS pension which she has paid for by her own full contributions. But the practical effect is that she still receives in total, in part from her widow's GMP and in part from the state, precisely the same amount (£172.26) as if her husband had been in contracted-in employment throughout.

57. That this is the law (namely that in a layer of sand case such as this the widow's GMP

can erode her own SERPS pension) has again been decided, in this case by Mr Commissioner Williams in *CP 5377 2006*. The claimant, Mrs R, was a widow, who had a not quite full contribution record but had had significant contracted-out earnings of her own. The figures here are instructive:

(1) Immediately before her husband's death in September 2005, Mrs R was entitled to a GMP in her own right of £95.99, and a Category A pension in her own right made up as follows (ignoring Graduated Retirement Benefit):

Basic pension		£ 80.41
SERPS pensions	£116.72	
Less GMP	£ 95.99	
		£ 20.73
		£101.14

(2) Her husband had a full contribution record (entitling him to a full basic pension) and also had significant contracted-out employment, but lower relevant earnings than she did. Immediately before his death he was entitled to a GMP of £85.02 and a Category A pension as follows (again ignoring Graduated Retirement Benefit):

Basic pension (full)		£ 82.05
SERPS pensions	£ 90.37	
Less GMP	£ 85.02	
		£ 5.35
		£ 87.40

(3) On her husband's death, Mrs R's Category A pension was more favourable than her Category B pension so she retained her Category A pension. But it was topped up by s. 52 SSCBA 1992 by reference to her husband's pension (i) by increasing her basic pension to the full amount and (ii) by increasing her SERPS pension to the then maximum of £143.08. She also of course retained her own GMP of £95.99; and she acquired a widow's GMP of half her husband's, or £42.51. Her Category A pension was therefore calculated as follows:

Basic pension		£ 82.05
SERPS pensions (own)	£116.72	
Top-up from husband (max)	£ 26.36	
	£143.08	
Less GMP (own)	£ 95.99	
widow's GMP	£ 42.51	
	£138.50	
		£ 4.58
		£ 86.63

58. What these figures show is that the effect of s. 46(1) was that the deduction of Mrs R's widow's GMP of £42.51 not only extinguished the SERPS top-up she inherited from her

husband (£26.36) but as to the balance (£16.15) eroded her own SERPS pension, thereby reducing the net SERPS pension that she received as part of her Category A pension from £20.73 to £4.58. But it also shows that she received in total by way of SERPS pension (£4.58) and GMP (£95.99 and £42.51) exactly the same that she would have received had her husband, or both of them, been contracted-in throughout, namely £143.08, this of course being the maximum to which her SERPS pension could have been topped-up under s. 52 SSCBA 1992. Mrs R complained that this calculation was disproportionate and unjust, resulting as it did in her losing some of her own pension, despite the fact that it was based on her own earnings and contributions. But Mr Commissioner Williams upheld the decision of the appeal tribunal that the calculation carried out by the Pension Service for the Secretary of State was correct.

59. Again Mr Milford did not ultimately seek to persuade us that this decision was wrong, his submission being that it did not matter to his case whether it was wrong or not. But in my judgement it was undoubtedly right, and entirely consistent with the passage in the White Paper at paragraph 62 that I have emphasised above (see paragraph 22) to the effect that the policy intention was that a widow who received a widow's GMP as a result of her husband having been in contracted-out employment should receive "in total at least as much as if her husband had never been contracted out at all".

60. Against this background I can finally come to the case such as Mrs Robins' where a widow is entitled to a Category A pension that is not topped up under s. 52 SSCBA 1992 as it is already at or above the maximum amount specified under that section. After her husband's death Mrs Robins was entitled to (i) a Category A pension (including a pre-97 SERPS pension of £152.68 and total additional pension of £194.13 (see paragraph 13 above)) and (ii) a widow's GMP of £53.21 (see paragraph 27 above). On the plain wording of s. 46(1) PSA 1993 the latter was to be deducted from the former, reducing her additional pension to £140.92 (see the calculation in paragraph 18 above). That seems to me entirely consistent with the other examples of how the s. 46(1) deduction works as I have explained them. As with the cases such as *Wilkinson* where the earner's own GMP can erode not only his SERPS for the contracted-out years but some of his SERPS for the contracted-in years (paragraph 46 above), or as with the layer of sand cases such as *CP 5377 2006* where the widow's GMP can erode not only the layer of SERPS pension inherited from her husband, but some of her own SERPS pension (paragraph 57 above), the effect in Mrs Robins' case is that her widow's GMP erodes her own SERPS pension despite the fact that she has paid full contributions. But the total amount payable to her by way of (i) GMP and (ii) SERPS pension remains exactly the same as it would have been had her husband's employment been contracted-in throughout. If that had been the case she would have retained her own SERPS unaffected by his death, but she would also have had no widow's GMP. So the total payable to her would have been the same.

61. This last point was a point made by Sir James Eadie and Ms Smyth, who between them put forward a comparison of two widows, one in the same position as Mrs Robins ("Mrs R"[4]), and one in the position of a widow with a similar Category A pension in her own right (untopped up under s. 52 SSCBA 1992), but whose husband was not contracted-out ("Mrs A"). In order to ensure that they each receive the same from the combination of SERPS and GMP, you have to apply the contracting-out deduction. Otherwise Mrs A simply receives her SERPS whereas Mrs R receives both her SERPS and the widow's GMP.

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[4] Not of course to be confused with the Mrs R who was the claimant in *CP 5377 2006* (paragraph 57 above).

62. Mr Milford said that in such a case Mrs A would inherit the entirety of whatever widow's pension was provided by Mr A's occupational pension scheme without deduction (there being no GMP), whereas Mrs R suffers a deduction of the GMP element of the pension payable under her husband's occupational pension scheme, and so Mrs A would be likely to be better off once one took the total pension received into account. But that all seems to me both impossibly speculative and legally irrelevant. The legislation we are concerned with only deals with state pension benefits and the ability to deliver part of those benefits through an occupational pension scheme in the shape of a GMP in return for lower national insurance contributions. It is simply not concerned with what other benefits might or might not be payable from an earner's occupational pension scheme. Mr A might not be a member of such a scheme at all; or might be a member of one which provided little, or no, widow's benefit, or, as occupational schemes sometimes do, permitted him to pay extra contributions for a widow's pension which he might or might not have been able to pay, or permitted him to allocate some of his own pension to provide a widow's pension, which he might or might not have been willing to do. What one can say is that both he and his employers would each be paying full national insurance contributions on his earnings, which might make them both inclined to pay less into an occupational pension scheme.

63. One cannot therefore make any comparison at all between what Mrs A might receive by way of non-GMP benefits, and what Mrs R might, as this would be entirely speculative and would all depend on the individual circumstances of each case. The only meaningful comparison that can be made is between Mrs A's state scheme pension and what Mrs R receives by way of a combination of state scheme pension and GMP. If s. 46(1) PSA 1993 operates as it appears to on its face then they each receive precisely the same.

64. My conclusion from this survey of how the contracting-out deduction works in various different scenarios is that it produces a coherent, workable and comprehensible scheme that delivers to members of contracted-out schemes and their widows the same overall benefits by way of a combination of SERPS pension and GMP as they would have received had the member's employment (and where relevant the widow's own employment) not been contracted out. That is a rational and readily understandable policy objective, and is, as I have said, foreshadowed in the White Paper. To apply it consistently to the case of a widow such as Mrs Robins who has an untopped-up Category A pension and a widow's GMP requires the GMP to be deducted from her Category A pension. This is precisely what s. 46(1) PSA 1993 provides on its face.

65. Properly understood therefore s. 46(1) does what one would expect it to do. What, then, is the argument for giving it any different meaning?

Mr Milford's arguments – (1) the unattractive result

66. The starting point is that s. 46(1) PSA 1993 is not ambiguous or difficult to interpret or apply. This was the point that Sir James Eadie put at the forefront of his submissions, namely that on its natural and plain meaning s. 46(1) is neither unclear nor controversial. He pointed out that Judge Ovey seems to have accepted this, saying (Decision at [33]) that she fully understood the contention that on the face of
s. 46 the contracting-out deduction fell to be made. Moreover Mr Milford in terms accepted that if s. 46(1) was read in isolation and literally then the Secretary of State would be right.

67. But Mr Milford put forward in effect two arguments in support of the UT's Decision. First he suggested that the result contended for by the Secretary of State was an inherently unattractive one. Mrs Robins had paid in full for her own contributions. Her pension was derived entirely from those and had nothing to do with her husband. The widow's GMP she received from her husband's scheme, the PCSPS, had in turn been paid for by him by his contributions to that scheme (or, to be more accurate, since employees' contributions usually only cover a small part of the cost of an occupational pension, by a combination of his contributions and his service as an employee, it being a commonplace of pensions law that such a pension is deferred remuneration for the member's service to his employer). The principle behind the contracting-out deduction was that a person should not receive a double benefit in the shape of both a SERPS pension and a GMP that was intended, in return for lower national insurance contributions, to be a substitute that replaced it. But Mr Robins' GMP, and the widow's GMP that went with it, were in no sense a substitute or replacement for Mrs Robins' own SERPS pension, for which she had paid her own full contributions. One would expect that since she had paid for her benefits in full she should receive her benefits in full, and any other result was instinctively odd.

68. These points were attractively advanced by Mr Milford. They are similar to points made by Judge Ovey in the UT to the effect that she could discern no policy reason why the contracting-out deduction should apply in Mrs Robins' case. Thus she said (Decision at [34]) that Mrs Robins:

> "is not receiving any state scheme payments equivalent to (or representing in part) the GMP the provision of which was contracted out to her husband's occupational scheme. As explained in paragraph 67 of the White Paper, the intention was that the contribution reduction would reflect the cost of providing through the occupational scheme the pension forgone under the state scheme: that is, the pension contracted out. No part of the claimant's Category A pension is pension forgone under the state scheme; it is pension which has been fully earned under the state scheme."

69. But, as I have sought to explain, the problem with analysing the question purely in terms of the GMP replacing, or being a substitute for, pension forgone under the state scheme is that it does not fully capture the complexity of the relationship between GMPs and the state scheme, particularly when it comes to married couples. Judge Ovey's comments, and Mr Milford's submission, would no doubt make sense if the legislation had treated husbands and wives as if they were financially independent of each other. But as we have seen the legislation, for very understandable reasons, did not do this but sought to cater for the fact that although some married women earned as much or more than their husbands, many married women did not and were financially dependent, to a greater or lesser degree, on their husbands, with the result that the pensions of married couples could not be looked at in isolation from each other but had to be looked at together, both while they were alive and if the husband died leaving his wife a widow. Once one sees that the policy given effect to by the legislation is not that those who pay full contributions should receive their own benefits in full, but is rather that an earner and his wife (or widow) should receive, by way of combination from the state and from their GMPs, the same benefits as if neither of their employments had been contracted-out, then it follows that the application of the contracting-out deduction in a case like Mrs Robins' is not only explicable but required to produce a coherent scheme.

70. I therefore do not accept the submission that there is anything unattractive, unfair, odd, or contrary to the policy of contracting-out in giving s. 46(1) its natural and ordinary meaning.

On the contrary I think it would cut across the legislative policy to exempt Mrs Robins' Category A pension, alone of all types of pensions payable to widows, from the effects of s. 46(1).

71. The absurdity of doing this can be illustrated by the following example:

(1) Assume two women, in almost identical circumstances, each widowed in 2018 like Mrs Robins, each with an entitlement to a Category A pension and each with an entitlement to a widow's GMP like Mrs Robins of £53.21 per week, the only difference in their circumstances being that the first has additional pension of her own of £173, whereas the other has additional pension of her own of £171.

(2) The maximum permitted for the topping-up provisions in s. 52 SSCBA 1992 was at the relevant time £172.26, so this means that the first widow, like Mrs Robins, receives no topping up to her additional pension, but the second has her additional pension topped up by £1.26 from her husband's pension to the maximum permitted level.

(3) If Mr Milford were right, the first widow would receive (i) her additional pension of £173 (with no deduction) and (ii) £53.21 GMP, a total of £226.21, whereas the second would, in accordance with the layer of sand cases, see her GMP not only erode the £1.26 derived from her husband but a further £51.95 of her own additional pension leaving her with (i) £119.05 additional pension and (ii) £53.21 GMP, a total of £172.26. That seems to me not only absurd but deeply unfair in that a difference of £2 in the two women's additional pension would lead to a difference of over £50 in what they received.

(4) On the Secretary of State's case, by contrast, the GMP of £53.21 would fall to be deducted from the widow's additional pension in each case, leaving the first widow with £119.79 additional pension and £53.21 GMP (a total of £173), and the second widow with £117.79 additional pension and £53.21 (a total of £171), thereby ensuring that each widow receives by way of additional pension and GMP exactly what they would have received had their husband's employment not been contracted out.

72. Mr Milford submitted that s. 46 should not be read in isolation but in the context of the Act as a whole and in a meaningful and purposeful way. I have no particular difficulty with that submission, but in the context of the PSA 1993 (and the SSCBA 1992 which has to be read with it), I think the natural and ordinary meaning of s. 46 does give effect to it in a purposeful and meaningful way, and for the reasons I have given it is in fact Mr Milford's submission that produces a result that is out of kilter with the remainder of the legislative scheme.

Mr Milford's arguments – (2) the effect of s. 40 PSA 1993

73. Mr Milford's central argument however was based on the wording of s. 40 PSA 1993, the first section in Chapter II of Part III of PSA 1993. I have set this out above (paragraph 30) but repeat it here for convenience:

"**40 Scope of Chapter II**

This Chapter has effect for the purpose—

(b) of providing for contributions to be paid by the Inland Revenue in respect of

earners who are members of contracted-out money purchase schemes or members of appropriate personal pension schemes; and

(c) of making provision concerning the payment of certain social security benefits payable in respect of members and former members of schemes that were contracted-out pension schemes."

He also drew attention to the heading of Chapter II. Part III is headed (in its current form):

"Schemes that were contracted-out etc and effects on members' state scheme benefits"

And the heading to Chapter II itself is (in its current form):

"Reduction in social security benefits for members of schemes that were contracted out".

74. The argument was as follows. In Mrs Robins' case she was never a member of a contracted-out scheme. It was only her husband who was. The pension that was paid to her was her own Category A pension, derived entirely from her own contributions. That was not payable "in respect of" her husband but only in respect of her. Hence it was not a social security benefit payable in respect of a former member of a contracted-out pension scheme.

75. As a matter of language, I am inclined to agree with Mr Milford that Mrs Robins' case does not fit precisely within s. 40(c). Sir James Eadie had an argument to the contrary, but I did not find it persuasive and do not need to set it out in detail. My inclination is reinforced by the fact that the wording of the predecessor section, namely s. 26 SSPA 1975, was even clearer on this point, as Judge Ovey noted in the Decision. It read as follows:

"**26 Contracting-out of full contributions and benefits**

(1) This Part of this Act shall have effect for the purpose of reducing —

(a) the rates at which contributions are payable under Part I of the principal Act by or in respect of an earner in employed earner's employment; and

(b) the rate of any Category A or Category B retirement pension, widowed mother's allowance or widow's pension payable by virtue of contributions at such reduced rates,

where an occupational pension scheme provides for the earner and his widow to be entitled to the requisite benefits and the earner's employment is contracted-out by reference to the scheme."

Mrs Robins does have a Category A retirement pension but it is not payable by virtue of contributions at reduced rates; it is payable by virtue of her own contributions at full rates.

76. Mr Milford made three points on s. 40. The first was that this was not just a clause saying what the purpose of the following provisions was; it provides that Chapter II "has effect for", which picks up the wording in the heading to the section which refers to the "scope" of Chapter II. The second is that s. 40 is not a general or high-level statement of the scope of the chapter, but is in precise terms that reflect the heading to Chapter II. The third was that s. 40(c) tells one that the chapter makes provision for certain things, and that this indicates the subject-matter of the relevant provision which does this, which is s. 46(1). In these circumstances, he submitted, s. 46(1) should be construed in such a way as to reflect s. 40(c). That required the words in s. 46(1) "where a person is … entitled to … a Category A retirement pension" to be read as "where a person is … entitled to … a Category A pension in respect of a member or former member of a contracted-out scheme".

77. I do not accept these submissions. First, I derive no help from the heading to Chapter II which refers to the reduction of social security benefits "for members of schemes that were contracted out". Headings are admissible to help interpret statutes but are of limited weight: see *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, 2020) §16.7:

> "A heading is part of an Act. It may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief guide to the material to which it relates and that it may not be entirely accurate."

The chapter elaborates on this with comments and examples, but this is sufficient for present purposes. The heading to Chapter II is a very good example. It does indicate in brief terms what the chapter is concerned with, but it is not precise or detailed and if one construes it narrowly it is on any view not entirely accurate. It is undisputed that one of the effects of s. 46(1) is to reduce a widow's Category B pension where her husband was contracted-out and she has a widow's GMP. But this is not strictly a "social security benefit for" her husband: it is a social security benefit for her. One might equally say that her widow's Category B pension is not a "members' state scheme benefit" as referred to in the heading to Part III as a whole, but it cannot be suggested that s. 46, being in Part III, does not have effect to require her Category B pension to be reduced.

78. Nor do I derive any help from the word "scope" in the heading to s. 40 itself. This indicates the general effect of s. 40, but its precise effect can only be found by reading the text of s. 40. Nor do I think any weight can be placed on the words "has effect" in s. 40: the complete phrase is "has effect for the purpose of…" and I do not see that this is any different from a provision saying that "the purpose of this chapter is …". Both are sections indicating what the purpose of other sections is.

79. That brings in the principles referred to in *Bennion* at §17.2 as follows:

> "A purpose clause is an operative part of the Act and will colour the interpretation of the provisions that it governs. Its function is to provide a guiding principle for interpreting the text. However it is unlikely to override the clear words of other operative provisions, partly because of the application of the principle that the general gives way to the specific."

That seems to me no more than good sense. A purpose clause is not itself an operative provision, but a signal as to the legislative intent of other provisions. The actual effect of those other provisions must depend on their wording. If that wording is ambiguous or open to doubt or of

uncertain scope, then no doubt the purpose clause may be helpful to resolve the question of interpretation. But if the operative provisions are clear and specific then one would not usually expect them to be controlled or cut down by a purpose clause which is necessarily expressed in more general terms.

80. As Sir James Eadie put it, a purpose clause is not seeking to set out the entire effect of the operative provisions, or to capture every nuance of them; it is simply seeking to introduce in broad terms what is to come. He said that in the present case if Parliament had intended in such a technical area to limit the effect of s. 46(1) so as to exclude Category A pensions where none of the pension was derived from contracted- out contributions, one would expect Parliament to have made provision for that in s. 46(1) itself rather than leaving such an intention to be deduced from s. 40.

81. On the facts of the present case I agree, but I do not want to be taken as laying down any hard and fast principles. There are many cases where even apparently clear words in a statute, or any other legal text, can be given a particular interpretation having regard to the purpose of the instrument in question. There have been numerous recent authoritative statements as to the correct approach to construing legislation of which we were shown a selection: *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 at [8] per Lord Bingham ("Undue concentration on the minutiae of the enactment may lead the Court to neglect the purpose which Parliament intended to achieve"); *Attorney General's Reference (No 5 of 2005)* [2004] UKHL 40, [2005] 1 AC 167 at [31] per Lord Steyn ("No explanation for resorting to purposive interpretation of a statute is necessary"); *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] UKSC 25, [2011] 1 WLR 1546 at [10] per Lord Mance ("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"); *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 at [72] per Lord Neuberger PSC ("The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a free-wheeling view of the intention of Parliament"); *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343 at [29] per Lord Hodge DPSC ("A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections").

82. So one cannot rule out the possibility that there may be cases where an operative provision in a statute appears plainly to say one thing, but an examination of the context and the statutory purpose as a whole might cause the Court to interpret it as saying something different. And that must be so whether the statutory purpose is expressly stated in a purpose clause, or is found by consideration of the legislative scheme as a whole, the context, the mischief and other matters. So I certainly do not mean to say that purpose clauses can never affect plainly worded operative clauses, and if I had thought that the Secretary of State's construction of s. 46(1) was anomalous, illogical and unfair and produced effects that were contrary to the legislative scheme as a whole, then a purpose clause such as s. 40 might help to shed light on whether s. 46(1) could really have been intended by Parliament to mean what it appeared to.

83. But for the reasons I have set out above, s 46(1) is in my judgement none of those things. It is not anomalous or illogical or unfair, and the effects that it produces in Mrs Robins' case on its plain meaning are entirely in line with the legislative scheme properly understood. In those circumstances I do not think that plain meaning can be distorted by appeal to the quite general words expressed in s. 40.

84. I therefore consider that Mr Milford's submission based on s. 40 must also be rejected. The effect of s. 46(1) is indeed to "make provision concerning the payment of certain social security benefits payable in respect of members and former members of schemes that were contracted-out pension schemes". This is precisely what it does in the paradigm case where what is in issue is the contracted-out earner's own pension; and I think it is probably also the case where a widow has a Category B pension or a Category A pension that has been topped-up (the layer of sand case) as such pensions are derived (in whole or in part) from the widow's husband and hence can be said to be "payable in respect of" him. The wording of s. 40(c) cannot therefore be said to be inaccurate. The fact that it does not precisely cover a case such as Mrs Robins' where her Category A pension is so large already that she derives none of it from her husband does not seem to me a reason for giving to the words of s. 46(1) anything other than the plain meaning that they bear.

85. We also received some very recondite arguments on s. 47 PSA 1993 from both sides, but in the light of the conclusions I have reached I do not think it is necessary to consider them.

Conclusion

86. For the reasons I have given I would allow the appeal and restore the decision of the FTT upholding the Secretary of State's calculation of Mrs Robins' pension under which the amount of her widow's GMP was deducted from her Category A pension.

Lady Justice Whipple:

87. I agree.

Lady Justice Asplin:

88. I also agree.