Case Name:

Strata Plan LMS597 v. Camsix Developments Ltd.

Between
The Owners, Strata Plan LMS 597, plaintiff, and
Camsix Development Ltd., Marine Roofing & Sheet Metal Ltd., Doug Johnston d.b.a. Johnston Barrington & Davidson Architects and the said Johnston Barrington & Davidson Architects, Scott Construction Ltd., Scott Management Ltd., defendants

[2004] B.C.J. No. 841
2004 BCSC 312
Vancouver Registry No. C973918

British Columbia Supreme Court
Vancouver, British Columbia
McKinnon J.
(In Chambers)

Heard: January 6, 2004.
Judgment: March 8, 2004.
(46 paras.)

Counsel:

A.I. Zasada, for the plaintiff.
P.G. Altridge, for the defendants.

¶ 1 **McKINNON J.**:— The plaintiff in this matter, The Owners, Strata Plan LMS 597, is a strata corporation comprised of the owners of a condominium complex known as "The Pacifica" in the City of Vancouver. On July 15, 1997, the plaintiff commenced an action for damages against various parties involved in the design, construction and inspection of The Pacifica which can be described in the vernacular as a "leaky condo." In this application, the plaintiff seeks to add Metro Testing Laboratories Ltd. ("Metro") as a defendant in the action as the party responsible for the roof inspections at The Pacifica. Metro opposes the application by asserting that; they were not responsible for any roof inspections, that the limitation period for bringing an action against them has lapsed and that there has been inexcusable and unexplained delay in bringing the action causing Metro prejudice in this matter.

¶ 2 On August 12, 2003 counsel for the plaintiff advised Metro of their intention to commence legal proceedings. On October 21, 2003, the plaintiff filed its notice of motion to add Metro as a defendant to the action commenced in July of 1997.

¶ 3 The seven buildings that collectively form The Pacifica were constructed between 1991 and 1994 with the final occupancy permit being issued in April of 1994. Within one year of the final permit being issued, the plaintiff encountered problems with water entering the building envelope. The plaintiff alleges that by November 1995, 31 of the 207 suites were reported to have problems with water ingress and were undergoing some form of repair.

¶ 4 The plaintiff retained the services of a building envelope specialist, McArthur Vantell Ltd., who provided the plaintiff with reports regarding water ingress as they pertained to the doors and windows, the brick cladding of

the buildings and the roofing of The Pacifica. The plaintiff received these reports on April 25, 1996.

¶ 5 Sometime in July 1997, the same month in which the action was commenced, a "comprehensive roof survey" (the "Roof Survey") was conducted by Inter-Provincial Inspectors (1982) Ltd. Though the court was not provided with a copy of this report by the plaintiff, a December 1999 Building Envelope Assessment Report (the "Envelope Assessment Report") completed by CSA Building Sciences Western Ltd. relies heavily upon the Roof Survey and makes extensive reference to its contents. The Roof Survey apparently identified several deficiencies in the roofing system. Repairs were undertaken by the plaintiff in response to the survey which were supervised by Inter-Provincial.

¶ 6 As indicated, the Envelope Assessment Report was delivered to the plaintiff on December 3, 1999. This is the most extensive report on the condition of The Pacifica to date. The plaintiff claims that it was not until receipt of this report that it became aware that the damage to The Pacifica was described as "dangerous".

¶ 7 Following the Envelope Assessment Report, extensive repairs were undertaken at The Pacifica between December 1999 and May 2000. Unfortunately, leakage problems persisted at the townhome section of The Pacifica and consequently further repairs were required which were completed between March and October of 2002.

¶ 8 On May 28, 2003, Interrogatories were delivered to the general contractor and architect regarding the identity of sub-contractors who performed work on The Pacifica. The general contractor and architect provided their responses to the Interrogatories on August 18 and 7, 2003, respectively. Both responses to these Interrogatories identified Metro as responsible for roofing inspections at The Pacifica. The plaintiff claims this is the point at which it first became aware of the identity of Metro.

¶ 9 I have concluded that the plaintiff's application to add Metro as a defendant pursuant to Rule 15(5)(a)(iii) should be dismissed as it would not be just nor convenient to do so in the circumstances. Specifically, the unexplained and inexcusable delay of the plaintiff in bringing this application and the attendant prejudice Metro would suffer were it granted, mandate that it not be added as a defendant.

Reasons for this Conclusion

¶ 10 The plaintiff's application to add Metro as a defendant is made pursuant to Rule 15(5)(a)(iii) of the Rules of Court. The Rule states:

> 15(5) (a) At any stage of a proceeding, the court on application by any person may
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> ...
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> (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
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> (a) with any relief claimed in the proceeding, or
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> (b) with the subject matter of the proceeding,
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> which in the opinion of the court it would be just and convenient to determine as between the person and that party.

¶ 11 To secure an order adding a party under Rule 15(5)(a)(iii), the onus is on the plaintiff to demonstrate to the Court that (1) there is a degree of connection between the parties that relates to either the relief claimed or the subject-matter of the proceeding, and (2) it is just and convenient that the party be added.

¶ 12 The Court's discretion to add a party under this Rule is unfettered but the discretion must be exercised judicially in accordance with the evidence and case authorities (see: Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd. (1996), 19 B.C.L.R. (3d) 282 at 291 (C.A.) per Finch J.A.).

Is There a Question or Issue to be Tried?

¶ 13 In assessing whether to add a party under Rule 15(5), the first matter to be determined is whether the plaintiff has demonstrated that there is a question or issue to be tried between the parties that is sufficiently related to the relief sought or the subject-matter of the proceeding. McFarlane J.A. of the B.C. Court of Appeal addressed the question to be answered in MacMillan Bloedel Ltd. v. Binstead et al. (1981), 59 B.C.L.R. 73 (C.A.) where he noted at [paragraph] 12:

> It seems to me clear that one of the functions of the chambers judge hearing an application under this rule must be to decide whether there may exist between the appropriate parties a question which can be answered or an issue which can be decided by a court of law or by a judge exercising jurisdiction in a judicial capacity and to see, through whatever means, and not necessarily affidavits, that the question or issue is a real one in the sense that it is not entirely frivolous and would result in courts wasting judicial time. It is not the function, in my opinion, to decide whether on any kind of a balance it is likely that the plaintiff would be able to prove its allegations on a balance of probabilities or to any other degree beyond showing that there may exist such a question or such an issue.

¶ 14 Thus it is important that the court bear in mind that the plaintiff need only demonstrate a sufficient degree of connection between the parties such that the issue or question can be described as "real" and "not entirely frivolous." The plaintiff need not show it will be successful in having that issue finally determined.

¶ 15 The above-cited passage from McFarlane J.A. also raises an important issue debated at this hearing. Specifically, the evidentiary burden placed on the plaintiff to show that the issues they allege as existing between the parties are real. The plaintiff submits that evidence of a cause of action between the parties is not necessary and that pleadings to that effect are sufficient. In support of this contention the plaintiff points to Binstead, supra, which it claims establishes that there is no specific evidentiary requirement to meet the threshold of whether or not the issues between the parties are real. This is not an entirely accurate assessment of the law.

¶ 16 The decision in Binstead was interpreted with regard to the evidentiary burden set out by Esson J.A. in Letvad v. Fenwick, 2000 BCCA 630. At [paragraph] 37, Esson J.A. wrote the following:

> ...that case [Binstead] is not authority for the proposition that the burden of demonstrating a real issue can be discharged other than by affidavit evidence. In that case, there was affidavit evidence, the principal purpose of which was to prove that sworn evidence had been given in a criminal proceeding which went to that issue. On the other hand, I see no reason to doubt that McFarlane J.A. was right in saying in obiter that the burden could be discharged "through whatever means, and not necessarily affidavits." In this case, the hospital records which were produced to the plaintiff by the initial defendants probably could have been placed before the chambers judge without being exhibited to an affidavit of plaintiff's counsel. But there should be few exceptions to the ordinary rule that on chambers applications evidence is placed before the judge by affidavits which comply with the requirements of the rules.

¶ 17 In my view, contrary to the submissions of plaintiff's counsel, it is clear that save for exceptional circumstances, the evidentiary burden on the plaintiff to demonstrate that there is a "real" issue to be tried can only be discharged through affidavit evidence. I am supported in this interpretation of the authorities by a decision of Burnyeat J. of this court. In Strata Plan LMS 1410 v. Surrey (City), 2003 BCSC 635, Burnyeat J. considered what the evidence was required to show that issues were sufficiently "real." At [paragraphs] 9-10, Burnyeat J. wrote:

> While the burden of demonstrating that there is a real issue which should be tried can be discharged other than by affidavit evidence, there should be few exceptions to the ordinary rule that the evidence which is placed before the Court should be by affidavits which comply with the requirements of the Rules of Court. In this regard, Esson J.A. on behalf of the Court in Letvad v. Fenwick [2000] B.C.J. No. 2369 (B.C.C.A.) stated:
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> > ... [Binstead] is not authority for the proposition that the burden of demonstrating a real issue can be discharged other than by affidavit evidence. In that case, there was affidavit evidence, the principal purpose of which was to prove that sworn evidence had been given in a criminal proceeding which went to that issue. On the other hand, I see no reason to doubt that McFarlane, J.A. was right in saying in obiter that the burden could be discharged "through whatever means, not necessarily affidavits". ... But there should be few exceptions to the ordinary rule that on Chambers applications evidence is placed before the Judge by affidavits which comply with the requirements of the Rules. (at para. 37).
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> I distinguish the contrary views expressed in Strata Plan LMS 2869 v. Redekop Properties (Lonsdale) Inc. [2002] B.C.J. No. 2599 (B.C.S.C.) and in Strata Plan LMS 1816 v. North Fraser Holdings Ltd. [2002] B.C.J. No. 2210 (B.C.S.C.) on the basis that the decision in Letvad was not drawn to the attention of the learned Chambers Judges. Ordinarily, the allegations set out in a proposed amended statement of claim will not be enough. The burden on the plaintiff to show that there is a real issue to be determined can only be discharged by affidavit evidence.

¶ 18 I adopt the reasoning of Burnyeat J. and agree with his decision to distinguish the Redekop and North Fraser decisions (both of which formed part of the plaintiff's argument). Absent compelling reasons otherwise, the burden on the plaintiff to show that there is a "real" issue to be tried can only be satisfied by affidavit evidence.

¶ 19 Notwithstanding this conclusion respecting the evidentiary burden, I find that the plaintiff has adduced sufficient evidence to show that the issues are real and are not entirely frivolous. Specifically, the affidavit evidence of the President of The Pacifica Strata Council, Judy Lee, supplies the requisite evidentiary basis.

¶ 20 Exhibits "J" and "K" of the Lee affidavit are the letters received by the plaintiff from the general contractor on August 18 and from the architect on August 7. These documents specifically identify Metro as the party at least partially responsible for the roofing inspections at The Pacifica. Furthermore, exhibit "JJ" to the Lee affidavit is a letter dated March 25, 1992 from Metro to the developer (c/o the general contractor) wherein Mr. Harry Watson, principal of Metro, appears to acknowledge some role for Metro in the roof inspection process. In this letter, which is marked "RE: ROOFING INSPECTION 16TH/CAMBIE - VANCOUVER", Mr. Watson writes:

> We understand that Trow Consulting Engineers have advised you that they will no longer be providing Testing and Inspection Services on the above project effective March 31, 1992. Further to discussion with the Project Senior Consultant, Mr. George Wilson, previously of Trow Consulting, and yourself, Metro Testing Laboratories Ltd. wishes to confirm that we are prepared to undertake to complete this project with Mr. George Wilson...

> Metro Testing Laboratories Ltd. looks forward to working with you and maintaining the continuity already established with Mr. George Wilson and yourself on this project.

¶ 21 In my view, this documentation is enough to show that there does exist a real, not entirely frivolous issue between the parties to be determined. That is, what role, if any, did Metro play in the testing and inspection of the roofing system at The Pacifica?

¶ 22 In making this determination, I am aware of the affidavit evidence of Mr. Harry Watson, principal for Metro, wherein he explains the role of Metro as being merely a gratuitous, administrative favour to the general contractor to allow a defunct roofing inspection contractor to submit invoices through Metro. While the evidence of Mr. Watson may be accurate and serve to relieve Metro of any liability, at this stage of the process (i.e., determining whether Metro should be added as a party) I am cognizant of the words of McFarlane J.A. in Binstead, supra.

> It is not the function [of a chambers judge], in my opinion, to decide whether on any kind of a balance it is likely that the plaintiff would be able to prove its allegations on a balance of probabilities or to any other degree beyond showing that there may exist such a question or such an issue.

¶ 23 In short, the burden of showing that a real issue exists between the parties is the plaintiff's and in the circumstances of this application, that burden has been successfully discharged.

Is It Just and Convenient to Add Metro?

¶ 24 The determination as to whether Metro should be added as a party does not, however, end with the plaintiff successfully demonstrating that there is an issue to be determined. The next stage of the inquiry mandated by Rule 15(5)(a)(iii) is to determine whether it would be "just and convenient" for this court to allow the issue to be determined finally by adding Metro to the action already commenced by the plaintiff. In this regard, whether the applicable limitation period has expired is of paramount importance.

¶ 25 The possibility of the passage of a limitation period with respect to the plaintiff's claim against Metro was the topic of much debate at this hearing. The approach to be taken in applications under Rule 15(5) where there is a potential limitation defence was succinctly outlined by Master Joyce (as he then was) in Britco (Guardian ad litem of) v. Wooley (1997), 15 C.P.C. (4th) 255 (B.C.S.C.) at [paragraph] 11:

> In my view, the proper approach to applications such as this is as follows:
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> If it is conceded that there is no accrued limitation defence or if the court can determine that fact on the interlocutory application, then the question is really limited to one of convenience since the party can always commence a separate action in which there will be no limitation issue. The question is whether it is more convenient to have one action or two?
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> If it is conceded that there is an accrued limitation defence or if the court can determine that fact on the interlocutory application, then the question is whether or not it would be just and convenient to add the party notwithstanding that by doing so the defendant will lose the benefit of the limitation defence. If the answer to that question is yes, then the order should be made. If the answer is no, then the order should not be made.

> If the defendant alleges that there is an accrued limitation defence and the plaintiff denies that fact and the court cannot determine that issue on the interlocutory application, then the court should proceed by asking this question: assuming that there is a limitation defence, would it nonetheless be just and convenient to add the party even though by doing so the defence is taken away? If the answer to that question is yes then the order should be made. In that event it does not matter whether or not, in fact, a limitation period has expired because in either case it would be just and convenient to add the party and any limitation defence will be gone.

¶ 26 I accept this approach which has been adopted in several subsequent decisions (see: Lawrence Construction Ltd. v. Fong, 2001 BCSC 813; Strata Plan LMS 2824 v. New Westminster (City), 2003 BCSC 713).

¶ 27 Firstly, I must determine whether a limitation defence has or has not accrued to Metro. It is common ground that the applicable limitation period under the Limitation Act, R.S.B.C. 1996, c. 266, is 6 years. What is not settled, however, is when time begins to run.

¶ 28 The plaintiff submits that the commencement of the applicable limitation period should be postponed pursuant to s. 6(4) of the Limitation Act, R.S.B.C. 1996, c. 266.

> 6(4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
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> (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
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> (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

¶ 29 Specifically, the plaintiff submits that (1) it did not know the nature and extent of the damage to The Pacifica until receipt of the Building Envelope Assessment Report on December 3, 1999, and (2) it did not learn the identity of Metro until August 7, 2003 when it received the response to their Interrogatories from the architect. For either of these reasons, argues the plaintiff, the commencement of the six-year limitation period should be postponed.

¶ 30 The evidence provided by the plaintiff pertaining to when it knew about roofing problems is fundamentally flawed. In particular, the plaintiff relies extensively upon the Building Envelope Assessment Report of December 3, 1999. In the section of that report that deals with the roofing problems at The Pacifica, the authors of the report mention and appear to rely heavily on "a comprehensive roof survey conducted in July 1997 by Inter-Provincial Inspectors (1982) Ltd." after which roof repairs were conducted on several of the buildings at The Pacifica. The plaintiff has not furnished the Court with a copy of this earlier report.

¶ 31 I am unable to determine, on reading the 1999 report, what information, if any, was not previously known by the plaintiff as a result of the 1997 roof survey. In the absence of the 1997 report, I am unable to accept the plaintiff's argument that it only learned the true extent of the roofing deficiencies in December of 1999.

¶ 32 The uncertainty created by the dearth of information about the first roofing survey in 1997 is also fatal to

the plaintiff's argument that it did not learn of the identity of the proposed defendant, Metro, until August of 2003. This is not to say I necessarily disbelieve the evidence of the plaintiff that they were not provided with the identity of Metro until that date, but complementary to the right of the plaintiff to assert that a limitation period should be postponed until it learned the identity of a possible defendant is the responsibility of the plaintiff to exercise reasonable diligence to discover the name of that defendant within the applicable limitation period (see Krusel v. Firth (1991), 58 B.C.L.R. (2d) 145 (C.A.)). As I am unable to determine whether the plaintiff knew of the alleged roofing deficiencies contained in the December 3, 1999 Building Envelope Assessment Report in 1999 or 1997, I cannot accurately assess whether the diligence (or lack thereof) exercised by the plaintiff was reasonable. Thus, the plaintiff is unable to satisfy the evidentiary burden imposed upon it in arguing that the running of time should be postponed.

¶ 33 Thus, in my assessment of whether it is just and convenient to add Metro as a defendant I must proceed on the basis that the issue of whether the applicable limitation period has expired is at best uncertain. In short, I am unable to determine whether the limitation period has expired based on the evidence before me. This conclusion, following the reasoning found in the third branch of the above-cited test in Britco, requires that I ask: "assuming that there is a limitation defence, would it nonetheless be just and convenient to add the party even though by doing so the defence is taken away?"

¶ 34 The relevant criteria to assess in relation to the issue of whether it is just and convenient to add a party are: the extent of the delay, the reasons for the delay, any explanation put forward to account for the delay, the prejudice caused by the delay and the extent of the connection between the existing claims and the proposed new cause of action (see: Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd., supra, and Letvad v. Fenwick, supra). None of these factors are to be considered in isolation and none are individually determinative.

¶ 35 I am satisfied there has been significant delay. The first period of delay starts from when counsel for Metro submits the cause of action first arose (i.e., water ingress first noted between August 1993 and April 1994) to the time the action was commenced in July of 1997 -- a gap of more than 3 years. During that three-year span, repairs were conducted on several of the buildings at The Pacifica and the first of three roofing reports was delivered to the plaintiff.

¶ 36 The second period of delay is from the time this action was commenced in July 1997 to the time Metro received notice from the plaintiff in August of 2003, a span of more than 6 years. I note that during this time the plaintiff had the full array of pre-trial discovery mechanisms available to it one of which, Interrogatories, eventually led to the discovery of the identity of Metro.

¶ 37 Also during this second period of delay, the plaintiff received the "comprehensive roofing survey" completed in 1997 and conducted repairs in response to its findings also in 1997. Despite receipt of this report and the subsequent repairs, the plaintiff did not issue a demand for discovery of documents for another two years.

¶ 38 Furthermore, after receipt in December, 1999 of what the plaintiff considers the most comprehensive assessment of the damage done to The Pacifica in December 1999 (i.e., the Building Envelope Assessment Report), a demand for discovery of documents was not issued to the general contractor for another six months - nearly three years since the action was commenced. The Interrogatories which eventually led to the identification of Metro were not issued until May of 2003 -- nearly six years after the action was commenced.

¶ 39 I have no hesitation in describing the accumulated delay in this matter as considerable and clearly significant.

¶ 40 The affidavit evidence before the court does not disclose any acceptable reason for the delay or explanation for it. The plaintiff's reasons and/or explanation for the delay are threefold: (1) the litigation is complex involving many individual parties; (2) the plaintiff was repairing and/or investigating problems with The Pacifica

for approximately seven years, and; (3) it was not until May of 2003 when the plaintiff received additional expert advice from the author of the 1999 building envelope report that it undertook to deliver the Interrogatories that subsequently revealed the identity of Metro as a roofing inspector. All of these reasons, considered individually and collectively, do not adequately explain the significant delays in this matter.

¶ 41 Firstly, all litigation involving large construction projects is complex and involves many parties. The plaintiff has not adduced any evidence to show this case is particularly complex or difficult to manage.

¶ 42 Second, that the plaintiff was involved in the repair and investigation of problems with the buildings is no explanation for why more than six years has elapsed between the time the action was commenced and the time Interrogatories led to the identification of Metro and other parties. This is especially so considering that extensive roof repairs were identified and remedial action was completed in 1997. Certainly, six years of opportunity to exercise relevant discovery rights should be sufficient.

¶ 43 Finally, the plaintiff's argument that it did not know where to send the appropriate Interrogatories until receipt of additional expert information in May of 2003 is also inadequate to explain the delay in this matter. In essence, the plaintiff says that until its expert confirmed the parties against whom it would be willing to provide evidence of liability, it would have been inappropriate to ask the architect and general contractor who inspected the roofing systems at The Pacifica.

¶ 44 I do not accept this explanation for two reasons. First, the plaintiff had, at different times, employed three different experts regarding the condition of the roofing system at The Pacifica. One of these experts, the author of the 1997 comprehensive roofing survey, actually supervised repairs on the roofing system in 1997. The expert the plaintiff chose to rely on, however, produced the 1999 building envelope assessment report which, as I have said, relied heavily on the 1997 report. Based on these facts and the fact that the plaintiff has not produced the "new" information it received in May of 2003, I cannot accept that the delay is sufficiently explained in this regard as there were likely other sources of the long delayed information. Secondly, even without the expert advice received in May of 2003, the plaintiff was aware of significant roofing problems even before the 1999 envelope report. That a roofing inspector may bear some responsibility for the defects was not information solely within the purview of the building envelope assessors.

¶ 45 On the issue of prejudice, I find that Metro would be subjected to significant prejudice if added as a party to the plaintiff's action. In this regard, Metro points to the fact that the documents they possessed relevant to this matter were destroyed in 2003 pursuant to their document disposal policy (i.e., 10 years after work is completed) and that their insurance no longer covers the type of damage alleged by the plaintiff due to an exclusion that came into effect via endorsement on May 22, 2003. The plaintiff alleges that neither of these factors should persuade the court that Metro would experience any prejudice were it to be added to the action. I disagree. Both of these factors, the loss of documents and insurance coverage, are directly related to the ability of Metro to respond to the claims made by the plaintiff. Had the plaintiff not delayed this application so long, Metro would have the relevant documents and insurance coverage. As the delay of the plaintiff has had such a significant impact on the ability of Metro to respond to the allegations made by the plaintiff, I conclude that the prejudice to Metro, should I consent to their joinder to this action, would be considerable.

Conclusion

¶ 46 In the circumstances, I conclude that Metro should not be added as a party to the present action as it would not be just nor convenient to do so. There is significant unexplained delay on the part of the plaintiff in bringing this application which, were Metro to be added would result in significant prejudice to Metro. Given these factors, the plaintiff's application under Rule 15(5)(a)(iii) must be dismissed. Costs to the respondent.

McKINNON J.

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