



Dispute Resolution - End of year round-up 2020

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1



Dispute Resolution - End of year round-up 2020

The law as stated during this webinar is up to date as of **14 December 2020**



2



Chair's Introduction

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3

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4

Cost decisions in 2020

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5

Cost decisions in 2020 (1)

2020 may be unforgettable on account of the plague but it has also generated some very important costs decisions:

BURGESS V LEJONVARN (2020) EWCA Civ 114

- The Court of Appeal started the year with an important judgment in **BURGESS V LEJONVARN (2020) EWCA Civ 114**.
- D made an early Part 36 offer of £25,000. C made a series of descending offers to settle. They lost at trial. D, who was only awarded standard costs, appealed. Granting permission to appeal, Coulson LJ noted the imbalance in the way that parties making good offers are treated. He then added his own additional issue. D had significantly exceeded her budget. Does the indemnity costs principle, which is not contemplated by CPR 3.18, permit her to do so?
- Rupert Cohen persuaded the Court that indemnity costs were payable because the action was "speculative, weak, opportunistic or thin". As to the conduct of the litigation, dealt with in the costs judgment from [17] – [22], the judge addressed various specific matters such as the confused nature of the pleadings, the making of allegations without expert evidence, the shambolic nature of the disclosure, and the "haphazard and spray gun manner" of the case on defects.

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6

Cost decisions in 2020 (2)

- The hopeless nature of their case should have been evident after the claimants had digested the earlier Court of Appeal decision about the scope of liability; **(2017) EWCA Civ 254**. Accordingly, indemnity costs were due starting one month after the judgment. The Court also confirmed, citing paragraph 43 of **DENTON**, that the budget as such was not relevant when dealing with indemnity costs.

MEDWAY V MARCUS 2011 EWCA Civ 750

- What happens where a large claim, say £525,000, results in a small recovery, say £2,500? See **MEDWAY V MARCUS 2011 EWCA Civ 750**.

HOCHTIEF V ATKINS (2020) COSTS LR1

- **HOCHTIEF V ATKINS (2020) COSTS LR1** saw a claimant who bettered their Part 36 quantum offer by £4,500 reap an uplift of £65,000 and interest at 6% above base plus indemnity costs.

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7

7

Cost decisions in 2020 (3)

ESSEX COUNTY COUNCIL V UBB WASTE (2020) EWHC 2387 (TCC)

- The third judgment of Pepperall J in **ESSEX COUNTY COUNCIL V UBB WASTE (2020) EWHC 2387 (TCC)** is bursting with wisdom on Part 36, conduct and costs. The claim concerned the future of a 25 year long contract worth £800m. The claimant spent £15m in successful pursuit of the claim and in defending a very large counterclaim. Damages of £9m were awarded as was an interim payment of £8m on account of costs.
- At trial, the defendant asserted that Council employees had failed to act in good faith. Whilst it was never alleged that they had acted in bad faith, the Court considered that allegations of sharp practice without a shred of supporting evidence was "out of the norm". Parties cannot make unjustifiable allegations of a lack of good faith with impunity. This in itself warranted an award of indemnity costs. To try and distinguish alleged lack of good faith from bad faith was a miserable exercise in sophistry.
- Furthermore, a counterclaim pleaded at £77m was both weak and opportunistic. It was calculated to put improper pressure upon the claimant. This was a further ground to justify indemnity costs.
- Finally, the expert instructed by the defendant was hopelessly compromised and could never have been seen as impartial. The conduct of an expert can justify indemnity costs in respect of costs they generate; see **WILLIAMS V JERVIS (2009) EWHC 1837 (QB)**.

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8

8

Cost decisions in 2020 (4)

- The Court also considered some important Part 36 issues. Ed Pepperall QC was the driving force behind the 2015 reforms to the Rule.
- The claimant had failed to make their Part 36 offer by way of the Court form N242A, the intelligent mode of making a compliant offer. Instead, Slaughter and May wrote to Norton Rose on the 7th making an offer specifying the 21 day relevant period as running from the date of their letter. CPR 36.7(2) stipulates that offers are made when served. The letter was sent by fax after 4.30pm on the 7th and so was deemed to have been served under CPR 6.26 on the following day. D argued that this meant the relevant period was less than 21 days and so was invalid for Part 36 purposes.
- The Judge found (paragraph 19) that a reasonable person aware of the circumstances would appreciate that the letter was intended to be a Part 36 offer and the 21 day period ran from the date made i.e. March 8. The guiding principle is " validate if possible "as Lewison LJ elegantly stated in **DUTTON V MINARDES (2015) EWCA Civ 984**.
- One final gem is his demolition of an estoppel argument based upon a requirement in an offer letter for the recipient to point out any defects. I have always considered this a nonsense and Sir Edward demolishes the point. "...the responsibility for ensuring that an offer is compliant with Part 36 should lie squarely upon the offeror and his lawyers".

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9

9

Cost decisions in 2020 (5)

JAMES V JAMES (2018) EWHC 242 (Ch)

- CPR 36.13 (1) stipulates that a claimant who serves notice of acceptance within the relevant period shall have their costs up to the date of acceptance. In **JAMES V JAMES (2018) EWHC 242 (Ch)** the offeror stipulated a different period. Held - It was impermissible to vary the costs entitlement and so the offer had no Part 36 consequences. By the same token, a defendant cannot make a valid Part 36 offer if they want to include or limit costs payable.

TELEFÓNICA V OFFICE OF COMMUNICATIONS (2020) EWCA Civ 1374

- Even more helpful for the receiving party is **TELEFÓNICA V OFFICE OF COMMUNICATIONS (2020) EWCA Civ 1374** where (at paragraph 46) the Court explained that a successful claimant should get all of the available rewards. The pick and mix philosophy does not apply. Note that D conceded that C should get indemnity costs and the Jackson uplift so could hardly assert that the (very high) offer was not a genuine attempt to settle.

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10

Cost decisions in 2020 (6)

HUCK V ROBSON (2002) EWCA Civ 398 and AB V CD (EWHC 602 (Ch)

- Since 2015 the Court has been obliged to consider if an offer was a genuine attempt to settle. Courts were already alert to this issue. See **HUCK V ROBSON (2002) EWCA Civ 398 and AB V CD (EWHC 602 (Ch) .**

RAWBANK V TRAVELEX (2020) EWHC 1619 (Ch)

- In unusual circumstances the High Court in **RAWBANK V TRAVELEX (2020) EWHC 1619 (Ch)** held that an offer to take 99.7% was genuine. The claim was unanswerable as to both liability and quantum. I anticipate claimants may begin to get more ambitious with offers. The White Book at page 1234 accepts that high offers may sometimes be justified but recommends a letter explaining the rationale of it.

CAMPBELL V MOD (2020) Costs LR 13

- Lambert J in **CAMPBELL V MOD (2020) Costs LR 13** gave advice about what to do when confronted by a Part 36 offer when evidence was incomplete; seek a stay so as to stop costs running on ! She said that everyone must "keep in mind the salutary purpose of the Part 36 regime which is to promote compromise and avoid unnecessary expenditure of costs and court time " .

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11

Cost decisions in 2020 (7)

AKINOLA V OYADARE

- It is not possible to make a ' drop hands ' offer under Part 36 decided held Deputy Master Henderson in **AKINOLA V OYADARE** , unreported but noted in 'Civil Procedure News ' October 12th 2020 at page 3. The idea of each party bearing their own costs was incompatible with the deemed Costs Order provision.

GLOVER V BARKER (2020) EWCA Civ 1112

- The Appeal Court in **GLOVER V BARKER (2020) EWCA Civ 1112** revealed that there is no presumption that the litigation friend of a defendant should pay costs which D would have been ordered to pay if not a child or protected party. The Court can under Section 51 of the SENIOR COURTS ACT order anyone at all to pay costs where there is justification eg bad faith or the prospect of personal benefit .

HEATHFIELD V AXIOM STONE (2020) 1075 (Ch).

- Late budgets arose in **HEATHFIELD V AXIOM STONE (2020) 1075 (Ch)**. HHJ Simon Barker QC refused to grant relief. He agreed that the default was serious both in itself and as a continuing demonstration of D2's lack of engagement with costs budgeting .He noted that D2 had a " history of tardiness in this litigation " .

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12

Cost decisions in 2020 (8)

MANCHESTER SHIPPING V BALFOUR WORLDWIDE (2020) EWHC 164 (Comm)

- The Judge declined to follow the benevolent approach applied earlier this year in **MANCHESTER SHIPPING V BALFOUR WORLDWIDE (2020) EWHC 164 (Comm)** . In that case the lapse to file was inadvertent. Here, D2 knew full well that a budget was required. HHJ Barker QC saw this case as akin to **LAKHANI V MAHMUD (2017) EWHC 1713 (Ch)** where relief was refused when a budget was just one day late . The lapse was nevertheless disruptive .
- An interesting aspect of this decision was that the Judge mooted the possibility of imposing a partial sanction rather than denying D2 all costs . He observed that it was open to the Court to pitch the outcome somewhere between granting relief and imposing the full penalty. He invoked the opening words of CPR3.14 penalty to be applied " unless the court orders otherwise " . He referred to shades of grey rather than a binary black or white outcome. However, the " outstandingly bad " conduct and attitude in this case justified upholding the penalty in full: relief refused.

ALI V CHANNEL 5 (2018) EWHC 840 (Ch)

- Do remember that even where the sanction bites there is a possibility of partial relief under CPR 36.23. Where the guilty party makes a good Part 36 offer it will be able to recover 50% of costs from the end of the relevant period. This was first applied in **ALI V CHANNEL 5 (2018) EWHC 840 (Ch)**.

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13

13

Cost decisions in 2020 (9)

GRAY V COMMISSIONER OF POLICE FOR THE METROPOLIS (2019)

- Lambert J upheld a budgeting decision made after 20 minutes which saw the claimant allowed less than 50% of the amount sought. In **GRAY V COMMISSIONER OF POLICE FOR THE METROPOLIS (2019) EWHC 1780 (QB)** , a wrongful arrest case worth perhaps £15,000, HHJ Boucher had at the conclusion of a 20 minute "discursive hearing " gave C less on some items than D had tendered. That was proper because the sums were disproportionate. A figure offered does not form the foundation of a budgeting phase. It is ultimately for the Court to determine the correct sum. The budget was not appealable even though the amount was "lower than those which would have been allowed by other Judges (even me)" at paragraph 26.

DSN V BLACKPOOL FC (2020) EWHC 670 (QB)

- In **DSN V BLACKPOOL FC (2020) EWHC 670 (QB)** Griffiths J gave an elegant judgment which every Costs Lawyer should read .It dealt with Part 36, budgets , ADR and indemnity costs .It is plainly influenced by the Appeal Court judgment of Briggs LJ as was in **PGF (2013) EWCA Civ 1288**.
- The claimant succeeded in an historic sexual abuse claim against the defendant. He also bettered his Part 36 offer to accept £10,000 made on 2nd December 2019. At a Costs hearing before the Trial Judge the real dispute between the parties was about the basis upon which costs should be paid .

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14

14

Cost decisions in 2020 (10)

- C contended for indemnity costs on 2 bases . The first was that such costs are provided for under CPR 36.17(4) .
- Furthermore, C also pursued indemnity costs on account of the conduct of D. It had repeatedly refused to engage in ADR .
- The defendant argued that the costs of the claimant were outrageous, being perhaps ten times the award of about £20,000. D wanted costs confined to the standard basis so that a full on challenge could be advanced in the name of proportionality.
- The Judge was rightly having none of this . Indemnity costs are an integral part of the raft of enhancements which accrue to a claimant making a good offer to settle . The defendant fought when it should have settled.
- We then move to even more indemnity costs ! On the back of the effective Part 36 offer C was entitled to them from December 2019. However, C secured a further years worth of such costs because of the conduct of D. Master McCloud in giving directions had ordered the parties to give serious consideration to Alternative Dispute Resolution. D refused to engage and filed evidence explaining that it believed it had a total defence so ADR would be futile . Remember, D lost at trial.

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15

15

Cost decisions in 2020 (14)

- The only term of the agreement which was challenged was Clause 6.2 of the Agreement .It stipulated that ". you may terminate this Agreement at any time.
- However, you are then liable to pay the Costs and Expenses incurred up to the date of termination...".
- The Court held that the purpose of the Regulations was to limit the amount that could be deducted from a recovery pursuant to a DBA .
- Those measures had no relevance to a free standing agreement about payment of fees and expenses outside of a DBA. The policy of the law was to recognise freedom of contract here . A light touch was compatible with access to Justice. A damages based agreement could well enable a litigant to pursue a claim which otherwise would be beyond their means.

HERBERT V HH LAW (2019) EWCA Civ 527

- The High Court has delivered another judgment about deductions from damages. Everyone will remember **HERBERT V HH LAW (2019) EWCA Civ 527** where the Court of Appeal held that a client who agreed to pay over part of her damages to fund her own solicitors had not given informed consent to the deduction. Whilst she had been told about it , she had not been given enough information and in particular was not told that the Solicitor was applying the maximum success fee allowed when the risk in her case was negligible.

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19

19

Cost decisions in 2020 (15)

BELSNER V CAM

- Checkmylegalfees.com have succeeded again in **BELSNER V CAM** (October 16) where Lavender J held that a deduction, being far greater than the amount of fixed costs recoverable from the defendant, was unreasonable. At paragraph 85 we find the crux of the decision.
- "If it had been pointed out to the Claimant that, while the Defendant's estimate of costs was £2,500 plus VAT, she might recover only £500 or £550 plus VAT from the Insurers, then that may have affected the Claimant's consent to the agreement between them insofar as it permitted payment to the Defendant of an amount of costs greater than that which the Claimant could have recovered from the Insurers. It may, for instance, have led the Claimant to ask whether her liability could be capped, or to approach a different firm of solicitors, who would cap her liability. Prima facie, therefore, it ought to have been disclosed."
- Robin Dunne , who was lead by PJ Kirby QC has written an excellent account of their win on the Hardwicke Chambers website. Equally, an interesting critique jointly authored by Ben Williams QC and Rob Marven QC appears on the 4 New Square website.

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20

20

Cost decisions in 2020 – the final bill

- Too many solicitors fail to deliver a final bill to their client upon conclusion of a claim. So what?
- The time limit within which a client can demand assessment of costs never begins to run until delivery of a final bill. So, always deliver such a bill even though you might not be asking the client to pay. It is to inform the client of the financials.
- Failure to deliver a bill leaves the door wide open for a challenge at a much later date.

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21

21

Dispute Resolution
The financial sector

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22

The financial sector

- This time last year
 - Cryptoassets and smart contracts: **AA v Persons Unknown who demanded Bitcoin on 10 and 11 October 2019 [2020]** 2 All ER (Comm) 704
 - Financial List: **FCA v Arch Insurance (UK) Ltd [2020]** EWHC 2448 (Comm) (Business interruption insurance); Test Case Scheme (CPR 122nd Update w.e.f. 01/10/2020); jurisdiction (CPR 63A.1(2))
 - Business Banking Resolution Service: partnership with CEDR; Live Pilot end report summary; possible caseload in early years
- The three "elephants"
 - COVID-19: force majeure clauses, doctrine of frustration, material adverse change clauses etc; **Umrish Ltd v Gill [2020]** EWHC 1513 (Ch) (PGS)
 - Brexit: ???!!!; UK application for accession to Lugano Convention 2007 (08/04/2020)
 - LIBOR cessation: "tough legacy" contracts; Financial Services Bill (21/10/2020)

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23

IRHP mis-selling: "no advice" clauses and UCTA

- **First Tower Trustees Ltd v CDS (Superstores International) Ltd [2019]** 1 WLR 637, CA
 - Distinction between "no advice" clauses (defining party's primary rights and obligations) and "non-reliance" clauses (statements that there has been no reliance on a representation)
 - Where the effect of a "non-reliance" clause is to exclude liability for misrepresentation, Misrepresentation Act 1967, s 3 is engaged and the UCTA reasonableness test applies
- **Fine Care Homes Ltd v National Westminster Bank plc [2020]** EWHC 3233 (Ch)
 - Not an "exceptional" case of a bank assuming an advisory duty to its customer: see **Property Alliance Group v The Royal Bank of Scotland plc [2018]** 2 All ER (Comm) 695, CA and **London Executive Aviation Ltd v RBS [2018]** EWHC 1387 (Ch)
 - Clauses setting out the bank's obligations (general dealing services on an execution-only basis) were not subject to UCTA, s 2

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24

Implication of regulatory obligations (e.g. COBS)

- **Target Rich International Ltd v Forex Capital Markets Ltd [2020] EWHC 1544 (Comm)**
 - C was a Seychelles FX investment company
 - D operated an online FX trading platform
 - C suffered losses in the Swiss Flash Crash (15/01/2015)
 - System circuit breakers (SCBs) prevented the execution of stop loss orders (SLO)
 - Held that the agreement between the parties did not include terms contained in an Order Execution Policy (also referred to as Best Execution Policy) either by express incorporation or implication
 - Nor did it include the rules contained in the FCA Conduct of Business Sourcebook (COBS) so as to give private law rights whether by implication as a matter of law (said to be necessary to give effect to MiFID), express incorporation or implication as a matter of fact. Nor was there a parallel duty of care in tort
 - (*Obiter*) A *force majeure* provision was reasonable and would have been triggered

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25

Scope of existing duty ("SAAMCO")

- **AssetCo plc v Grant Thornton UK LLP [2020] EWCA Civ 1151**
 - General principle: in an "information" case (versus an "advice" case), D is (i) "liable only for the financial consequences of [the information] being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater" and (ii) not liable for consequences which would have occurred even if the information had been correct: **South Australia Asset Management Corp v York Montague Ltd [1997] AC 191; Hughes-Holland v BPE Solicitors [2018] AC 599**
 - A's CEO and CFO prepared group accounts dishonestly
 - Auditors admitted breach of duty in failing to identify that dishonesty
 - Held that the SAAMCO approach applied to audit negligence
 - Shareholders (A was AIM-quoted) and non-execs had been deprived of the very information which would have caused A to (i) cease loss-making operations and (ii) take steps to regain its solvency
 - GT's negligence was not merely the occasion for, but a substantial cause of, further losses
 - The SAAMCO principle is a tool not a mechanistic requirement

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26

Narrowed scope of the "reflective loss" rule

- **Sevilleja v Marex Financial Ltd [2020] 3 WLR 255, SC**
 - Assumed (but disputed) facts: following receipt of a confidential draft judgment, the owner and controller (S) of two BVI companies transferred their assets to frustrate satisfaction of the judgment
 - Held that a creditor could pursue S irrespective of whether the liquidator chose to pursue the companies' causes of action
 - There is no justification for a general "reflective loss" principle in the law of damages
 - There is a more limited principle of company law (underpinned by *Foss v Harbottle*) that shareholders cannot bring an action to make good a diminution in the value of their shareholding flowing from a loss suffered by the company in respect of which it has a cause of action
- **Broadcasting Investment Group Ltd v Smith [2020] EWHC 2501 (Ch)**
 - A claim by a "third degree" shareholder (a "shareholder in a shareholder") was not struck out, the principle described in *Marex* being a "highly specific exception of no wider ambit"

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27

The Quincecare duty

- **Stanford International Bank Ltd v HSBC Bank plc [2020]** EWHC 2232 (Ch)
 - The (not uncommon) problem: Instructions to a bank from a customer are given dishonestly or in an attempt to misappropriate funds
 - The general principle: there is an implied term that the bank will observe reasonable skill and care when executing a customer's instructions
 - Established in 1992 by **Barclays Bank plc v Quincecare Ltd** but brought back into the spotlight by **JP Morgan Chase Bank NA v The Federal Republic of Nigeria [2019]** EWCA Civ 1641 and (successfully) **Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd [2020]** 1 All ER 383
 - Liquidators argued that HSBC should have frozen payments to investors in a *Ponzi* scheme and thereby exposed the fraud
 - The banks "simple and beguilingly attractive" argument was that the payments reduced not only assets but also liabilities – hence no loss
 - Strike out and SJ were refused (although a claim for dishonest assistance was struck out). There was a real loss (although the position may differ depending on whether the customer is solvent or insolvent)

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28

Illegality (*ex turpi causa*)

- **Gron dona v Stoffel & Co [2020]** 3 WLR 1156
 - Policy-based test (*Patel v Mirza* [2017] AC 467): "a more flexible approach which openly addresses the underlying policy considerations involved and reaches a balanced judgment in each case, and which also permits account to be taken of the proportionality of the outcome"
 - Replaced the reliance based test in **Tinsley v Milligan (1994)**
 - **Mortgage fraud (back in 2002)**: G agreed with M to use her good credit history to obtain a mortgage advance from a high street lender to buy a property from him. M (who thus raised finance he would not otherwise have been able to obtain) would retain control of the property, make the mortgage repayments and receive any rental income. G would receive 50% of any proceeds of sale
 - G's solicitors were negligent in failing to register the transfer to G and the lender's charge at HMLR
 - The defence of illegality failed. Policy required that conveyancing solicitors should be expected to conduct transactions competently. Here, the negligence involved administrative errors unconnected to the mortgage fraud

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29

Pensions mis-selling

- **Adams v Options Sipp UK LLP [2020]** EWHC 1229 (Ch)
 - A was introduced to a SIPP provider (formerly called Carey) by an unregulated business in Malaga and went on to invest in self-storage rental pods in Blackburn
 - Held (subject to appeal) that, even if A could rely upon s 27 of FSMA (which he could not), it would be not be just and equitable for the SIPP contract to be deemed unenforceable
- **FCA v Avacade Ltd [2020]** Bus LR 1897
 - Two unregulated firms introduced consumers to SIPP operators for the purpose of investment in alternative assets (e.g. Melina tree plantations in Costa Rica, Brazilian property developments)
 - Held that they had unlawfully carried on the regulated activity of making arrangements with a view to the buying or selling of investments in securities
 - Two companies and three individuals ordered to pay a total of £10.715m in (statutory) restitution to investors

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30

Dispute Resolution webinars in Q4 2020

- Disclosure in 2020
- China's belt and roads: dealing with disputes (2020)
- Changes to the LCIA Arbitration Rules (2020)
- Dispute resolution - end of year round-up 2020



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31

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32

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33
