



**Planning and  
Environmental  
Seminar  
– Cambridge 2023**

Thursday 9 March 6pm – 7pm

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# PROMOTING ORDERS (SOME SALUTARY LESSONS)

Jonathan Darby



- Two high profile CPOs recommended for refusal in just four months...

# Vicarage Field CPO

Purpose of the CPO was to facilitate the regeneration of Barking town centre to provide a comprehensive mixed-use development

- Inquiry April and July 2022
- Decision October 2022





# Vicarage Field CPO

- Inspector found that there was “national policy support, regional policy drive and strong local policy” that promoted the regeneration of Barking town centre and the Scheme benefitted from outline planning permission
- The evidence provided by the Borough also demonstrated “an obvious and desperate need” for the regeneration of the town centre and substantial benefits in the public interest
- Inspector concluded that “there is an extremely compelling case” for the CPO to be confirmed
- So, what was the problem?

# Vicarage Field CPO

## Inadequate evidence of financial viability

- No budget for business extinguishment costs
- Inadequate evidence in support of assertion that Scheme was viable (the most recent viability report was carried out in 2016 for outline planning permission, which concluded “substantially unviable”)
- Inspector: it is the Borough’s “responsibility to provide substantive information as to the financial viability of the Scheme in light of the CPO Guidance, and to be able to defend this” and could “not understand why an up-to-date appraisal was not presented, even if this was redacted or subject to an independent review.”

# Vicarage Field CPO

## Inadequate negotiations

- Failure to provide full details of CPO to affected parties
- Failure to confirm powers would be used in a timely manner
- Failure to appoint a single point of contact for those affected
- Failure to keep delays to a minimum
- Failure to offer advice and assistance to affected occupiers (e.g. about relocations, etc)
- Failure to provide a 'not before' date to affected parties

# Nicholson Shopping Centre CPO





# Nicholson Shopping Centre CPO

- Council secured planning permission to redevelop shopping centre to deliver a mixed-use development providing the town centre with a revitalised retail, office and residential offering
- Decision January 2023
- Inspector concluded that redevelopment would bring significant benefits for the social, economic and environmental well-being of Maidenhead
- Inspector did not raise any concerns relating to the scheme's viability or deliverability
- So, what was the problem?

# Nicholson Shopping Centre CPO

- Effect on owners of Smokey's Nightclub would be disproportionate and CPO not demonstrated to be a last resort
- CPO would have resulted in the closure of the nightclub and no prospect of alternative premises being found within reasonable timeframe
- Inspector: could have been avoided with constructive engagement and genuine willingness to explore options for relocation
- Onus on Acquiring Authority to provide reasonable and appropriate relocation options to affected parties.

# Lessons?

- A number of common themes
  - Justification
  - Preparation
  - Engagement
  - Negotiation
  - Presentation

# Justification

*“It is the acquiring authority that must decide how best to justify its proposal to compulsorily acquire land under a particular act. The acquiring authority will need to be ready to defend the proposal at any inquiry or through written representations and, if necessary, in the courts”*

# Justification

- Will need to demonstrate:
  - a clear idea of how the land to be acquired is to be used;
  - that all necessary resources are likely to be available within a reasonable time-scale (to cover CPO process, acquiring the land and implementing the scheme);
  - that the scheme is unlikely to be blocked by any physical or legal impediments e.g. the programming of infrastructure works or the need for planning permission/other consents;
  - whilst planning permission is not essential, the acquiring authority will need to show that there are no obvious reasons why it may be withheld.



# Justification

- Statement of Reasons - sets out advance case for making CPO and explains why compulsory powers are sought, together with describing the land over which these powers are to be granted
- Approach should be strongly evidence-based in order to demonstrate compelling case in the public interest

# Preparation

- Key documents, e.g. Order and Order Schedule, detailing the powers requested, and the interests in the land over which powers are to be acquired
- Ensure effective governance, e.g. hierarchy of approvals
- Put in place an experienced professional team
- Be clear as to who is responsible for what
- Look at / review other projects to understand what has gone well and key challenges
- Demonstrate adequate resources available to implement CPO (and scheme) within reasonable time frame (even if no viability-type objections have been raised)

# Preparation

- Understand, manage and mitigate risks, e.g. designing out problems, extending notice periods etc
- Record keeping and paper trail – always related directly to:
  - A well-articulated public need
  - A project designed to meet that public need and supportive planning policy
- Test the extent of the proposed acquisition against the public need at each design stage,
- Assess the land requirements for different design options on a consistent basis over time
- Identify politically charged acquisitions as well as acquisitions which could affect the programme (e.g. sensitive buildings)

# Engagement

*“Stakeholder engagement should not be seen as a separate activity from ‘real’ project management, and in most cases, it should not be outsourced or, worse still, regarded as an activity only for public relations or communications departments. It is vital for project teams, especially the senior members, to continuously develop their understanding of their stakeholders’ evolving objectives, interests, constraints and expectations, whether these are reasonable or not”*

2014 RICS guidance on stakeholder engagement

# Engagement

- **Explain**, e.g. the impact of the project
- **Understand**, e.g. the financial consequences
- **Work together**, e.g. with stakeholders to mitigate the impact
- **Invest**, e.g. build good relationships.



# Engagement

- Early and often, as well as reasonable, well-considered and thorough
- Understand the needs of businesses and individuals, particularly if they have wider community benefits / cultural or heritage value
- Provide information in a timely manner to enable meaningful discussion
- Establish a single point of contact for those affected to ensure direct and easy access

# Negotiation

- Timing and content
- Record keeping
- Reasonable steps to acquire land by agreement
- Avoid exposure to risk, e.g. don't leave a handful of interests to be acquired after years of negotiation
- Identify the land essential to meeting the public need and if land assembly is unlikely by consent then undertake negotiations in parallel with preparing and making Order
- Keep delays to a minimum (not least to reduce anxiety)
- Provide a 'not before' date where appropriate (to provide certainty)

# Presentation

- Demonstrate a willingness to listen
  - Be flexible and open to alternatives
  - Establish firm foundations for constructive relationships
- 
- Successful delivery generally comes down to proactive risk, opportunity and stakeholder management

# Environmental Case Law Update

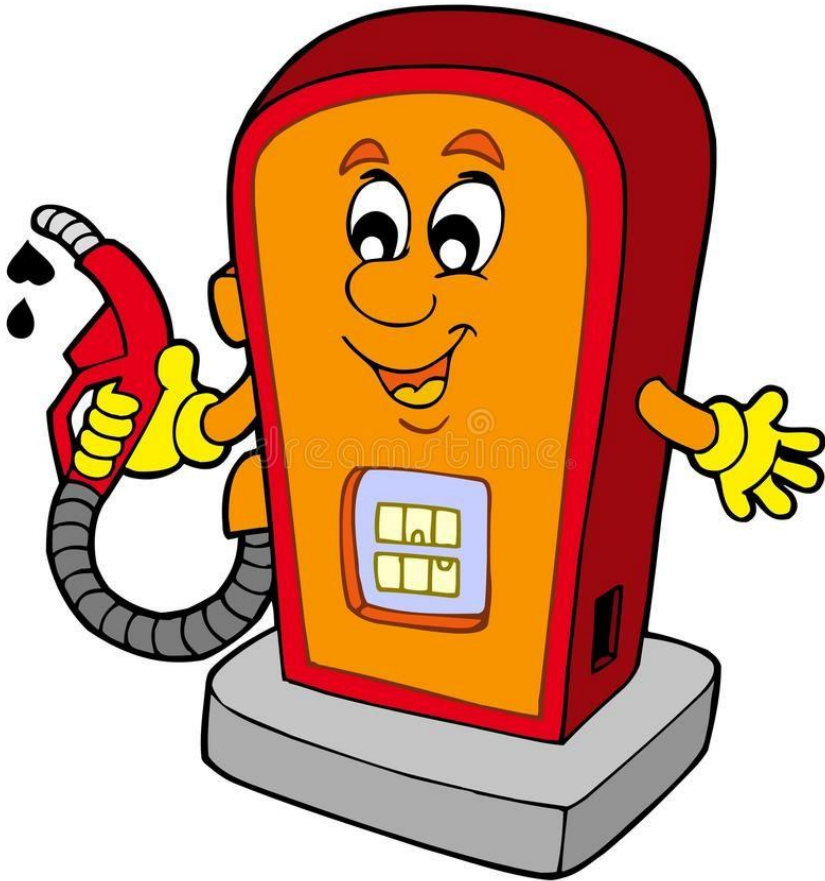


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- Insurance, pollution and contamination
- Climate Change:
  - National and international level
  - Individual planning decisions
  - Future litigation?
- Protest
- Environmental offences and sentencing
- Office for Environmental Protection
- Watch this space...



# *Brian Leighton (Garages) Ltd v Allianz Insurance plc* [2023] EWCA Civ 8



- Fuel leak from a section of pipe connecting one of the underground fuel tanks to the forecourt fuel pump
- Caused by a sharp object
- Within days – fuel had contaminated the forecourt and building

# Relevant policy terms

- **Indemnity:** damage to Property Insured at The Premises by any cause not excluded...
- **Exclusion 9:** Pollution or Contamination  
Damage caused by pollution or contamination, but We will pay for Damage to the Property Insured not otherwise excluded, caused by:
  - a. pollution or contamination which itself results from a Specified Event
  - b. any Specified Event which itself results from pollution or contamination.”
- **Specified Events:** Fire, lightning, explosion, aircraft or other aerial devices or articles dropped from them, riot, civil commotion, strikers, locked-out workers, persons taking part in labour disturbances, malicious persons other than thieves, earthquake, storm, flood, escape of water from any tank apparatus or pipe or impact by any road vehicle or animal

# Principles

1. The policy is to be interpreted objectively, as it would reasonably be understood by an **ordinary policyholder, in this case the owner of a petrol garage**, albeit with the benefit of advice from a broker familiar with basic principles of insurance law.
  - a. Relevant commercial context?
  - b. Obvious risks arising?
2. The exclusion (in this case) was part of the definition of the scope of cover, not an exemption from liability for cover which would otherwise exist
3. Presumption: The insurer is liable, and only liable, for losses **proximately** caused by a peril covered by the policy. Policy language such as “caused by” generally taken to mean the proximate (or efficient) cause of the loss. That presumption is capable of being displaced...

# Proximate cause? (Popplewell, LJ para 27)

- Marine Insurance Act 1906, s 55
- Not the last cause of the loss
- Dominant, effective or efficient cause
- Where there are concurrent proximate causes, one an insured peril and the other excluded, the exclusion prevails

# Damage caused by pollution or contamination

32. The OED definition of pollution includes: "the action of polluting", "the condition of being polluted" and "a thing that pollutes". The definition of contamination includes "the action of making impure or polluting", "something which contaminates" and "an impurity". **Each is therefore capable of describing three separate things, namely (1) the damage to property; (2) the process by which such damage is caused; and (3) the state of affairs or occurrence which gives rise to that process.**

Critical question: whether the exclusion is concerned with pollution or contamination as a proximate cause or merely as an intermediate process in the chain of causation.

# Court of Appeal: 2 vs 1

- Popplewell LJ and Nugee LJ vs Males LJ
- Appeal allowed
- Importance of legal advice to client and the broker – “caused by” vs “directly or indirectly caused by” - “presumptions involved in the use of such language”



# Climate Change: National and International (1)

- Net Zero Strategy found to be unlawful last July: *R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin)
- Sector specific challenges:
  - Climate Change Act 2008, s 13 “(1)The **Secretary of State** must prepare such proposals and policies as the Secretary of State considers **will enable** the carbon budgets that have been set under this Act to be met.”
  - Food Strategy
  - Jet Zero Strategy

# Climate Change: National and International (2)

*R (Friends of the Earth Limited) v Secretary of State for International Trade and others* [2023] EWCA Civ 14

- FoE – JR of decision export finance worth \$1.15bn in respect of a liquefied natural gas project in Mozambique. One of the project's aims was to help Mozambique move away from using coal and oil.
- Paris Agreement – unincorporated international treaty that does not give rise to domestic legal obligations; for the executive
- One of range of factors that D decided to have regard to
- Standard of review: whether the decision-maker adopted a tenable view
- Appeal to the Supreme Court



# Climate Change: National and International (3)

## European Court of Human Rights

- Approx 12 cases before the ECtHR – member states' obligations with regard to climate change mitigation and adaptation
- Case law on Art 2 and 8 – right to be protected against serious damage to the environment
- States – positive obligation to prevent or mitigate environmental harm: see recent case of *Pavlov v Russia* (Oct 2022) – industrial air pollution

# Local planning decisions (1)

- *Bristol Airport Action Network Co-ordinating Committee v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 171 (Admin)
  - Focus: interpretation of local plan policies and NPPF, para 188
    - how policy, properly interpreted, requires aviation emissions to be treated?
  - “...I should make clear that nothing in this judgment is to be taken as contradicting what is said in its opening paragraph, regarding the significance of climate change and GHGs. As will by now be apparent, the main issue in this case is not whether emissions from any additional aircraft using Bristol Airport should be ignored. Plainly, they should not. Rather, it is about how and by whom those emissions should be addressed.”

# Local planning decisions (2)

- *R (Sahota) v Herefordshire Council* [2022] EWCA Civ 1640 – court has a discretion to admit ex post facto evidence. Touchstone – “evidence is elucidation not fundamental alteration, confirmation not contradiction”
- *R (Ashchurch Rural Parish Council) v Tewkesbury* [2023] EWCA Civ 101 – (1) LPA acted irrationally by only taking into account the benefits of the wider development, not the possible harms and (2) not taken correct approach in determining whether EIA was necessary – “project” had to be understood broadly and realistically but cannot circumvent regulations
- Solar panels on roof of King’s College Chapel...

# Future climate change litigation?

- Disconnect:
  - Across Government
  - Between national policy and local planning decisions
- Other types of claim:
  - Derivative shareholder claims: Companies Act s172 (duty to promote the success of the company) and s.174 (duty to exercise reasonable care and skill) of the Act.
  - Private law nuisance and/or trespass: *Manchester Ship Canal Company Ltd v United Utilities Water* – Supreme Court...

# Environmental Protest

*National Highways Ltd v Persons Unknown* [2023] EWCA Civ 183

- Final anticipatory injunction vs 109 named Insulate Britain protestors
- The tort was threatened and for some reason cause of action not complete
- Persons unknown? Supreme Court due to hear appeal of *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13

# Environmental offences and sentencing

*R v Anderson* [2022] EWCA Crim 1465

- Guilty plea to offences of excess storage and depositing of waste contrary to the Environmental Permitting (England and Wales) Regs 2016, reg 38 and 41
- Sole active director of waste recycling company
- 15 months' imprisonment, suspended for 18 months
- Sentence not manifestly excessive or wrong in principle
- Found that the offending was deliberate

# Office for Environmental Protection

- Joined as an interested party: *R (Wild Justice) v The Water Services Regulation Authority* [2022] EWHC 2608 (admin)
  - OEP investigation: not an adequate alternative remedy but relevant to the public interest in the judicial review
- Application to intervene in the Supreme Court case: *R (Finch) v Surrey County Council* [2022] EWCA Civ 187

# Watch this space...

- Judicial review: *R (Marine Conservation Society, Richard Haward's Oysters (Mersea), and Tagholm) v SSEFRA* and *R (Wild Fish Conservation) v SSEFRA* - Permission granted
- Statutory review: Protect Dunsfold – permission granted in relation to the grant of planning permission for an exploratory gas well in Surrey



A room without a view?

*Fearn and others v Board of Trustees of the  
Tate Gallery* [2023] UKSC 4; [2023] 2 WLR  
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David Sawtell



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# The facts

- Four flats in a modern development in central London called Neo Bankside.
- Overlooked by a new extension of the Tate Modern known as the Blavatnik Building.
- Visitors to the viewing gallery are able to see directly into the living accommodation of the claimants' flats.
- Visitors to the viewing gallery frequently look into their flats and take photographs.

# The claim

- Claim for an injunction requiring the Tate Modern to close or screen the part of the gallery which gives views into their flats.
- Relied on private nuisance; alternatively, section 6 of the Human Rights Act 1998 and article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

# First instance

[2019] EWHC 246 (Ch); [2019] Ch 369

Mann J

- Claim dismissed.

# Court of Appeal

[2020] EWCA Civ 104; [2020] Ch 621

Sir Terence Etherton MR, Lewison, Rose LJJ (single judgment)

- Appeal refused, different grounds: mere overlooking not capable of giving rise to a cause of action in nuisance.

(<https://www.39essex.com/information-hub/insight/david-sawtells-analysis-development-implications-recent-court-appeal>)

# Supreme Court

[2023] UKSC 4;  
[2023] 2 WLR 339

- Lord Leggatt  
(Lord Reed and  
Lord Lloyd-Jones  
agreed)
- Lord Sales  
dissenting speech  
(Lord Kitchin  
agreed)





# Scope of the tort

- Both Lord Leggatt and Lord Sales made it clear that nuisance is a ‘tort to land’.
- The harm that the law protects a claimant from is diminution in the utility and amenity value of the claimant’s land, not personal discomfort to the persons who are occupying it.
- The tort has a wide ambit; must be a **substantial interference** with the **ordinary use** and enjoyment of the neighbours’ land.
- Lord Leggatt referred to Mann J’s example of the viewing tower, built only to enable views into neighbours’ gardens.

# Test of ‘reasonableness’

- Lord Leggatt and Lord Sales differed on the test of ‘reasonableness’.
- Lord Leggatt considered it “*entirely open-ended and lacking in content*” [20].
- Cited Lord Goff’s speech in *Cambridge Water Co v Eastern*
- *Counties Leather plc* [1994] 2 AC 264.

# Test of ‘reasonableness’

“...although liability for nuisance has generally been regarded as strict, [it] has been kept under control by the principle of reasonable user - the principle of give and take as between neighbouring occupiers of land, under which **‘those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action’**: see *Bamford v Turnley* (1862) 3 B & S 66, 83, per Bramwell B. The effect is that, if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour’s enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it.”

# Test of ‘reasonableness’

- Lord Leggatt – the phrase ‘reasonable user’ was a shorthand for Bramwell B’s principle in *Bamford v Turnley*.
- Referred to the Court of Appeal decision in *Barr v Biffa Waste Services Ltd* [2013] QB 455: reasonableness was a shorthand for the traditional common law tests.

# Test of ‘reasonableness’

- Lord Leggatt considered that the level of visual intrusion was a substantial interference with the ordinary use and enjoyment of the claimants’ properties.
- *“Inviting members of the public to look out from a viewing gallery is manifestly a very particular and exceptional use of land.”*
- There was a private law nuisance.

# Test of ‘reasonableness’

- Lord Leggatt considered that Mann J went wrong by considering ‘reasonableness’ in all the circumstances (noting that *Barr v Biffa Waste Services* had apparently not been cited to him); therefore concluded that operating a viewing gallery was not an inherently unreasonable activity in the neighbourhood.
- Lord Leggatt: “*Nowhere did the judge consider whether the operation of a viewing gallery is necessary for the common and ordinary use and occupation of the Tate’s land.*” [55]

# Prophylactic measures not relevant

- Lord Leggatt also considered that Mann J went wrong by considering the design of the flats.
- [Jonathan Morgan: “*Perhaps people who live in glass houses shouldn't stow thrones*”: (2019) Cambridge Law Journal, 78(2), 273-276]
- Lord Leggatt: relevant to the question of sensitivity to the ordinary use of neighbouring land. Focus is on the defendant’s use.
- Not a good defence to refer to possible remedial measures.
- (Left open question of “*extreme cases*” of unusual design or construction).

# Public interest

- ‘Public interest’ in the viewing gallery is irrelevant when it comes to liability.
- Becomes relevant when it comes to remedy (i.e. whether or not to grant an injunction, or damages in lieu of an injunction).



# Lord Sale's dissent

- The unifying principle underlying the tort is reasonableness between neighbours: *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264. Differed in his interpretation of Lord Goff's speech.
- Reasonableness is to be judged objectively.
- Principle of reasonable reciprocity and compromise: "give and take".
- Also agreed that the extreme degree of visual intrusion would be a serious interference with claimants' ability to enjoy their property.

# Lord Sale's dissent

- Lord Sales regarded 'reasonableness' as taking into account the interests of both the claimant and the defendant and their competing interests.
- The fundamental principle remains that of reasonable user, not common and ordinary.
- *“In a situation like the present where the respective use of its land by each of a claimant and a defendant falls outside existing standards of common and ordinary use of land in the locale, I can see no principled justification why unusual use of land by the defendant should necessarily have to give way to unusual use of land by the claimant without any attempt to balance the competing interests.” [227]*

# Lord Sale's dissent

- Considered that Mann J's approach to the application of the 'give and take' test was correct.
- The judge was also correct to take into account self-help measures that were available to the Claimants which it was not unreasonable to take.
- *“The owners of the flats in Neo Bankside could not turn the operation of the viewing gallery into a nuisance by reason of the development of their own property according to a design which was out of line with the norm for the area.”*  
[278]
- Would have dismissed the appeal (for different reasons to the Court of Appeal).

# Overlooking versus intrusion

## *Attorney General v Doughty* (1752) 28 ER 290

- Claim for an injunction to stop the construction of buildings which would “*intercept the prospect from Gray’s Inn gardens*”
- Hardwicke LC: “*I know no general rule of common law, which warrants that, or says, that building so as to stop another's prospect is a nuisance. Was that the case, there could be no great towns ; and I must grant injunctions to all the new buildings in this town*”

(see David Howarth, ‘Nuisance, planning and human rights: throwing away the emergency parachute’ (2020) CLJ 79(3) 394.

# Overlooking versus intrusion

- Both Lord Leggatt and Lord Sales criticised the Court of Appeal's equation of overlooking with intrusion: they agreed that intensive degree of visual overlooking by large numbers of people amounts to visual intrusion and hence can amount to a nuisance.
- Both agreed with the Court of Appeal that overlooking by itself cannot give rise to liability in nuisance.

# Extreme facts?



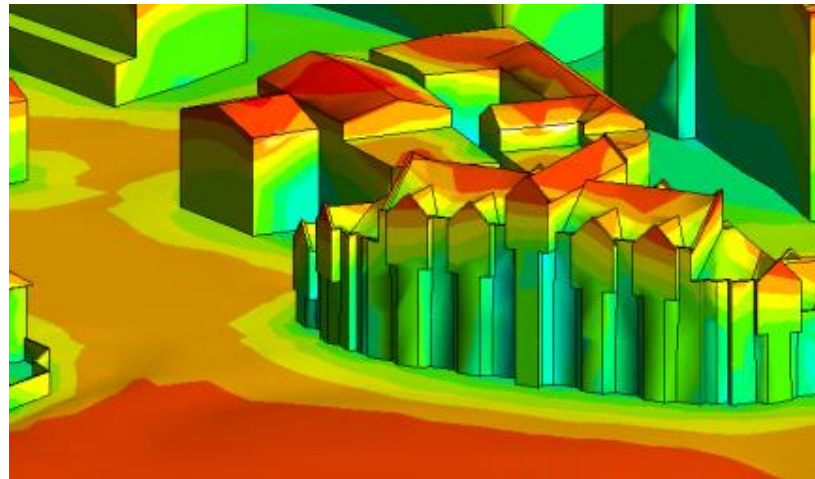
Watchtower located in Serra das Talhadas, Portugal, designed by Álvaro Siza:  
<https://www.archdaily.com/964260/alvaro-sizas-new-steel-frame-watchtower-for-ecotourism-in-portugal> )

# Extreme facts?

- Very unusual to have a purpose-built viewing platform directly adjacent to residential dwellings.
- The dwellings themselves are unusually open in their design.

# Implication: 3D development?

- Need to consider land usage and property rights in three-dimensional space.
- Already familiar when carrying out a rights of light analysis.





# Thank you for listening

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