SINGAPORE CONSTRUCTION LAW

SOCIETY OF CONSTRUCTION LAW (SINGAPORE) OFFICIAL NEWSLETTER

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Contents

Chairman's Message

As we approach the mid-year mark, I thought it useful to take stock of the SCL Singapore's ("SCL(S)") achievements and activities in the past 6 months. The year started with the SCL(S)'s regular update of construction cases in the preceding year. Mr. Edwin Lee and Mr. Raymond Chan gave an excellent summary of the key legal developments affecting the construction industry in 2012 to almost 150 attendees. This was followed by a talk on the Effective Use of Experts in Construction Disputes by Mr Andrew Rigney QC and Mr Crispin Winser in February and a more technical talk by Dr. Sean Brady who spoke on Structural Failure and the Role of Forensic Engineering in Legal Disputes in April. In March, the SCL(S) and RICS organised a site visit to the Iskandar Development Region (IDR) in Johor, where 42 participants were given a tour of the massive development being undertaken across the causeway.

Apart from the SCL(S)'s active professional development calendar, the SCL(S) does not forget the social aspect of its activities. On 15 May, the SCL hosted its first networking cocktail to a resounding success with over 50 guests enjoying drinks and the company of fellow professionals in the construction industry.

Not forgetting its corporate social responsibilities, the SCL(S) works closely and supports the activities of various charitable organisations including the Light House Club and Habitat for Humanity, with several council members joining in at fund-raising and other charitable events organised by these organisations.

In addition to this quick update on the events held by the SCL(S) this year, it is often forgotten that a lot of hard work goes into the organisation of these events. I would therefore take this opportunity to thank each and every council member for the time and effort they put into the activities of the SCL(S). Each and every one of them has a demanding schedule in their own work lives, but nonetheless, have gladly volunteered to serve in the SCL(S). It is with this in mind that I ask that members extend their utmost support and cooperation to the council as it pushes ahead to make the SCL(S) and its activities more beneficial and enjoyable for one and all. It is also necessary for me thank the SCL(S) secretariat led by Gabriel, Cheryl, Sandy and Seraphine from Intellitrain who help the council manage the load of running the SCL(S).

Before I end off, I would ask that members save the dates for 2 upcoming events. The first being the annual AGM and dinner on 20 August and followed by the SCL(S) Annual Construction Law Conference which will be held on 11 September this year, where an impressive panel of speakers has been lined up. Details will follow in due course.

It remains for me to thank all members again for their support and we look forward to seeing all of you at our events during the rest of the year.

Paul Sandosham
Vice-Chairman

SCL(S) Networking Event – 15 May 2013

Venktaramana V Vijayaragavan
Land Transport Authority

The SCL(S)'s 1st Networking Cocktail of 2013 was held at the Modern-European restaurant "Chef D'Table" located at Chijmes, a strategic location for fellow members to mingle and network with invited guests and non-members from the construction industry, with SCL(S) Council facilitating the acquaintances between the guests and members.

On behalf of the Chairman Anil Changaroth who had to be away on official business, the immediate past chairman Chris Nunns did a splendid job by giving a warm welcome and appreciation speech peppered with his wry sense of humour to break the ice and get the crowd going. The event was attended by the President of TUCSS and many members from TUCSS fraternity, including QC/ Council member from SCL(UK) and the new President of the Light House Club.

The networking event had a record turnout this year, and this is a testament that the relationship with the now expanded MOU partners is bearing fruit with far greater participation and interaction between SCL(S) and the industry partners.

The evening rain did not dampen the spirits as there was enough of the latter going around. The free flow of wine, beer and a good spread of food coupled with great service and a relaxed ambience helped the crowd mingle freely, and made the evening a truly enjoyable one.

Structural Failure and the Role of Forensic Engineering in Legal Disputes – 9 April 2013

Christopher Nunns
FTI Consulting Asia

Dr Sean Brady is a specialist forensic engineer. Don't ask him to design a building, because he would politely refuse. He would direct you to a design engineer.

Many of us listening to him speak were surprised, even a little shocked, by Dr Brady's firm advice that the best engineers do not make the best experts in forensic work. Yes, we already understood that top professionals may not be the best expert witnesses, as a result of the peculiar pressures of cross-examination, but Dr Brady made a more fundamental point. He argued convincingly that design engineers simply have the wrong mindset to be forensic experts. They are inclined to say "I wouldn't have designed the structure in this manner, so this must be related to the cause of failure".

Dr Brady pointed out that it is experience in the application of the forensic process that is critical, and this experience cannot be attained through design experience alone.

The talk was well-illustrated by documented cases of engineering disasters in the past and a fascinating description of the forensic work which resulted in a better understanding of the cause of failure and, though often painfully slow, improvement in design standards subsequently.

All in all, a fascinating talk for both engineers and non-engineers who might be invited to give expert opinion in their specialist field.

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New BCA Requirements for Increased Buildability and Productivity

David Shuttleworth
Co-Chair of the Publication Committee SCL(S)

On 11 March 2013, the Building and Construction Authority (BCA) announced the introduction of further new measures to increase construction productivity and quality growth in the built environment sector through enhanced score targets and incentives, mainly:

(a) Raising minimum buildability and constructability requirements for all new projects to accelerate the adoption of more buildable designs and increased productive construction methods.

(b) Enhancing the Construction Productivity and Capability Fund (CPCF) to boost incentives and support for companies, especially for smaller firms, to kick-start productivity.

HIGHER MINIMUM REQUIREMENTS

The minimum buildability and constructability score requirements for all new projects will be raised by 3 points each in July 2013 and another 2 points in July 2014. Buildability was introduced under the Building Control Act in 2001 with the aim of promoting buildable design by better use of prefabricated, modular and standardised building components. Currently the maximum point for a building's design is 100 points. The constructability score measures the level of adoption of labour ef□cient construction methods and construction processes.

The aim is to improve productivity across the entire construction value chain commencing at the planning and design stage right through to construction. BCA projects that a 5-point increase in buildability score should yield manpower savings of about 10% to 15%.

With the introduction of higher buildability requirements, consultants (architects, engineers and other specialists) working upstream (at the design and planning stage) in the construction value chain have to consider the productivity requirement at an early stage and ensure that building designs are easier and more ef□cient to construct. Building designs will now have to incorporate more productive technologies and a wider adoption of standard components to facilitate ease of construction. In addition, contractors downstream (at construction stage) will have to make use of new technology and productive methods of construction, as well as improve their work processes to meet the higher constructability requirements.

As an incentive and to encourage consultants and contractors to work towards more buildable design and adoption of advanced construction technologies, BCA intends to introduce tendering advantage for both consultants and contractors that can demonstrate good buildability and constructability records respectively in their tenders for public sector projects with effect from 15 July 2013. BCA is also exploring bonus incentives for consultants and contractors to encourage them to go far beyond the minimum legislated buildability and constructability scores. Details of this will be available at a later stage.

ENHANCED CONSTRUCTION PRODUCTIVITY AND CAPABILITY FUND (CPCF)

The Construction Productivity and Capability Fund (CPCF) was a S$250 million incentive fund to construction companies to improve productivity and strengthen capability. To date, $85 million of the CPCF has been committed, bene□tting more than 2,300 individual □rms, of which more than 80% are small □rms. BCA will be enhancing the CPCF scheme to further support productivity efforts and extend more help to contractors and consultants.

In addition, BCA will increase the funding level of the current Mechanisation Credit (MechC) and Productivity Improvement Project (PIP) schemes from 50% to 70%. Contractors can expect more funding support when they purchase or lease equipment through the MechC scheme to improve productivity. The PIP scheme provides additional reimbursements for capital investments that improve site processes and adoption of advanced construction technology.

The funding caps under the PIP scheme will also be increased. For □rm-level applications, the funding cap will be increased from $100,000 to $300,000 for the adoption of key productive technologies, such as system formwork, prefabricated bathrooms, self-compacting concrete, precast and steel construction. The funding cap for industry-level applications will be raised to $5 million per application for projects that are radically different and can achieve at least a 40% productivity improvement when implemented.

BCA is introducing a MechC Referral Programme to encourage contractors to assist their smaller sub-contractors to improve productivity. Contractors can earn an additional $20,000 credit on top of their funding cap as an incentive for every successful referral to the MechC scheme.

The original incentive schemes had a positive impact in terms of productivity on the construction industry in Singapore and with the enhanced terms, this surely indicates substantial further improvements in overall productivity and ef□ciency are realistically achievable.

For more information, please visit BCA's website at www.bca.gov.sg.

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A Decision to Swear By: Guidance on Concurrent Delay and Global Claims

Paul Teo and Edward Foyle
Hogan Lovells

On 24 January 2013, permission to appeal was refused in the case of ***Walter Lilly and Company Limited v (1) Giles Patrick Cyril Mackay (2) DMW Developments Limited*** [2012] EWHC 1773 (TCC). This confirms the landmark judgment of Mr Justice Akenhead of July 2012, which gave guidance on a number of important issues in construction law, in particular the principles relating to claims for an extension of time in cases of concurrent delay and global claims. Mr Justice Akenhead's decision, summarised briefly below, now looks set to shape these important areas of construction law.

WALTER LILLY BUILDS A NEW PAD

Walter Lilly was engaged by DMW in 2004 as main contractor under an amended JCT Standard Form of Building Contract to build three houses. Mr and Mrs Mackay were to occupy the house, which would be built for £5.3m and was intended to be their dream home.

There were major problems during the construction of the project arising from incomplete designs and many changes. DMW withheld liquidated damages for late completion and Walter Lilly initiated proceedings, seeking an extension of time for completion, prolongation costs and payment for work done. A judgment of over two hundred pages was handed down by Mr Justice Akenhead on 11 July 2012, who summarised the whole project as "a disaster waiting to happen".

Walter Lilly was successful and obtained an extension of time (avoiding liquidated damages), a £2.3 million recovery and, in an indication of how bitterly the case was fought, a staggering £9m in costs.

The decision makes important points in relation to various matters including snagging, practical completion, the duty to warn and the correct formulation of claims for the recovery of overheads. However, this article focuses on concurrency and global claims, the most important parts of the judgment.

THE (CON)CURRENT POSITION AFFIRMED

Concurrent delay refers to a period during which two events on a construction project occur, both of which delay the progress of the works. One event is the contractor's responsibility under the contract and the other is the employer's responsibility. The question arises as to whether a contractor in these circumstances will be entitled to more time (and money) to complete the works where it would have been late anyway, irrespective of its entitlement to an extension of time for excusable delay under the relevant contract. For example, consider the scenario where a contractor requires gas to commission a turbine, which is to be provided by an employer by a certain date, and the gas is provided late. For entirely unrelated reasons, the contractor has failed to mobilise sufficient labour at the site to complete the installation of the turbine by that date, meaning that the turbine could not have been commissioned anyway. Would a contractor in such a situation be able to obtain relief?

Much of course will turn on the wording of the clause in question. In Walter Lilly, the JCT extension of time clause required the architect to grant an extension of time which was "fair and reasonable" having regard to the employer-risk events. In ruling in favour of Walter Lilly, the court confirmed the correctness of the English approach adopted in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* and followed in *De Beers UK Ltd v Atos Origin IT Services UK Ltd*: the general rule is that where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible, the contractor is entitled to a full extension of time but cannot recover in respect of delay and disruption costs caused by the delay. *Walter Lilly* explicitly rejected the approach of the Scottish courts in *City Inn Ltd v Shepherd Construction Ltd* on the basis that the relevant test for determining a "fair and reasonable" extension is one of causation, namely, has the Relevant Event caused the contractor to be delayed? In *City Inn*, it was held that a contractor is only entitled to an extension of time for the reasonably apportioned period of concurrent delay.

The crucial passage in the *Walter Lilly* judgment is as follows:

"…where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time, the Contractor is entitled to a full extension of time. Part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to… [deny]…a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of [the applicable clause] which points very strongly in favour of the view that, provided that the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question. There is nothing in the wording of [the applicable clause] which expressly suggests that there is any sort of proviso to the effect that an extension should be reduced if the causation criterion is established. The fact that the Architect has to award a "fair and reasonable' extension does not imply that there should be some apportionment in the case of concurrent delays. The test is primarily a causation one. It therefore follows that, although of persuasive weight, the City Inn case is inapplicable within this jurisdiction."

This is a welcome confirmation of the position in England. This point has yet to be considered by the courts in Singapore and it remains to be seen if the *Malmaison* approach will be adopted. Nevertheless, parties are free to contract in whatever way they like in relation to concurrent delay.

GLOBAL CLAIMS MADE EASIER?

The other important area addressed in Walter Lilly is the formulation of global claims. In any claim by a contractor before an English court or arbitral tribunal, the contractor must prove, on the balance of probabilities, that the employer was responsible for an event or breach and that the event or breach caused the contractor to suffer the relevant loss. It is often difficult, time consuming, expensive and, in some cases, impossible, to do this in complex engineering and construction projects. As a result, contractors often make so-called "global claims" which, in effect, seek to remove the need to prove individual causation. Such claims highlight a series of employer-risk events (whether they

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be breaches, acts of prevention or interference or changes to the scope of work) and link these to a global loss, without "joining the dots" between individual events and losses.

After analyzing the claims made by Walter Lilly, the court made the following important observations in relation to global claims:

- Assuming there are no contractual restrictions on global claims, there is no set way for a contractor to prove its case, although it was acknowledged that a tribunal might be more sceptical about the global claim if the contractor failed to use the direct linkage approach, if that was available;
- Global claims should not be rejected out of hand, even where the need for a global claim had been caused by the contractor making it impossible to "disentangle" one claim and loss from another; and
- A contractor has the burden of establishing that the loss it incurred would not have been incurred in any event. In particular, the contractor will need to demonstrate that its accepted tender was "suf□ciently well priced that it would have made some net return". The court dismissed the contention that the burden of proving this transfers to the employer, although it acknowledged that it is open to an employer to challenge a global claim by adducing evidence that shows or suggests that the tender was so low that the loss would have always occurred irrespective of the events relied upon by the contractor, or that other events relied upon by the contractor, or that other events may have or did cause all or part of the relevant loss

The judge made the following comments by way of example:

"…say a contractor's global loss is £1 million and it can prove that but for one overlooked and unpriced £50,000 item in its accepted tender it would probably have made a net return; the global loss claim does not fail simply because the tender was underpriced by £50,000; the consequence would simply be that the global loss is reduced by £50,000 because the claimant contractor has not been able to prove that £50,000 of the global loss would not have been incurred in any event. Similarly, taking the same example but there being events during the course of the contract which are the fault or risk of the claimant contractor which caused or cannot be demonstrated not to cause some loss, the overall claim will not be rejected save to the extent that those events caused some loss. An example might be…time spent…dealing with some of the lift problems;…assuming that this time can be quantified either precisely or at least by way of assessment, that amount would be deducted from the global loss."

Therefore, it is not right to say, as some commentators have previously suggested, that a single issue, which is not properly pleaded or proved or which is shown to be the fault of the contractor, will undermine the entire global claim. One mistake in a global claim does not, according to *Walter Lilly*, "burst the bubble" and prove fatal to that claim.

A BEACON FOR CONTRACTORS TO RALLY AROUND

The reasoning in this decision forms the basis of contractors' claims for extensions of time and global claims for many years. Employers challenging such claims will need to make sure they understand the □ndings in *Walter Lilly* and, where appropriate, include suitable drafting if they wish to depart from the positions adopted in this case.

Paul is a Partner in Hogan Lovells' Singapore office. He has more than 16 years' experience acting for clients on commercial, trade and investment, and project related disputes, including those spanning the power, oil and gas, maritime, infrastructure, building and telecommunications sectors. Paul has acted as counsel and solicitor in arbitration, Court and ADR proceedings across Asia. He also sits as an arbitrator and has been appointed under the SIAC and ad hoc arbitral rules. Paul is a Fellow of the Chartered Institute of Arbitrators, the Singapore Institute of Arbitrators and the Hong Kong Institute of Arbitrators. He is listed as an arbitrator with the Singapore International Arbitration Centre, the Kuala Lumpur Regional Centre for Arbitration and the Hong Kong International Arbitration Centre.

Edward is an Associate in our Singapore office with experience in international arbitration and dispute resolution. He was previously based in our London office for over 3 years where he worked and trained in the construction disputes practice.

SCL(S) - RICS Technical Visit to Iskandar, Malaysia – 2 March 2013

Tan Wee Teck
Conint Pte Ltd

On the 2nd March this year, RICS Singapore and SCL (Singapore) for the 1st time jointly organised a visit to Iskandar development in Johore Malaysia, with 42 members participating in the event.

Iskandar Malaysia, which represents an important economic and geographical region of 2,217 sq km, just north of Singapore, is set to become Southern Peninsular Malaysia's most developed region, where living, entertainment, environment, and business seamlessly converge within a bustling and vibrant metropolis. Iskandar Malaysia's advantages include six to eight hours □ight radius from Asia's burgeoning growth centres such as Bangalore, Dubai, Hong Kong, Seoul, Shanghai, Taipei and Tokyo; easy reach to a global market of some 800 million people; accessibility by air, land, rail, and sea; and □anked by three major ports, the Pasir Gudang Port, Port of Tanjung Pelepas and Tanjung Langsat Port.

The RICS-SCL(S) group of 42 members explored Iskandar's Zone B, Nusajaya, one of the □ve Flagship Zones of Iskandar and was shown around (by representatives of UEM) various signature developments including Commercial/ Industrial (SiLC Nusajaya, Mall of Medini); Residential (East Ledang, Horizon Hills, Nusa Idaman, Nusa Bayu, Puteri Harbour); Education (EduCity and Marlborough College); Of□ces (Kota Iskandar); Healthpark (A□at Healthpark); and Leisure (Medini, LegoLand) all integral to Nusajaya's vision to be 'The World in One City', planned and designed to be a sustainable city conducive for business, living, and leisure thereby enhancing the quality of life for those who live, work, and play there.

The second part of the tour was a brie□ng at the Sales Gallery, UEM Land Of□ce. Here, IRDA representatives presented general and technical information on Iskandar Malaysia, and UEM Land representative presented on Nusajaya developments. The tour ended with a sumptuous networking international buffet spread at The Ledang Urban Retreat.

This was indeed an experience, not just for a better understanding of this project but more importantly the exciting collaboration between the RICS and SCL(S) – it is to be noted that while both the institute and society share a common base from the construction industry, the membership differs. The camaraderie built between people attending the visit is likely to grow in strength and □rmly establish the SCL(S) memorandum of understanding program.

The Effective Use of Experts in Construction Disputes – 27 February 2013

David Shuttleworth
Foremost Consultants Pte Ltd

I was delighted to preside as Chair in a seminar organized by the SCL(S) dealing with the effective use of experts in construction disputes which was well attended by over 100 delegates at the MND Auditorium. The speakers consisted of two visiting Barristers from Crown Of□ce Chambers in the UK who shared their experience both in the UK courts and in international arbitration in dealing with experts and making the best use of them and how to avoid or minimize potential problems.

The seminar commenced with Mr Andrew Rigney QC introducing the concept of using experts and the various role and rules of conduct in different jurisdictions starting with the courts in the UK and moving onto Singapore and the US and then looking at international arbitration. Mr Crispin Winser then "took the stand" and explained the principles of instructing experts (who, when and how) and highlighted the rules and protocol governing this process.

The seminar progressed in a manner with the speakers seamlessly alternating with each other through different sections of the subject, such as presenting evidence in the report, joint reports, the hearing, cross examination, expert conferencing, expert determination and concurrent evidence culminating in an intriguing discussion on examples of where it can all go badly wrong. Needless to say the question and answer session prompted several interesting questions from the audience (not surprisingly mainly from practicing experts) and these were again addressed by the speakers with knowledgeable and straightforward answers.

In my closing remarks, I suggested a follow up event one day, inviting several practicing experts and possibly clients to speak on this subject giving their perspectives; this seemed positively received so hopefully this can be arranged sometime in the future. The evening rounded off with a reception to which all attendees were invited, very kindly hosted by the speakers and this was held at the Scarlet hotel when the real question and answers began and some interesting in-depth discussions took place. I wish to extend my thanks to such eloquent and polished speakers and also to the SCL(S) events committee for organising the event. It has set a very good bench mark to follow for similar such events.

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SINGAPORE CONSTRUCTION INDUSTRY & LAW UPDATES

Technical: The Building and Construction Authority (BCA) has introduced the Eurocodes as Singapore's building codes with effect from 1 April 2013. The Eurocodes is a new set of standards for the structural design of buildings and civil engineering works. The move is part of BCA's ongoing efforts in raising the standards of the industry and the standards of structural building design to one of the most advanced codes currently in use.

To help the industry move to the new codes smoothly, BCA will allow building professionals to submit the structural plans of a building using either the Eurocodes or the British Standards from 1 April 2013 for two years. However, mixing the use of the Eurocodes with the current codes for the same building will not be accepted, i.e., the same standard shall be used throughout the building design. On 1 April 2015, BCA will withdraw the current codes -- which are based on the British Standards -- from use.

BCA will be commencing briefing sessions and workshops for the industry on the regulatory requirements in relation to the adoption of the Eurocodes. BCA advise industry practitioners, especially professional engineers, to attend these briefing sessions to better understand the regulatory requirements if they plan to start adopting the Eurocodes in their structural design

Case Law: The Singapore High Court decision of *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] SGHC 56 dealt with issues from the Building and Construction Industry Security of Payment Regulations, namely the non-compliance with regulations 5(2)(c)(iii) and (iv) – there was no breakdown of the quantities, rates and calculations in the progress claim submitted by the sub-contractor, Australian Timber Products. The Court held that the failure of the sub-contractor to include in its progress claim the details required in regulations 5(2)(c)(iii) and (iv) did not render the progress claim invalid, and the adjudication of the claim was therefore valid. In line with the approach adopted in *Lee Wee Lick Terence v Chua Say Eng* [2011] SGHC 109, one would need to consider the legislative intent behind the Regulations or requirement to ascertain whether the consequences of non-compliance would lead to rejection of the adjudication application.

Look out for a full article on this case and the Court of Appeal case of *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] SGCA 32 in the next newsletter.

CALENDAR OF EVENTS

UPCOMING EVENTS

No.	Date	Event
1	20 August 2013	SCL(S) Annual General Meeting
2	11 September 2013	SCL(S) Annual Construction Law Conference 2013
3	September 2013	Workshop on Scotts Schedule
4	October-November 2013 (rescheduled)	Engineering 101 [5th run]
5	November 2013	Construction Law 101 [4th run]

For information on past events, please refer to the Post Event Updates on our website: www.scl.org.sg

LIST OF NEW MEMBERS WHO JOINED SCL (SINGAPORE) BETWEEN JANUARY AND MAY IN 2013

1. Reza Mohd
2. Daniel Xu
3. Josephine Tong
4. Clive Holloway
5. Xun-Ai Wong
6. Geak Eng, Angie Ng
7. Gim Peng Chia
8. Uma Menon
9. Soo Hwee Kwek
10. Stuart Begbie
11. James Chessell
12. Shintaro Uno
13. Sathiaseelan Jagateesan
14. Silas, Wai Peng Loh
15. Tian Luh Tan
16. Tobias McCallum
17. Roger Goshawk
18. Bhaskaran Sivasamy
19. Alastair John Henderson
20. Gilbert Lau
21. Samuel Sharpe
22. Vineet Shrivastava
23. Jon Jack
24. Ben Hudson

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A COMMENTARY ON THE 9th EDITION OF THE SINGAPORE INSTITUTE OF ARCHITECTS STANDARD FORM OF BUILDING CONTRACT

A practical and comprehensive "clause-by-clause" guide to the SIA forms

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