

ENGLAND AND WALES / JUDGMENT

Macpherson v Wise

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Neutral Citation Number: [2011] EWCA Civ 399 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE HIGH COURT CHANCERY DIVISION NORRIS J CH/2010/462 IN THE MATTER OF HOWARD MACPHERSON AND IN THE MATTER OF THE INSOLVENCY ACT 1986 Before : LORD JUSTICE PATTEN

- ----- Between : HOWARD MACPHERSON
- and - DENNIS WISE
- -----
- ----- Case No: A2/2011/0261 Royal Courts of Justice Strand, London,
WC2A 2LL Date: 12 th April 2011 Appellant Respondent Bridget Williamson (instructed by
Coyle White Devine) for the Appellant John Briggs (instructed by Butcher Burns LLP) for the
Respondent Hearing date : 4th April 2011
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Judgment

Lord Justice Patten : 1. 2. This is an application by Mr Howard Macpherson for permission to bring a second appeal against the Court's refusal to set aside a statutory demand dated 1 st April 2010. The application to set aside the demand was heard by District Judge Devlin in the Slough County Court on 16th July 2010 and dismissed. Mr Macpherson appealed to the High Court and his appeal was heard and dismissed by Norris J on 17 th January 2011: [2011] EWHC 141 (Ch). His application for permission to bring a second appeal was refused by Etherton LJ on a consideration of the papers but a stay of the bankruptcy proceedings was granted over any oral hearing of the renewed application. Etherton LJ made his order on 1st March 2011 but on 23rd March Mr Macpherson issued an application for leave to adduce and rely on new evidence in support of his appeal. This consists of a witness statement made on 21st March 2011 by his solicitor, Mr David Sheahan of Messrs Coyle White Devine, who exhibits some correspondence between his firm and Mr Ahmud of Ahmud & Co. This is the firm of solicitors who acted for Mr Dennis Wise, the respondent, at the time when Mr Macpherson says an agreement was reached between them to postpone the payment of various debts due to Mr Wise until after the sale of a property now known as Wells House, Wells Lane, Ascot ("the Property"). This is owned by a company called Howard Land Limited ("the Company") of which Mr Macpherson is the controlling shareholder. Before coming to the significance of the new evidence it is necessary to

outline the background to the present dispute. Mr Wise was a close friend of Mr Macpherson and the godfather of one of his children. Mr Macpherson accepts that he is indebted to Mr Wise in the sum of at least £268,500 based on three separate transactions. The first is a loan agreement dated 30th November 2008 under which Mr Wise lent him the sum of £200,000 which was repayable on 30th November 2009. The loan was to be interest-free if paid on time but clause 4 of the agreement provided that if the loan was not repaid within 7 days of 30th November 2009 then a penalty of 30% (i.e. £60,000) would become payable in addition. The second transaction was a loan of £50,000 made on 19th August 2009. Mr Macpherson contended in his evidence that the sum lent was only £40,000 but he now accepts (having seen the evidence of bank statements put in by Mr Wise) that he was wrong about this. The loan was repayable in 14 days: i.e. on 3rd September 2009. The third debt arises out of the sale of Mr Wise's Range Rover which Mr Macpherson carried out on his behalf on 10th January 2009. Mr Macpherson says that he agreed to pay the net sum of £28,500 to Mr Wise from the sale. The statutory demand is in the sum of £338,500 based on the 30th November 2009 loan of £200,000 plus the £60,000 penalty; the August 2009 loan of £50,000; and the £28,500 from the sale of the car. Mr Macpherson says in his first witness statement in support of his application to set the demand aside that the maximum he owes is £328,500 but this was before he accepted that the August 2009 loan was for £50,000. He contends that the £60,000 penalty is irrecoverable but that is not, of course, sufficient to justify setting aside the statutory demand. The application to set aside included various technical challenges to the statutory demand based on the way it was served but these are no longer pursued. The sole ground for the application is that the debt is disputed on substantial grounds. If this is right then the Court has power to, and will, as a matter of established practice, set aside the statutory demand leaving it to the parties to resolve that dispute in ordinary court proceedings: see Insolvency Rules r. 6.5(4)(b). In essence, Mr Macpherson's case is that in January 2010 he had a conversation with Mr Wise about the monies which he owed. Eventually it was agreed that the entire sum owing would be repaid from the proceeds of sale of the Property. This was on the market at a guide price of about £3.2 million. It was subject to a charge in favour of National Westminster Bank plc ("the Bank") in the sum of about £1.8 million leaving sufficient equity to discharge what was owed to Mr Wise. There is no evidence as to what other creditors of the Company there were at the time and whether the Company was itself solvent. We do not therefore know what other claims there might be on the proceeds of sale. In the letter from his solicitors dated 22nd March 2010 which preceded the service of the statutory demand Mr Wise contended that under the agreement reached, he was to be paid by 31st March 2010. This is consistent with an e-mail which Mr Macpherson sent to his solicitors on 3rd March 2010 in which he says that he was expecting to be able to repay by the end of that month. But in his evidence Mr Macpherson denies 3. 4. 5. 6. 7. 8. 9. that it was ever a term of any agreement that the debts would be cleared by then. He says that the agreement reached in January 2010 was simply that repayment would be made from the proceeds of sale of the Property. Subsequently Mr Wise expressed concern about what might happen if Mr Macpherson were to die leaving Mr Wise to rely on an unrecorded agreement against his estate. He was keen to be given some form of security preferably in the form of a second charge over the Property. Mr Macpherson says that he explained that he had no problem with this but that it would require the consent of the Bank.

Critically, however, he emphasises in paragraph 32 of his witness statement that; “the agreement to repay the Creditor from the proceeds of sale from Wells House was not conditional on the Creditor having a second charge or some other form of security. It was simply a case of the Creditor preferring to have a second charge if it were possible”.

10. Miss Williamson accepts (as she must) that an agreement in these terms is not legally enforceable. Mr Macpherson gives no consideration for Mr Wise’s agreement to defer the repayment of the loans if he does no more than to promise to repay what is already due: see *Foakes v Beer* (1883) 9 App Cas 605. In order to establish a serious dispute about the debt he must adduce credible evidence of an enforceable agreement made after January 2010 to the effect that payment of his liabilities was postponed until after the sale of Wells House. His case is that such an agreement was reached by 5th March 2010 when he executed a second charge over the Property on behalf of the Company. This, Miss Williamson submits, provided valuable consideration for an agreement to postpone the repayment of the debt and is perhaps the strongest evidence that such an agreement was reached. 11. 12. 13. I propose to start by considering the evidence which was before the District Judge and Norris J. I do so because Miss Williamson submits that they were wrong even on that material to reject the existence of a substantial dispute as to whether the debt is currently repayable. I will then go on to consider the admissibility and effect of the new evidence. In his first witness statement Mr Macpherson says that in February 2010 he had a further meeting with Mr Wise at a hotel in Gerrards Cross when the possibility of a second charge was discussed. On one view this suggests that what had been agreed in January was itself only provisional but, because its enforceability is not in issue, that does not matter. It is clear that nothing further was agreed as such at the February meeting. Mr Macpherson says that it was left for him to chase up the question of security. He says that he did this by contacting the Bank and also instructing his solicitors, Lennon & Co, who prepared a second charge. The latter is not correct. The evidence produced on the application to adduce further evidence in the form of Ahmud & Co’s file indicates that Mr Wise instructed that firm on 3rd March 2010 to prepare a second charge over “the property of Mr Howard Macpherson in order to protect the monies which you have advanced to him”. This is a quotation from the client care letter countersigned by Mr Wise on 4th March but an attendance note records that Ahmud & Co were first contacted by him the previous day. On 3rd March Mr Macpherson contacted his solicitors by e-mail asking them to get Mr Wise’s solicitor to draw up the charge. This is the e-mail in which Mr Macpherson states that he expected to be able to repay by the end of March 2010. 14. His solicitor then contacted Mr Wise to get his solicitors’ details and Ahmud & Co were instructed. They had in fact acted for Mr Macpherson in connection with his companies but nonetheless they accepted Mr Wise’s instructions and drafted the charge on a Land Registry Form CH1 which had the date of 5 th March typed in as part of the details. Curiously the charge is stated to secure “all amounts due under an agreement with Mr Dennis Wise to Howard Land Limited relating to the advancement of all monies in the sum of £338,500” even though no guarantee of the debt has ever been entered into by the Company. On the face of it, the charge is ineffective to secure the liabilities of Mr

Macpherson. He says in his second witness statement that he has offered to amend the charge to correct the mistake but that Mr Wise has not taken up his offer. 15. In paragraph 35 of his witness statement Mr Macpherson says this: "On or around 5th March 2010 I recall a conversation with the Creditor during which I advised him that the second charge had been prepared and had been sent to my home by first class post to sign. The post had not yet arrived but the Creditor was keen to get the second charge signed off. He wanted to drive to Lennon & Co's office to get it signed immediately. I agreed and we both went. My solicitor at Lennon & Co was not available but his personal assistant printed off a further copy of the second charge which I executed there and then". 16. 17. 18. He now accepts that the charge was prepared by Ahmud & Co for Mr Wise but in his second witness statement there is no other change to the account of events contained in paragraph 35 above. Mr Wise in his own evidence accepts that discussions took place between January and March 2010 but denies that he agreed to accept repayment of the debts at some future unspecified time following the sale of Wells House. He says that Mr Macpherson proposed repaying the money from the proceeds of sale but this was in the context of a timeframe up to the end of March. He denies the existence of an agreement as such in the terms of the January agreement referred to by Mr Macpherson but he does not in terms explain how the execution of the legal charge fitted in. All that he says about the charge is that it was wrongly drafted (and therefore ineffective to secure the debts) and that it cannot be registered without the consent of the Bank. The District Judge declined to accept that Mr Wise would have agreed to what might amount to the almost-indefinite postponement of the debts. He said that there was not a genuinely triable issue. He described Mr Macpherson's evidence as very thin on the issue of an agreement in the sense of a contract. The highest it could be put was that Mr Macpherson was telling Mr Wise how he proposed to repay the money. But there was no contract on those terms. Norris J held that the District Judge was entitled to come to this conclusion and that there were no grounds for interfering with his decision. He sets out in his judgment a detailed analysis of the evidence I have referred to including the execution of the charge. Miss Williamson submitted to the judge (as she has to me) that, in assessing the credibility of Mr Macpherson's evidence, it is necessary to ask why Mr Wise accepted the charge over the Property. Mr Wise does not deal with this in his evidence. The judge dealt with this point as follows: "Ms Williamson challenged that conclusion. She made three points. First, she said that anyone who took the view that Mr Macpherson's evidence was not credible had to explain why Mr Wise pressed for and eventually took a legal charge which he took to his solicitors. She said that Mr Wise does not answer that challenge. But in my judgment the evidence does meet the challenge. Mr Macpherson and Mr Wise had (it is now common ground) informally and without creating a legal bargain, agreed in January 2010 that Mr Macpherson should be offered a further opportunity to pay the debt. As the email of 3 March which Mr Macpherson sent to Mr Wise makes clear, Mr Macpherson expected to complete the sale or alternatively obtain other funding to repay the debt by the end of March

2010. The legal charge is readily explicable as supporting a further opportunity for him to pay the debt within that time scale. When he failed to do so, on the very next day, Mr Wise issued his statutory demand. These events seem to me to undermine the criticism that there is no explanation for the legal charge other than a legally binding agreement to postpone repayment indefinitely.” 19. 20. 21. 22. It is now said that the judge impermissibly filled the gaps in the evidence by supplying an explanation not contended for by Mr Wise. I do not believe that this is a fair reading of the judgment or of Mr Wise’s own evidence. Mr Macpherson’s own evidence is that Mr Wise wanted a charge to record what was owed and to give him some security. That is not inconsistent with there being no binding agreement to defer payment until after the sale of the Property whenever that might occur. It is equally consistent with Mr Wise requesting security in return for an actual deferment of payment without binding himself to wait indefinitely for the Property to be sold. As both judges point out, Mr Macpherson contemplated that only a short postponement until the end of March would be necessary and this makes it less, rather than more, likely that the parties entered into the binding contract contended for. It needs also to be remembered that it is for Mr Macpherson to prove the agreement for which he contends. I think that the District Judge correctly analysed his evidence as falling short of this. Although paragraph 35 refers to the execution of the charge, it does not suggest that the parties intended to create a new contract; that they ever gave active consideration to the possible long-term postponement of the debts; or that the January arrangements under which the giving of security was not a term or condition of the agreement were materially varied. The District Judge was therefore entitled to conclude that no binding contract for the deferment of the debts until the sale of Wells House was made. In these circumstances, Norris J was, I think, right to dismiss the appeal and a second appeal would have no real prospect of success. It is therefore necessary to consider the application to adduce the new evidence because it represents Mr Macpherson’s only realistic chance of persuading me that there is a compelling reason to grant permission for a second appeal under CPR 52.13. The appeal does not, in my view, raise any important point of principle or practice. The new evidence is highly controversial and its admissibility is contested. In his witness statement Mr Sheahan refers to and exhibits a letter of 7th March 2011 from Ahmud & Co to Messrs Butcher Burns who now act for Mr Wise. In May 2010 Butcher Burns took possession of Ahmud & Co’s file when they were instructed by Mr Wise. On 4th June 2010 they put Ahmud & Co on notice of a claim that Ahmud & Co had been subject to a conflict of interest or duty when they accepted instructions from Mr Wise in connection with the second charge having previously acted for Mr Macpherson and indeed having continued to act for him in other matters. The letter also complained that Ahmud & Co had failed to protect Mr Wise’s interests 23. 24. 25. 26. 27. both in the drafting of the charge and by failing to include any repayment date for the loans due from Mr Macpherson. There was no response to this letter and a chaser was sent on 29th July 2010 asking Ahmud & Co to inform their professional indemnity insurers that a claim would be made for any loss that could not be recovered in the bankruptcy proceedings against Mr Macpherson. There appears to have been no response to this until 20th January

2011. In this letter Ahmud & Co refer to the fact that Mr Wise refused to have the charge registered against the Company and instead chose to pursue bankruptcy proceedings. The allegations of conflict of duty and negligence were denied but only in general terms. On 26th January Ahmud & Co wrote to Butcher Burns saying that they would respond substantially to their allegations shortly and that they would be putting Mr Macpherson on notice of a Part 20 claim if proceedings were to be issued against them. A letter to this effect was sent to Coyle White Devine on the same day but with no explanation as to the basis upon which Ahmud & Co might have a claim against Mr Macpherson for an indemnity or contribution towards their own liability in damages for breach of duty. Nothing further was heard until 7th March which was six days after Etherton LJ had refused permission on paper for a second appeal. Mr Sheahan says that he had a brief telephone conversation with Mr Ahmud in July 2010 when he was told about (but not shown) the letter before action from Butcher Burns. He spoke to him again on 17th August 2010 when Mr Ahmud told him that he had not yet reviewed the documents but would supply him with a copy of his reply to Butcher Burns when it was prepared. Apart from the letter sent on 26th January, he heard nothing further from Mr Ahmud until 7th March when he received a copy of a letter of that date in which Ahmud & Co replied to Butcher Burns on the details of a possible claim. This is the letter which Mr Macpherson now wishes to adduce in evidence in support of his appeal. The letter is some eight pages long but its relevance to any second appeal lies in its description of what Mr Wise is said to have told Mr Ahmud about the agreement he had reached with Mr Macpherson. Ahmud & Co say that they were first instructed by Mr Wise in June 2009 in connection with a dispute which he had with a Mr James Creed. Mr Creed owed Mr Wise some money which Mr Wise wished to protect by taking a charge over Mr Creed's property. Mr Wise is said to have agreed to give Mr Creed time to pay without setting a long-stop date for payment. The charge was the only formal document and was intended to record the debt. Ahmud & Co say that it was against this background that they accepted Mr Wise's instructions on 3rd March. He telephoned them saying he wanted another charge to register in respect of some loans. The letter goes on to explain why they felt able to accept his instructions despite continuing to act for Mr Macpherson but none of that is strictly relevant to what I have to decide. Ahmud & Co say that by the time that they were instructed it was not within their power to renegotiate the terms of what had been agreed between Mr Wise and Mr Macpherson. This was because there was already a legally binding contract between them: "Mr Wise's instructions to us was that he had negotiated a legally binding agreement with Mr Macpherson to extend the time for all monies owed by him to be repaid immediately upon the sale of Karina, Wells Lane, Ascot, SL5 7DY ("Karina"). Mr Wise informed us that Mr Macpherson was "a mate" (as Mr Wise kept referring to Mr Macpherson at the time), and if he had repaid Mr Wise by the end of 2009, Mr Wise only required the principal sum of £200,000 to be paid because he was not interested in making any money from Mr Macpherson and simply wished to help him out. Mr Wise explained that this is the reason that it was an interest free loan for 12 months. But when Mr Macpherson had still not paid the loan at the beginning of 2010, Mr Wise and Mr Macpherson agreed that the £60,000 interest penalty had to come into play and would be

applicable, and Mr Wise wanted a signed Charge form (as Mr Wise required in the Mr Creed matter) to record the total sum owed by Mr Macpherson so that there would be no dispute or confusion as to the amount in the future or if Mr Macpherson was knocked down by a bus. Mr Wise instructed us that Mr Macpherson agreed to the same, and in return Mr Wise agreed to give him further time to repay him from the proceeds of Karina when it is sold. This was almost an identical agreement which Mr Wise had reached with Mr Macpherson to that which was agreed between Mr Wise and Mr Creed. Mr Wise instructed us that he had agreed with Mr Macpherson that there was no fixed repayment date, that he would accept a lump sum interest payment of £60,000 and the signing of the Charge in exchange for the delayed repayment of the loans from Mr Macpherson. Both of these mirrored the agreement which Mr Wise had offered to Mr Creed and therefore he clearly knew what he was agreeing with Mr Macpherson. Mr Wise specific instructions to us was that he had agreed to extend the time for Mr Macpherson to pay all monies owed until Karina was sold whenever that may be in consideration for two matters: (1) he would not waive the £60,000 interest penalty as he had previously informed Mr Macpherson he would do (if payment of the £200,000 had been made by the end of December 2009/early January 2010) and that he would have to pay the same and (2) he required Mr Macpherson to sign a Charge (CH1 form) thereby recording the amount owed by Mr Macpherson by way of an agreed debt. It must be pointed out that Mr Wise knew full well that the registration of the Charge was out of any of the parties' control and it was up to the Bank to agree to it. Mr Wise was informed that if the Bank refused to allow the registration of the second charge, there was nothing he could do to force them to agree to it. Mr Wise was primarily concerned to have an official document setting out the amount which Mr Macpherson had to pay "in the event he got knocked down by a bus" – as Mr Wise put it..."

28. Mr Briggs on behalf of Mr Wise makes a number of points about the credibility of this account which is, of course, one of the factors which I need to consider when deciding whether to admit further evidence under CPR 52.11(2). He submits that it is highly significant that this letter was sent to Mr Macpherson's solicitors without warning shortly after the order was made by Etherton LJ refusing permission to appeal. This indicates, he suggests, that the letter is contrived and highly tactical and 29. 30. 31. 32. 33. 34. that its timing is only consistent with Mr Macpherson having told Ahmud & Co of his difficulties and the need to produce further evidence to support his case. It is also highly unlikely, he says, that Mr Wise would have told his solicitors in terms that he had made a legally binding agreement with Mr Macpherson. This is much more likely to be the solicitors putting their own interpretation of events into the mouth of their former client. It is also to be remembered that the primary purpose of this letter was to rebut allegations of negligence and breach of duty made against Ahmud & Co rather than to provide an objective recollection of the events of March 2010. I share a number of those misgivings. I also find it unlikely that Mr Wise would have taken it on himself to describe any arrangement with Mr Macpherson as legally binding. It is much more likely that he would have emphasised the need to obtain a formal record of the loan in the form of the charge and to have mentioned

that he had agreed that he would wait until Wells House was sold which was anticipated to take place at the end of March. The suggestion in the letter that Mr Wise's instructions were that he had agreed to extend time until the Property was sold whenever that might be is completely inconsistent with what Mr Macpherson was saying at the time and is not supported by Mr Macpherson's own evidence. There is no suggestion in that that the parties specifically contemplated an open-ended arrangement. Another difficulty about the account in the letter is that it seems to be at variance with what we know about the timing of those events. There is no suggestion in the letter (and no record on the file) of any face-to-face meeting between Mr Wise and Ahmud & Co between the phone call on the morning of 3rd March and the charge being prepared on 5th March. The actual phone call appears to have been brief. It is also difficult to understand why Ahmud & Co made the error which they did in describing the debt secured by the charge if they had the benefit of the detailed instructions referred to in their letter. Mr Briggs submits that its contents are largely a reconstruction of events designed to assist Mr Macpherson and there is much to be said for that view. But that is not the principal reason why I have decided to dismiss this application. It is common ground that the information about the instructions which Ahmud & Co are said to have received from Mr Wise is covered by legal professional privilege. It is also common ground that the privilege has not been waived by the letters written to Ahmud & Co by Butcher Burns in June and July 2010 or by anything else which has subsequently occurred. The disclosure of this information to Mr Macpherson and his solicitors was therefore a breach of confidence on the part of Ahmud & Co which can be restrained by this Court as part of the exercise of its own powers in deciding whether or not to admit the evidence in the appeal. I have been referred to the principal authorities on how the Court's discretion to restrict the use of confidential material of this kind ought to be exercised. These include the decisions of this Court in *Ashburton v Pape* [1913] 2 Ch 469 and *Goddard v Nationwide Building Society* [1987] QB 670. I have also been referred to the decision of Lawrence Collins J (as he then was) in *Istil Group Inc v Zahoor* [2003] 2 All ER 252 which contains a useful summary of the relevant principles. Although copies of privileged communications between a solicitor and client can be adduced as secondary evidence in litigation (see *Calcraft v Guest* [1898] 1 QB 759), the Court has power to restrain the breach of confidence which that would involve. In *Goddard Nourse* LJ expressed the view that: "[O]nce it is established that a case is governed by *Lord Ashburton v. Pape* [1913] 2 Ch. 469 there is no discretion in the court to refuse to exercise the equitable jurisdiction according to its view of the materiality of the communication, the justice of admitting or excluding it or the like. The injunction is granted in aid of the privilege which, unless and until it is waived, is absolute. In saying this, I do not intend to suggest that there may not be cases where an injunction can properly be refused on general principles affecting the grant of a discretionary remedy, for example on the ground of inordinate delay... [I]n a case to which *Lord Ashburton v. Pape* can no longer apply, public policy may nevertheless preclude a party who has acted improperly in the proceedings from invoking the rule of evidence: see *I. T. C. Film Distributors Ltd. v. Video Exchange Ltd.* [1982] Ch. 431, where the defendant had at an earlier hearing obtained some of the plaintiff's privileged documents by a trick. (see

[1986] 3 All ER 264 at 271-272, [1987] QB 670 at 684-686).” 35. In this case the only justification put forward by Miss Williamson for refusing to protect the duty of confidentiality owed by Ahmud & Co to Mr Wise is that this may impede a fair trial of Mr Macpherson’s defence to the bankruptcy proceedings by depriving him of the corroboration which Ahmud & Co’s letter provides. She submits that Mr Wise’s failure to explain in detail the circumstances leading to the execution of the charge, if not calculated to mislead the Court, amounted at least to a tactical stance designed to enable him to succeed on the basis of silence. I do not accept this. Mr Wise is not obliged to put in evidence, although he must take the consequences of not doing so. There is no restriction on Mr Macpherson in relation to what he may say based on his own knowledge of these events and he can invite the court to take into account any lack of reply on points of detail by Mr Wise. 36. The balance between preserving the confidentiality of privileged communications and the risk of the Court reaching a wrong conclusion on the facts has been struck firmly in favour of the need to preserve confidentiality. As Lawrence Collins J says in *Istil* (at paragraph 93): “there is nothing in the authorities which would prevent the application of the rule that confidentiality is subject to the public interest. In this context, the emergence of the truth is not of itself a sufficient public interest. The reason why the balancing exercise is not appropriate is because the balance between privilege and truth has already been struck in favour of the former by the establishment of the rules concerning legal professional privilege: see *The Aegis Blaze* [1986] 1 Lloyd’s Rep 203, 211; *R v. Derby Magistrates Court, ex parte B* [1996] AC 487, 508.” 37. This is not a case where any other public interest considerations intervene in favour of disclosure. I therefore consider that the Court’s discretion must be exercised so as to exclude the new material contained in the letter of 7th March 2011. It follows that there is no compelling reason to permit a second appeal and I therefore refuse permission to appeal.

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