HONG KONG / JUDGMENT

JTJ v. HGSH

[2025] HKFC 116

COURT
Family Court

DECIDED
26 May 2025

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FCMC15810/2018

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FCMC 15810/2018 (consolidated with FCMC No.15905/2018)

[2025] HKFC 116 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION MATRIMONIAL CAUSES NO. 15810 OF 2018

BETWEEN JTJ Petitioner and HGSH Respondent

Coram: His Honour Judge G. Own in Chambers (By Paper Disposal) Date of Decision: 26 May 2025

D E C I S I O N (Variation of Costs Order Nisi)

Background

1. On 31/10/2024, I handed down my 87-page Judgment ("AR Judgment") on the parties' respective ancillary reliefs after a 5-day trial (in June and November 2022). Two Corrigenda have also been issued on 1 November and 23 December 2024 respectively. For the sake of convenience, I would adopt the same nomenclature in the AR Judgment in this Decision with "H" for the Petitioner husband, "W" for the Respondent wife and "C" for their only child of the family. 2. In the AR Judgment I decided, in summary, as follows :- There be a capitalised maintenance for the child C assessed at HK$8 million ("C's Fund") to be carved out from the matrimonial pot of assets; There be a ratio split of 48% to H and 52% to W of the matrimonial pot of assets after carving out the said C's Fund of HK$8 million; For equalisation, parties may keep and retain those assets specified in the AR Judgment or otherwise agreed between the parties; For equalisation, there be a payment by W to H in the sum of HK$9,229,629; H to bear W's costs of the ancillary reliefs, including all costs

reserved, to be taxed if not agreed. This is a costs order nisi which would become absolute if no application was made by any party to vary the same within 14 days from the date of the AR Judgment. (with Certificate for Counsel) ("costs order nisi"). 3. On 14/11/2024, H issued a Summons ("H's Summons") seeking variation of the costs order nisi to the extent that H do pay 70% of the costs of the ancillary reliefs, including the ancillary reliefs trial and all costs reserved, with Certificate for Counsel, to be taxed if not agreed. 4. H filed his 5th Affidavit in support. W filed her 5th Affirmation in opposition. H filed his 6th Affidavit in reply. 5. On 12/12/2024, with the consent of the parties, I directed that H's Summons for variation of the costs order nisi be dealt with on paper. H's grounds of application 6. There are 5 grounds of application grouped under the following headings :- H's partial success in the ancillary reliefs claims; W's lack of effort in settlement negotiations; W's failure to give full and frank financial disclosure; W's litigation conduct; H's full and frank disclosure in respect of LECL. Applicable legal principles on costs 7. The Court has a wide discretion in deciding costs. There is no difference between civil cases and matrimonial cases. The rules of procedure on costs are contained in Order 62, rules 3 and 5 of the Rules of the High Court ("RHC") which by virtue of Rule 3 of the Matrimonial Causes Rules, Cap.179A ("MCR") are applicable to the family courts. 8. Order 62 rule 3(2) of the RHC provides :- "(2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings (other than interlocutory proceedings), the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs." 9. Order 62 rules 5(1) and (2) of the RHC provides : "(1) The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account – (aa) the underlying objectives set out in Order 1A, rule 1; any such offer of contribution as is mentioned in Order 16, rule 10, which is brought to its attention in pursuance of a reserved right to do so; any payment of money into court and the amount of such payment; any written offer made under Order 33, rule 4A(2); any written offer which is expressed to be 'without prejudice save as to costs' and which relate to any issue in the proceedings, but the Court may not take the offer into account if, at the time it is made, the party making it could have protected his position as to costs by means of a sanctioned payment or a sanctioned offer under Order 22; the conduct of all the parties; whether a party has succeeded on part of his case, even if he has not been wholly successful; any admissible offer to settle made by a party, which is drawn to the Court's attention. (2) For the purpose of paragraph 1(e), the conduct of the parties includes – whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; the manner in which a party has pursued or defended his case or a particular allegation or issue; whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim; and conduct before, as well as during, the proceedings." Some case law on costs 10. In family proceedings, the guiding principles on costs can be traced back to the leading case of Gojkovic v Gojkovic [1992] 1 All ER 269 at page 271where Butler-Sloss LJ said :- "However, in the Family Division, there still remains the necessity for some starting point. That starting point, in my judgment, is that costs prima facie follow the event (see per Cumming-Bruce L.J. in Singer (formerly

Sharegin) v Sharegin [1984] FLR 114 at 119) but may be displaced much more easily than, and in circumstances which would not apply, in other divisions of the High Court. One important example is, as the judge pointed out, that it is unusual to order costs in children cases. In applications for financial relief the applicant (usually the wife) has to make the application in order to obtain an order by consent; and if money is available and in the absence of special circumstances, such an agreement would usually include the applicant's costs of the application. If the application is contested and the applicant succeeds, in practice in the divorce registries around the country where most ancillary relief applications are tried, if there is money available and no special factors, the applicant spouse is prima facie entitled to, and likely to obtain, an order for costs against the respondent. The behaviour of one party, such as in material non-disclosure of documents, will be a material factor in the exercise of discretion in making a decision as to who pays the costs." 11. Further, at page 273 of the Judgment, it was said :- "There are many reasons which may affect the court in considering costs, such as culpability in the conduct of the litigation: for instance (as I have already indicated earlier) material non-disclosure of documents. Delay or excessive zeal in seeking disclosure are other examples. The absence of an offer or of a counter-offer may well be reflected in costs – or an offer made too late to be effective. The need to use all the available money to house the spouse and children of the family may also affect the exercise of the court's discretion. It would, however, be inappropriate, and indeed unhelpful, to seek to enumerate and possibly be thought to constrain in any way, that wide exercise of discretion. But the starting point in a case where there has been an offer is that, prima facie, if the applicant receives no more or less than the offer made, she/he is at risk not only of not being awarded costs, but also of paying the costs of the other party after communication of the offer and a reasonable time to consider it. That seems clear from the decided cases and is in accord with the Rules of the Supreme Court and the County Court Rules 1981 requiring the court to have regard to the offer. I cannot, for my part, see where there is any difference in principle between the position of a party who fails to obtain an order equal to the offer made and pays the costs, and a party who fails by the offer to meet the award made by the court. In the latter case prima facie the costs should follow the event, as they would do in a payment into court, with the proviso that other factors in the Family Division may alter that prima facie position." 12. Given H's grounds of application was grouped under separate and distinct headings, in a way akin to "time-to-subject" analysis, it is thus pertinent for me to also refer to what Hartman J (as he then was) had said in the case of F v F (No.2) [2003] 3 HKLRD 976 on the principles applicable on costs determination. 13. At paragraphs 9 to 12 of the Judgment, His Lordship said :- "9. The founding principles as to the award of costs in civil proceedings generally have been stated in Re Elgindata (No.2) [1992] 1 WLR 1207. Nourse LJ (at p.1214) said that the principles are these : Costs are in the discretion of the Court. Costs should follow the event except when it appears to the court that in the circumstances of the case some other order should be made. The general rule that costs follow the event does not cease to apply simply because the successful party raises issues or makes allegations on which he fails. But where that has caused a significant increase in the length or costs of the proceedings, he may be deprived of the whole or a part

of his costs. Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs.

10. I am satisfied that these principles apply equally in this jurisdiction. The first, second and fourth are recognised and/or provided for in O.62 of the Rules of the High Court (Cap.4, Sub.Leg). While, as Nourse LJ said (at p.1214), the third depends on well-established practice.

11. In light of the husband's detailed "time-to-subject" analysis of the trial, it is useful, I believe, to heed the observances of Beldam LJ in Re Elgindata (No.2) [1992] 1 WLR 1207 in which he said (at p.1218): "It was no doubt convenient for the judge to consider the factual issues in four groups, but by concluding on a purely numerical basis that costs should be borne in the proportion three-quarters to one-quarter the judge apparently assumed, first, that the costs of the groups of issues would all be equal and, secondly, he made no allowance for the fact that proof of some of the facts in the groups of issues on which he had deprived the petitioners of all costs was essential to establish the petitioners' right to an order that the respondents buy their shares. It in my view, it is only if it is possible so to isolate an issue in the case that it can properly be said that it is unnecessarily pursued as having no bearing on the real questions in the suit that it would be proper to deprive the successful party of all costs of that issue. Otherwise a more general assessment should be made.. I would adopt those observations as a correct determination of principle.

12. Contested family proceedings, being civil in nature, are subject to the founding principles that I have outlined. However, it has been accepted that, because of the special dynamics of family litigation, the discretion is broader than it may be in civil matters generally." 14. At paragraph 22 of the same Judgment, His Lordship went further and said :- "22. Leaving aside what I consider to be the long-established principle that costs are determined not by dividing litigation into quantifiable subjects and figures, like a profit and loss account, but rather by way of overall impression. I have a number of difficulties with the husband's "time-to-subject" analysis : As Beldam LJ observed in Re Elgindata (No.2) [1992] 1 WLR 1207, not all subjects canvassed during a trial are of equal importance. A critical issue may take a relatively short time to be disposed of while it is axiomatic, I believe, that issues of less importance may, if they are contentions or complex or a witness testifying to the issues is overly long, take a relatively longer period. The fact that a particular issue at trial took a particular time to be canvassed, does not define who was most responsible for the use of that time. One party, for example, may advance an issue in respect of which he is unsuccessful in a manner that is commendably brief while the opposing party may spend an inordinate time opposing that issue. In such circumstances, who is to be penalised, the party who advanced the unsuccessful issue or the party who successfully opposed it but did so in a time-wasting manner ? The fact that an issue advanced by one party has not found favour with the court does not mean that the issue was not necessary, if only peripherally, to assist the court in considering the overall strength of that party's case. This, in my opinion,

is especially important in ancillary relief proceedings in which, in terms of s.7(1) of the Matrimonial Proceedings and Property Ordinance, (Cap.192), a broad range of matters must be taken into account, the one invariably interlocking with others so that, by that interlocking process, a full picture is woven. As Beldam LJ observed in Re Elgindata (No.2) [1992]1 WLR 1207, it is only if it can properly be said that an issue that has been advanced has no bearing on the real questions in the suit that it would be proper to deprive the successful party of his costs in respect of that issue." 15. Madam Justice Yuen JA in the case of L v C, CACV No. 169/2006 (date of judgment: 19 March 2008) sets out the principles in costs in family court cases said at paragraph 23 : "23 . As a matter of law, it is clear that costs are in the court's discretion. Pointers as to how that discretion should be exercised include the following : in family cases, as in others, costs should normally follow the event; however, because of the special dynamics of family litigation (eg where the cased involved children, or where financial resources were inadequate to meet the needs of both parties, etc.), the discretion may be broader than in civil matters generally (Gojkovic v. Gojkovic [1991] 2 FLR 233, F v. F (No.2) [2003] 3 HKLRD 977.....; the court also retains a discretion to deprive successful litigants of costs under the Elgindata principles (In re Elgindata Ltd (No.2) [1992] 1 WLR 1207]; where a litigant succeeds on appeal but only on a new point, the court can deprive him of the costs below (Farquharson v Morgan [1894] 1 QB 552) or even order him to pay those costs (Yip Lai Fong v Sin Tung Hing [2004] 3 HKLRD 230), and the court can deprive him of the costs of appeal (Chard v. Jervis (1882) 9 QBD 178). 16. In the later case of T, L v. S, N, CACV No.196/2009 (date of Judgment : 19 October 2010) where Hon Kwan JA said : "123. In matrimonial cases, as in other cases, costs should normally follow the event. The court also retains a discretion to deprive successful litigants of costs under the principles in In re Elgindata Ltd (No.2) [1992] 1 WLR 1207 (L v.C, CACV 169/2006, 19 March 2008, paragraph 23, per Yuen JA). The general rule that costs follow the event does not cease to apply simply because the successful party raised allegations on which he failed, but where that has caused a significant increase in the length or costs of the proceedings, he may be deprived of the whole or a part of his costs...." 17. In the case of W v. K and Anor (Costs) [2008] HKFLR 378 where Saunders J at page 383 said : "13. In the course of exercising the discretion as to costs the court will also take into account Calderbank offers: see O22 r 12 and O62 r 5 RHC. Such offers influence, but do not govern, the exercise of discretion. The proper question to be asked is whether the party to whom offer was made ought reasonably to have accepted the proposal made. In addition, litigation misconduct or neglect may be taken into account in deciding the incidence of cost: see O62 r 7. 18. Further, in the case of Z v. X & C, CACV No.166/2011 (date of Judgment : 8 March 2013) where Hon Cheung JA said : "10. Although Saunders J in W v.K & Anor (Costs) [2008] HKFLR 378 stated that in 'big money case' each party should bear its own costs, this Court's approach on costs in ancillary relief application is that costs should follow the event although because of the special dynamics of family litigation (e.g. where the case involved children, or where financial resources were inadequate) the discretion may be broader than in civil matters generally : L v.C (CACV 169/2006, Judgment 19 March 2008) applying Gojkovic v. Gojkovic (No.2) [1991] 2 FLR 233; TL v. SN (Ancillary Relief) [2010] HKFLR 506. 11. In England the approach has now been

changed where the general rule is that the Court will not make an order requiring one party to pay the costs of another. However, costs orders may be made because of the litigation conduct of another party. The factors to be considered include, for example, whether an open offer to settle has been made, whether it was responsible to raise, pursue or contest a particular allegation or issue and the financial effects on the parties of any costs order. (See Rayden and Jackson on Divorce and Family Matters, 18th Ed, Noter up to Col 1(2) [52.17] – [52.20] and see further the Noter up on Family Procedure Rules 2010). 12. The changes in England were carried out by prescribed rules. The position in Hong Kong has remained unchanged since L v.C and TL v. SN). 19. Guided by the above principles, I will now consider H's 5 grounds of application in sequence. Discussion 20. There are a number of factual disputes over assets and source of funds at the trial of the parties' ancillary relief and various findings of fact had been made upon evidence accepted to be the truth or preferred to be more probable that not to be the truth. 21. No application for leave to appeal had ever been lodged by H in respect of the final outcome of the AR Judgment save as to the present application to vary the costs order nisi from 100% of costs to be paid by him to W downwards to 70%. No challenge was made to my decision on granting Certificate for Counsel. 22. That said, H could only confine his grounds for variation to factual findings arrived at in the AR Judgment rather than to re-visit his own case or evidence which had either been rejected or discarded after trial. Otherwise, this would be akin to an "appeal" of the AR Judgment or "challenge" on findings of fact through the backdoor of a costs order nisi variation application. Ground (a) – H's partial success in the ancillary reliefs claims 23. H referred to 3 areas of controversies at trial, namely, (i) the beneficial ownership of LECL; (ii) the source of funds in the P&C Account and IB Account; and (iii) transfer of the 1 share (100% shareholding) of LECL from LLOL to H in July 2018 made without the knowledge or consent of W. 24. Reference was also made by H as to his success in obtaining an "add-back" of his claims on W's overspending in purchase of jewelleries after their separation. This success of "add back" was said to have been achieved by H and his legal teams by going through a sizeable quantity of W's credit card statement which were only supplied to them at a rather late stage of the proceedings. 25. On beneficial ownership of LECL, H's position throughout the trial was that he was the sole beneficial owner and that LECL has a negative value. However, both of H's position was not accepted in the AR Judgment. It was found and decided in the AR Judgment that LECL should be viewed upon as a family business, and further that it was a valuable asset although there was no proper valuation undertaken by professionals before trial. At the end, an arbitral assessment of HK$5 million was allocated by this Court. 26. The Court's decision that H was to retain LECL was based upon asset allocation (as per Step 5 of the LKW exercise) and not upon any finding of fact that H possessed 100% beneficial ownership of it. 27. On the "add back" submission, I tended to agree with W in that only a small portion of H's claim for "add back" was achieved by him. Out of H's claim of HK$8,431,381, only a sum of HK$450,330 was "added back" at the end. W could hardly be sanctioned on costs for achieving an overall success of only a modest amount, say around 5.3%. was found after trial to be "added back". H had failed in 94.7% of his "add back" claim. 28. On the P&C Account and IB Account, given both parties' position as

to sole ownership of the funds in the accounts, but ended up with this Court's finding that both parties are the beneficial owners, it would only be fair to say that neither party should be sanctioned or awarded costs for contention over this topic. 29. On the transfer of the 1 share of LECL to H himself, neither party pursued any further with their respective case by adducing further evidence to traverse or rebut the other party's contention. It would only be fair to say neither party should be sanctioned or awarded costs over this topic. 30. Taken into account all the above, I stand by my decision that the overall impression, without dividing the litigation into quantifiable subjects like a profit and loss account, was that W was the winning party and not H who under this ground of application alleged to have partially succeeded in the ancillary reliefs. 31. I find this ground of application fails. Ground (b) – W's lack of effort in settlement negotiations 32. H referred to himself having made 3 detailed settlement proposals but met with no response from W. There was only 1 proposal from W who was compelled by the Court to do so at the FDR hearing. 33. Whilst the absence of settlement negotiations might have an implication on costs determination, the terms proposed for settlement in terms of their reasonableness are important. Whether the terms proposed are reasonable or unreasonable could be easily seen if one compared them with the end result that had been achieved after the trial. This clicks in the commonly used statement of "whether the end result could 'beat' the settlement proposals so that the party who refused to accept the other's proposals could be said to have acted correctly to pursue and not to settle his/her claims and thus should be awarded his/her costs for so doing." 34. H's settlement proposals, in particular, in relation to the child C's maintenance or his share of such maintenance, was far below from what was decided at the end in the AR Judgment, both in terms of the amount of the capitalised sum and the reserve module of C's capitalised maintenance. Further, H had never proposed in any of his 3 offers that LECL was a family business to fall within the matrimonial pot for sharing. On these 2 issues decided in the AR Judgment, let alone decisions on other issues, it is plain and obvious that any counter-suggestion or counter-proposals from W would be futile as they were "miles apart" on their stance and thus serve no meaningful negotiation except to increase both parties' legal costs. 35. In any event, H was unable to show that any of his 3 offers had "beat" the orders and decision under the AR Judgment disentitling W to receive her costs. 36. I find this ground of application fails. Ground (c) -W's failure to give full and frank financial disclosure 37. H first referred to W's non-disclosure of her claim filed with the Labour Tribunal against her previous employer in her 3rd Form E dated 11 February 2022 (when she was terminated by her employer a month ago in January 2022). It was, however, decided in the AR Judgment that the outcome of the claim in the Labour Tribunal was too uncertain for disclosure at the time of the 3rd Form E. H then submitted that , W should have, but chose not to, disclosed in her 3rd Form E that actually she had engaged lawyers to advise her on employment matters as early as 15 July 2021. 38. The other reference made by H was that W had misrepresented the surrender value of her China Life Policy as "0" in her 3rd Form E dated 11 February 2022 whilst the surrender value stated in the policy application form dated 2 January 2021 was HK$425,408. It was only until the 1st day of trial on 7 June 2022 after this was pointed out to W who then conceded and agreed to include such surrender value into the Schedule of

Assets and Liabilities. 39. Lastly, H referred to W through her Counsel erroneously represented to the Court that the spending on jewellery purchase made for the child C was from the arcade APM when, upon analysis of W's credit card statements, the purchase made from APM was only HK$23,870 but the total amount of purchase made between September 2018 and September 2022 was as much as HK$900,660. 40. Further, none of the purchase on jewelleries made by W were disclosed in her Form E whether under Part 2.10 as her own "valuables" or under Part 5.1 as "significant change in her assets during the last 36 months" even if W had given the jewelleries away to her family, friends or tutors so alleged by her at trial. 41. On the above submissions, H was attempting to re-visit the evidence at trial and try to convince this Court to make further additional findings of fact now (my emphasis), that is, after trial to support this ground of application that W had failed to give full and frank financial disclosure to the extent that such "failure" should be taken into account of. In my decision and with respect, this is not the correct approach. The Court would not make further additional findings of fact to those findings that had already been made in the AR Judgment. As a matter of fact, H was unable to show under which part of the AR Judgment that W was found to have failed in her duty of financial disclosure. 42. Upon reviewing the Reasons for the AR Judgment, there was no such findings by me against W on those matters which H now alleged under this ground of application. 43. I find this ground of application fails. Ground (d) - W's litigation conduct 44. H referred to W's disclosure of voluminous financial information only on 30 May 2022, just one week before the trial on 7 June 2022. The late disclosure was rejected but was then allowed only when it became apparent that the trial would have to be adjourned part heard. 45. Same as before, H attempted to re-visit matters which had been canvassed by me in the AR Judgment and, on this ground of variation for late disclosure, there was the specific finding at paragraph 164 of the Reasons for the AR Judgment that, the trial had not been unnecessarily prolonged with wasted costs incurred to the prejudice of H (my emphasis). 46. I find this ground of application fails. Ground (e) – H's full and frank disclosure of LECL 47. H referred to paragraphs 75 to 76 of the AR Judgment and made the submission that there appears to be a misunderstanding by the Court that H had failed to provide LECL's audited reports when in fact H had provided all of them for the financial years ended 2017 to 2021. At the trial in June 2022, the audit for the 2022 financial year was still ongoing. H therefore provided the balance sheet and income statement up to 30 September 2022 during the trial adjournment in November 2022. 48. As to W's concern over the independence of LECL's auditor E&M, H submitted that W ought to have applied for leave to adduce expert evidence on the valuation of LECL which W had not done so. W should not be allowed to go behind the audited financial statement of LECL. 49. At paragraphs 71 (11) and (12) of the AR Judgment, when this Court was making its observation on H's earning capacity, there was extracted the audio transcript of H's evidence during cross examination by W's Counsel, where H first asserted that W had never asked for bank statements of LECL (which W disagreed). H then went on to try and justify his refusal on disclosure by saying that W had asked for disclosure "as part of a massive expedition" (which W also disagreed). H even went further to try and justify his refusal by proclaiming that he would have happily provided disclosure had W asked for it earlier

before Judge Melloy but W had not asked. 50. At paragraph 72 of the AR Judgment, there was extracted the audio transcript of W's evidence in chief when she was asked upon the audited accounts that had been produced by H in these proceedings. W in her answers confirmed she had asked H for audited financial statements even during the marriage but it was very difficult to get any documents from H. 51. At paragraph 73 of the AR Judgment, there was extracted the audio transcript of evidence when it was put to W by H's Counsel that she wanted to be difficult rather than wanted to turn around the business of LECL to a successful business. W disagreed and provided an explanation as to the lack of valuation of LECL as she trusted H that it was a loss-making company. 52. It was against this backdrop that the Court concluded its views at paragraphs 75 to 76 of the AR Judgment that H's attitude on disclosure was not forthcoming, H was not co-operative in providing proper accountant's or auditor's report or, to the very least, to produce LECL's bank statements. Thus, paragraphs 75 to 76 of the AR Judgment should be read in their proper context. 53. As to the submission of W not seeking expert evidence on valuation of the business of LECL, this does not even get off the ground given my finding of fact over H's unwillingness and un-operative stance in his disclosure of any of the bank statements of LECL not having been overturned or disturbed. How could expert valuation be made without H's assistance and co-operation? 54. It remains for me to repeat that, in any event, H was unable to show any of his offers made for settlement exceeded the AR Judgment. With all the findings carefully considered, I stand by my decision that the overall impression of W being the "winner" in the ancillary reliefs trial stands. 55. For all the above reasons, I find that none of the 5 grounds of application could assist H's application to vary the costs order nisi dated 31 October 2024. Costs 56. I decided that H should bear W's costs of his application to vary the costs order nisi, including all costs reserved (if any), to be taxed if not agreed.

Orders

57. I now grant the following Orders :- H's Summons dated 14 November 2024 be dismissed; H do pay to W all costs of and incidental to his application for variation of the costs order nisi; including all costs reserved (if any), to be taxed if not agreed; The costs order nisi (including Certificate for Counsel) be made absolute. (George Own) District Judge Miss Vivien Leung instructed by Messrs. Holmes Lawyers, Solicitors for the Petitioner Messrs. Karas So LLP, Solicitors for the Respondent

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