CITATION: Taiga Building Products Ltd. v. Classic Fire Protection Inc., 2021 ONSC 676
COURT FILE NO.: CV-16-496
DATE: 2021 01 28

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Taiga Building Products Ltd., Plaintiff

AND:

Classic Fire Protection Inc., Vipond Inc., John Doe and ABC Corporation Inc., Defendants

BEFORE: Conlan J.

COUNSEL: J. Schacter, for the Plaintiff

G. Banks, for the Defendant, Classic Fire Protection Inc.

R. Betts, for the Defendant, Vipond Inc.

HEARD: January 25, 2021

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ENDORSEMENT

I. Introduction

The Motions

[1] There are two Motions before the Court.

[2] The first, dated July 10, 2019, on behalf of the Defendant, Classic Fire Protection Inc. ("Classic Fire"), asks for summary judgment, dismissing all claims and crossclaims against Classic Fire. The argument is that the Claim advanced by the Plaintiff, Taiga Building Products Ltd. ("Taiga"), is barred as it was issued after the expiration of the applicable two-year limitation period.

[3] The second, dated September 20, 2019, on behalf of the Defendant, Vipond Inc. ("Vipond"), also asks for summary judgment, dismissing all claims and crossclaims against Vipond. The argument is the exact same as that advanced by Classic Fire.

[4] Both Motions are opposed by Taiga.

The Action

[5] In the Statement of Claim, issued on February 12, 2016, Taiga requests $400,000.00 in damages, plus interest and costs. In a nutshell, the basis of the Claim is as follows: on or about January 11, 2014, the dry sprinkler system inside Taiga's business premises in Milton, Ontario ruptured and caused a flood and resulting damages. Taiga has sued (i) Classic Fire, who inspected the sprinkler system, and (ii) Vipond, who installed the sprinkler system, and (iii) John Doe and ABC Corporation Inc., who owned the business premises.

[6] Classic Fire defended the action and, in its amended pleading, raised the limitation period defence.

[7] Vipond, likewise, defended the action and raised the limitation period defence.

The Issue

[8] There is no argument on behalf of Taiga that the summary judgment motion procedure is not appropriate here; the only question raised is whether the action was commenced within the applicable two-year limitation period, or whether, at a minimum, a genuine issue requiring a trial exists in that regard: Rule 20.04(2)(a) of the *Rules of Civil Procedure*.

The Burden and the Standard of Proof

[9] Normally, the burden here would rest with the moving parties, Classic Fire and Vipond, to persuade this Court that there is no genuine issue requiring a trial. Effectively, that would mean that this Court would have to be persuaded that Taiga's Claim was commenced after the expiration of the applicable two-year limitation period.

[10] The above is not quite correct, however. As Taiga acknowledges at paragraph 33 of the factum filed on its behalf, there is a presumption that it knew of the matters giving rise to the claim on the day that the act or omission on which the claim is based took place, and it is Taiga's burden to rebut that presumption, on a balance of probabilities: section 5(2) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B (the "Act").

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[11] Taiga admits that the act or omission on which the claim is based (the rupture of the dry sprinkler system and the resulting leak and flood) occurred on January 11, 2014: paragraph 4 of Taiga's factum. Thus, that is, admittedly, the presumptive start date of the two-year limitation period provided for in section 4 of the Act (although, it appears that both Classic Fire and Vipond would be content with the start date being January 13, 2014, as the 11th was a Saturday, and the rupture was not observed by anyone at Taiga until Monday morning, the 13th, when employees reported for work).

[12] Taiga asserts that the two-year limitation period, however, did not commence until February 28, 2014, the date that it received its expert's report. That is the date that the claim was truly "discovered" by Taiga, within the meaning of section 5(1) of the Act, argues the Plaintiff.

[13] The burden is on Taiga, therefore, on a balance of probabilities, to prove that the two-year limitation period started to run on or after February 12, 2014 (given that the Claim was issued on February 12, 2016).

<u>The Positions of the Parties</u>

[14] In its factum, an overview of Classic Fire's position can be found at paragraphs 1 through 9, reproduced below.

> 1. This is a motion by the defendant, Classic Fire Protection Inc. ("Classic"), for summary judgment dismissing the claim brought by the plaintiff, Taiga Building Products Ltd. ("Taiga"). It is Classic's position that the within action was commenced more than two years after the claim was discovered by Taiga.
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> 2. On Saturday, January 11, 2014, a tee junction forming part of a dry sprinkler system (the "Dry System") in Taiga's unheated warehouse burst (the "Warehouse"). There was a resulting escape of water and damage was caused to Taiga's property. The water escape and damage was discovered on Monday January 13, 2014, when Taiga employees returned to work.
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> 3. On January 22, 2014, a sprinkler expert attended the Warehouse and met with the plaintiff's general manager, Les Rewegan, to investigate the loss. It was determined that a low elevation tee junction in an unheated space adjacent to an overhead exterior door had burst, with the most likely explanation being that water had become trapped in this low point and froze. The expert also learned from Taiga during the site visit that in 2012 Classic had installed heating and insulation on low points on the dry sprinkler system in another warehouse owned by Taiga to address similar freezing issues.

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> 4. The expert emailed himself later the same day and stated, *inter alia*, **this is really a problem with installation and maintenance**, in that the burst low point was not heated or insulated. The plaintiff was aware that the defendant, Vipond Inc., had installed the Dry System and that Classic maintained it.
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> 5. On cross-examination, the expert admitted to discussing the issues with the Dry System with Mr. Rewegan.
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> 6. Over the course of the next few weeks, additional evidence was gathered by Taiga and provided to the expert. In addition, during this same time period, recommendations were made to Taiga by the expert on avoiding future incidents, and Taiga commissioned Classic to effect these recommendations. Lastly, it was determined that in 2013 Classic had noted it would be prudent to insulate and heat the Dry System low points in the Warehouse but it did not appear that Classic had made an express recommendation to the plaintiff in this regard.
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> 7. It is Classic's position that Taiga was aware of enough material facts on which a claim for damages could be based by January 22, 2014.
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> 8. Taiga's position is that it did not have adequate knowledge on which it could base a claim prior to receiving the expert's report on February 28, 2014. However, it is clear from the documentary evidence that a significant amount of evidence was developed with respect to liability well before February 28, 2014.
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> 9. The within action was commenced by Taiga on February 12, 2016 and it is the position of Classic that this was beyond the two-year limitation period provided for under the *Limitations Act, 2002*.

[15] As for Vipond, attention should be drawn to paragraphs 1 through 9 of its factum, set out below.

> 1. The defendant, Vipond Inc. ("Vipond"), brings this motion for summary judgment seeking to dismiss the plaintiff's claim on the basis that it was commenced outside of the applicable 2 year limitation period.
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> 2. On Saturday, January 11, 2014 water escaped from a dry pipe sprinkler at property municipally known as 520 Harrop Drive in Milton, Ontario ("the premises"). The plaintiff, Taiga Building Products Ltd. ("Taiga"), operated a warehouse/office space at the premises and allegedly sustained damages as a result of the escape of water.
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> 3. The loss was discovered by Taiga on Monday, January 13, 2014. Taiga notified its insurer who appointed Malik, Giffen & Burnett Claims Consultants ("MGB") to adjust the claim. MGB retained Giffen Koerth, an engineering firm, on January 20, 2014 to assist in determining the cause of the loss.
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> 4. Giffen Koerth attended the premises on January 22, 2014 and at that time noted in their file that the failure was associated with both installation and maintenance issues. It was also known at that time that Vipond had installed the sprinkler

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system and that the defendant, Classic Fire Protection Inc. ("Classic Fire") was responsible for maintenance.

5. Giffen Koerth discussed the sprinkler system issues with Taiga on January 22, 2014 and reported out on same to MGB on January 23, 2014.

6. A claim is discovered when a prospective plaintiff has material facts sufficient to make allegations of negligence. The precise cause of the loss is not required. A formal opinion from an expert is not required. Certainty is not required.

7. Vipond states that the plaintiff had the requisite knowledge to make a claim as of January 22, 2014. It did not issue a Claim until February 12, 2016 and as such did not comply with the 2 year limitation period applicable under the *Limitations Act, 2002*.

8. The plaintiff has the evidentiary onus to prove that discoverability shifts the commencement date for the limitation period to February 12, 2014. Vipond submits that the plaintiff has failed to discharge this burden.

9. Vipond submits that the evidence before the Court supports the conclusion that the limitation period was missed and therefore this is no genuine liability issue requiring a trial. Accordingly, Vipond requests that summary judgment be granted.

[16] The position of Taiga may be summarized by having regard to paragraphs 1 through 3 and 60 of the factum delivered on its behalf, reproduced below.

1. This action arises from a water leaking incident at the Plaintiff's premises, first observed on January 13, 2014. The Plaintiff's insurer promptly engaged a claims adjuster and within one week of the incident, an expert was retained to investigate the cause of the loss. Within a month the expert began authoring his expert report which was delivered expeditiously on February 28, 2014, just 46 days after the loss. Relying on that expert report, the Plaintiff had discovered the basis of its claim against the Defendants, as contemplated in the Limitations Act, 2002, and subsequently issued this claim inside of two years of receiving the report.

2. The Defendants, Classic Fire Protection Inc. ("Classic Fire") and Vipond Inc. ("Vipond"), bring motions for summary judgment, seeking to dismiss the action on the basis that the claim was commenced outside of the applicable limitation period. The Defendants argue that this claim had to be issued before the Plaintiff received the expert report and in effect the Plaintiff should have relied on the expert's initial theories concerning the loss.

3. The Plaintiff opposes the motion, maintaining that the action, issued on February 12, 2014 was brought within the applicable two year limitation period, which did not being to run until receipt of the expert report, which was prepared in a timely and diligent manner.

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60. While it is agreed that absolute certainty is not required on the part of the plaintiff, or their expert, in order to trigger a limitation period, as was stated by Mr. Justice J.W. Sloan, "…surely a degree of certainty is."(Footnote: 63 *Gateman Milloy v. Brownstone Masonry*, 2013 ONSC 1131 (CanLII), Taiga's Book of Authorities, Tab 13.) When a case required an expert, that expert should not sit idle, but rather should and must act with reasonable diligence in reaching an opinion. In the within action, Sparling was retained 6 days after the loss was discovered, attended the premises 2 days later to start his investigation, over the following weeks gathered documents, made inquiries, performed his analysis, and provided an opinion on February 28, 2014. The Statement of Claim was issued on February 12, 2016, within the two year limitation period of when the plaintiff's cause of action arose against the Defendants.

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II. Analysis and Conclusion

[17] For the reasons that follow, I have determined that the Motions must be granted as the Claim was commenced after the expiration of the limitation period.

[18] I agree with Mr. Schacter, counsel for Taiga, that the disposition of the two Motions before this Court depends on a fact-driven analysis. More accurately, it depends on the application of the law to the facts, as there is no dispute among the parties about (i) the law of summary judgment, or (ii) whether this case is capable of being decided on a summary judgment motion, or (iii) the applicable limitation period, or (iv) the leading jurisprudential principles about when a limitation period starts to run.

The Law

[19] All parties agree on the test for summary judgment, and counsel spent no time on that in their oral submissions, thus, the focus below is exclusively on the law as it pertains to the test for discoverability of a claim, within the meaning of section 5(1) of the Act. That legislative provision is set out below.

5 (1) A claim is discovered on the earlier of,
(a) the day on which the person with the claim first knew,
(i) that the injury, loss or damage had occurred,
(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

[20] All counsel have been very helpful to the Court with regard to the leading cases, and I would summarize the most important principles that are relevant to our facts as follows:

(i) it is not required that the plaintiff know the precise cause of its injury or damage before the limitation period starts to run, but rather it is sufficient if the plaintiff knows enough facts on which to base its allegation of negligence against the defendant [*McSween v. Louis*, 2000 CanLII 5744 (ONCA), at paragraph 51];

(ii) "[t]he knowledge required to start the limitation running is more than suspicion and less than perfect knowledge"; "[i]t is reasonable discoverability – rather than the mere possibility of discovery – that triggers a limitation period" [Graeme Mew, Debra Rolph & Daniel Zacks, *The Law of Limitations*, 3rd ed. (Toronto: LexisNexis, 2016), at article 3.50, quoted approvingly in *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47 (CanLII), at paragraph 41];

(iii) in determining the date that the claim was discovered and the limitation period started to run, "[w]hile absolute certainty is not required, surely a degree of certainty is" [*Gateman Milloy Inc. v. Brownstone Masonry*, 2013 ONSC 1131 (CanLII), at paragraph 22];

(iv) an expert's opinion is not a prerequisite to the commencement of the limitation period clock, but rather the key question is whether the prospective plaintiff knew enough facts on which to base an allegation of negligence against the defendant, or put another way whether there were "*prima facie* grounds to infer that the acts or omissions were caused by the party or parties identified" [*Lawless v. Anderson*, 2011 ONCA 102 (CanLII), at paragraphs 21 and 23; *Kowal v. Shyiak*, 2012 ONCA 512 (CanLII), at paragraph 18];

(v) there are some cases, however, where an expert's opinion, or even an expert's report, is/are necessary in order for the plaintiff to have been said to have "discovered" its cause of action, and the fact that the ultimate expert opinion obtained is no different than the initial or preliminary theory known to the plaintiff earlier does not automatically "move the limitation period backwards" [*Gordon Dunk Farms Ltd. v. HFH Inc.*, 2017 ONSC 6683 (an unreported decision of Lemon J., sitting in Guelph, dated November 7, 2017, at paragraph 35];

(vi) one instance where it might be said that an expert's opinion is necessary is a case where further investigation is required in order to bring

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clarity to the cause of the injury or damage and, at the same time, discount other non-tortious explanations for the loss or injury, such as an accident [*Hansen v. Strone Corporation*, 2013 ONSC 7130 (CanLII), at paragraph 28];

(vii) especially in cases where the subject matter is relatively complex, simply put, "[s]ometimes the discovery of the acts or omissions which constitute liability requires expert analysis of the circumstances", and in those cases "[i]t cannot be said that the plaintiff has a discoverable cause of action until he has obtained an expert opinion confirming the facts which give rise to the cause of action" [*Burtch v. Estate of Kyle Barnes*, 2005 CanLII 33583 (ON SC), at paragraph 18; appeal allowed in part but not on an issue that is germane to the decision herein]; and

(viii) in determining the start date for the limitation period, it is not determinative that the injured party sent a letter to the prospective defendant which put the defendant on notice of an intended claim (*Gordon Dunk Farms, supra*, at paragraphs 40-43).

<u>The Law as Applied to our Facts</u>

[21] I accept the evidence of Mr. Robert Sparling ("Sparling"), an engineer retained by the insurance adjuster handling the claim reported by Taiga, that, as of February 10, 2014, he had not formed a <u>conclusive</u> opinion on the cause of the dry sprinkler system failure that had occurred on the 11th of January (paragraph 13 of Sparling's affidavit sworn on August 1, 2019).

[22] I also accept Sparling's evidence that, based on his January 22nd site-visit alone, he did not, that day, form an opinion on the cause of the dry sprinkler system failure (paragraph 6 of the said affidavit).

[23] Those findings are not the end of the inquiry, however, for two reasons. First, a "conclusive" opinion is not required to start the limitation period clock. Second, what was known to Taiga is more important than what was known to Sparling.

[24] So, what was known to Taiga prior to February 12, 2014? In my view, quite a lot.

[25] Important to this Court's decision are (i) the documents found at Exhibit C to Sparling's affidavit referred to above, and (ii) pages 27-28 of the transcript of the cross-examination of Sparling that occurred on November 1, 2019.

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[26] With regard to item (i), we know that Sparling sent email correspondence to Mr. Les Rewegan ("Rewegan"), a person in authority at Taiga, that was received by Rewegan on January 28, 2014. We also know that the said correspondence was originally prepared by Sparling on January 23rd, the day after his initial site-visit.

[27] Although, in that correspondence, Sparling requested further documentation, in my opinion it is clear that the said correspondence, when examined in the context of what precipitated it, provided to Taiga everything that it needed to know in order to start the limitation period clock.

[28] In its plain wording, the said correspondence received by Taiga on January 28th warned the Plaintiff of additional failures of the dry sprinkler system caused by ruptured piping that contains accumulated water that has frozen.

[29] Sparling was clear during his cross-examination that his said warning to Taiga (his opinion that drains may accumulate water and must be prevented from freezing) related to the specific rupture of the dry sprinkler system that occurred on January 11th (see, in particular, the bottom of page 28 of the transcript).

[30] On the basis of that evidence, I find that by the 23rd of January (when Sparling prepared the email correspondence addressed to Rewegan), Sparling was pretty sure that the sprinkler system failure that had occurred on January 11th was caused by accumulated water in the piping that then froze and burst or ruptured.

[31] By "pretty sure", I am attempting to use common parlance that is more useful to the parties, especially Taiga, than a bunch of expressions for which a course in lexicology is required. What I mean is a degree of reasonable confidence that is sufficient to satisfy the ingredients of section 5(1) of the Act.

[32] I also find that Sparling's commentary on January 23rd was further to the discussion that he had with Rewegan the day before, on the 22nd of January. That is clear from the plain wording of the email itself.

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[33] It is not denied by Rewegan that he spoke with Sparling on January 22nd about what Sparling thought had caused the failure. When Rewegan was questioned by Mr. Banks on November 1, 2019, he simply could not remember (see pages 4-7 of the transcript). I think that Rewegan was being truthful when he said that, and I prefer that evidence over anything to the contrary that is contained in his affidavit.

[34] The only reasonable inference from all of the above, therefore, is that Sparling told Rewegan on January 22nd that he thought that the failure was probably caused by water having accumulated in the piping, and then freezing, and then bursting.

[35] That is consistent with Sparling's notes contained at pages 84 and 85 of volume 1 of Classic Fire's Motion Record.

[36] That is consistent, further, with Taiga's quick written notice to Classic Fire dated January 24th (page 410 of volume 3 of Classic Fire's Motion Record), which notice was from Rewegan as general manager of Taiga and which clearly and unequivocally stated that its insurers intended to hold Classic Fire responsible for the damages sustained by Taiga as a result of the deficiencies that had been discovered in the sprinkler system that led to the failure that occurred on January 11th.

[37] That is consistent, also, with Sparling's evidence during his questioning, specifically, with reference to the transcript, at pages 13-14 (no urgency to microscopically examine the broken pipe fitting), 18-20 (knowledge, on January 22nd, of the cause of the failure and of the respective roles of Classic Fire and Vipond), 25-26 (knowledge, on January 22nd, of the installation and maintenance issues), and 30 (knowledge, on January 22nd, of the cause of the failure).

[38] And, finally, that is consistent with what was recorded by the insurance adjuster, Mr. Prefontaine, in his docket entry for January 23rd – "[d]etailed discussion with R. Sparling re probable cause".

[39] I agree with Mr. Schacter that Sparling continued to investigate and marshal further evidence after January 23rd, as evidenced by a review of the documentation contained at pages

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22-23 of Taiga's Motion Record, for example, but that does not change the fact that, by January 28th at the latest, Taiga had discovered its claim as against both Defendants, within the meaning of section 5(1) of the Act.

[40] By January 28th, Taiga had not perfect knowledge, nor conclusive proof, nor absolute certainty, but it surely had more than suspicion and a sufficient degree of certainty that the failure of the dry sprinkler system that had occurred on January 11th was caused by a ruptured pipe that had accumulated water which then froze – an act or omission caused or contributed to by the known installer (Vipond) and/or the known maintenance provider (Classic Fire).

[41] I agree with Mr. Schacter that the "notice" letter sent by Taiga to Classic Fire is in no way determinative. I have not treated it as such. It is just one factor in the overall analysis.

[42] I agree with Mr. Schacter that some explanation from an expert was required here, but that explanation was given to Taiga by January 28th, long before the date of the final report which was delivered a month later.

[43] I agree with Mr. Schacter that what Sparling formed almost immediately, on January 22nd, was an impression or a theory that was not conclusive and which he wanted to investigate further, but that does not change the fact that Taiga had, by January 28th, the requisite facts to start the limitation period clock.

[44] I agree with Mr. Schacter that Sparling's final report dealt with other issues that serve to illustrate that his investigation up to that point was fruitful, such as ruling out responsibility on the part of Taiga itself, the pipe manufacturer, and/or the alarm company. I respectfully disagree, however, that our facts are similar to those in *Hansen v. Strone*, *supra*. In that case, there was very good reason to await the findings of a fulsome independent investigation into the cause of the fire because accident was a live issue; in fact, the fire chief had ruled the fire "undetermined accidental" (paragraph 5 of the decision). Hence, in that case, it would have been irresponsible for the plaintiffs to have alleged negligence on the part of anyone until such time as sufficient particulars to ground such a claim were known (paragraph 28 of the decision).

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[45] In our case, the totality of the evidence up to January 28th and known to Taiga pointed to nothing else except Classic Fire and/or Vipond being responsible for the ruptured pipe.

[46] I agree with Mr. Schacter that Sparling was never challenged on his evidence that he formed no conclusive opinion by February 10th. "Conclusive" misses the point, however, on the facts of our case.

[47] I agree with Mr. Schacter that the consistency between Sparling's initial findings on January 22nd and his formal findings as contained in his February 28th report does not necessarily "move the limitation period backwards", to borrow the expression used by Lemon J. in *Gordon Dunk Farms, supra*. I have not based my decision on that consistency.

[48] Having addressed all of the significant submissions advanced on behalf of Taiga, despite Mr. Schacter's able argument, I conclude that the Claim was not commenced within the applicable two-year limitation period, as the said period started to run no later than January 28, 2014, and the Claim was not issued until February 12, 2016. I am further satisfied, on a balance of probabilities, that there is no genuine issue requiring a trial in that regard.

[49] Consequently, the Motions are granted, and the Claim is dismissed as against both Classic Fire and Vipond. The crossclaims are also dismissed.

[50] Should the parties be unable to resolve the issue of costs, I may be spoken to through the Superior Court trial coordinator's office in Milton. We can deal with costs in writing, on a schedule agreed to between counsel, or in a brief Zoom hearing, whichever is preferred. Failing an agreement, I will decide which method to employ.

[51] I thank all counsel for their assistance in this matter.

("*Original signed by*")

Conlan J.

Date: January 28, 2021

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