Reasonableness – a fundamental aspect of a lawyers' duty to the court and the administration of justice.

Australian Disputes Centre

Justice Robert McClelland

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Good Evening,

Firstly I'd like to begin by acknowledging the Traditional Owners of the land on which we meet today. I would also like to pay my respects to Elders past and present. Secondly, I would like to thank the ADC for inviting me to speak here today on the topic of reasonableness and how reasonableness is a fundamental aspect of a lawyers' duty to the court and the administration of justice.

Speaking at the 2017 Queensland Legal Profession Dinner, the president of the Queensland Law Society, Ken Taylor stated;

> When we are admitted, we take an oath that we will, first and foremost, discharge our duty to the court and the administration of justice. We do what is right-not what is popular…At every turn, when rights are threatened or abused; you will find a lawyer standing between abusers and their victims.

The question is - what is a lawyer's duty to the court and to the administration of Justice. In most jurisdictions around Australia, relevant legislation or court rules confirm that a fundamental part of the duty is to facilitate the just resolution of disputes.

The overarching purpose

Take, for instance, section 37M of the ***Federal Court Of Australia Act 1976*** which provides:

(1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:

(a) according to law; and
(b) as quickly, inexpensively and efficiently as possible.

(2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:
(a) the just determination of all proceedings before the Court;
(b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
(c) the efficient disposal of the Court's overall caseload;
(d) the disposal of all proceedings in a timely manner;
(e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

Note the emphasis on the words "to facilitate the just resolution of disputes" not to prepare and present a case in court irrespective of the costs for the litigant.

And there are sound reasons why this should occur. Speaking extra judicially, Justice Kenneth Haines AC said in a paper entitled "Restricting Litigiousness";[1]

> [It] is as well to state some obvious and well accepted propositions about why we should want to restrict litigiousness. Restricting litigiousness, or at least limiting the amount of contested litigation, must be one of the fundamental aims of any developed legal system. Anyone who has had direct experience of litigation knows all too well the costs that it exacts from the participants. Those costs are not limited to time and money. The costs in time and money are real and obvious, but the emotional cost of litigation for those who participate in it is often equally pressing.

I appreciate that in many ways I am preaching to the converted. However, the purpose of this presentation is emphasise that, with a bit more determination on the part of reasonable practitioners, backed up by a supportive judiciary, we can hasten the change in the litigious culture that still plagues our courts - particularly in Sydney.

[1] Haine J, "Restricting Litigiousness" 13th Commonwealth Law Conference Melbourne, Melbourne, 13 April 2003.

The court's expectations in respect to reasonable conduct before commencement of proceedings

Firstly, relevant legislation and court rules require that, before coming through the door of the court - in the absence of urgency or other justifiable reason, lawyers will have advised and assisted their client to have made a genuine attempt to resolve the matter.

The Civil Disputes Resolutions Act

This is emphasised in the ***Civil Disputes Resolution Act*** 2011 (CDRA), which applies to non-excluded matters commenced in the Federal Court of Australia and the Federal Circuit Court of Australia.

The object of that CDRA is stated in s 3 as follows:

> The object of this Act is to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted.

In the pursuit of this object, s 6(1) of the Civil Dispute Act provides that:

> An applicant who institutes civil proceedings in an eligible court must file a genuine steps statement at the time of filing the application.

Along with this, section 7(1) of the CDRA contains similar provisions in relation to a respondent to a proceeding.

Under section 9 of the CDRA, a lawyer acting for a person who is required to file a genuine steps statement has a duty <u>to advise</u> that person of that requirement and <u>to assist</u> that person to comply with it.

The consequences for the parties and their lawyers in failing to comply with these obligations are set out in s 12 of the CDRA. The failure can be taken into consideration by the court in awarding costs against a party or, indeed, the parties' legal representatives if they have failed to comply with their obligations under the act. As noted, this includes the obligation on the part of the legal advisor to both advise and assist.

The Explanatory Memorandum to the Civil Dispute Resolution Bill 2010 explained that a rational of the legislation was not simply to encourage parties to engage in pre-action dispute resolution. A further reason was that it would assist in case management. The explanatory memorandum states;

> For example, if genuine steps have been taken and have resulted in issues being identified and positions clarified, a court may be in a better position to decide that court ordered mediation would impose unnecessary costs and delay. Early listing for hearing will be the best and most cost efficient and just outcome.
> Alternatively, if a court is not satisfied with the steps already taken, further case management directions may be appropriate to ensure parties explore options for resolving or narrowing the dispute.

In other words it was anticipated that, to get the greatest benefit from the pre-action procedures, required the court to become actively engaged in case management at an early stage in the proceedings.

Similar obligations exist under the Family Law Act and the Family Law Regulations

In the family law jurisdiction, there are comprehensive obligations on parties to attempt to resolve disputes concerning parenting before commencing proceedings. My focus is on property proceedings. In that respect similar provisions to those set out in the CDRA are contained in the Family Law Rules.

The rules are comprehensive. However, in my view, there remain two significant deficiencies in the Family Law Rules.

The first is that parties are not required to advise the court whether they have or have not complied with the pre-action procedures. The second deficiency is that, as the Family Court of Australia and the Federal Circuit Court of Australia have developed separate rules, there is currently no obligation on parties and practitioners to take genuine steps to attempt to resolve property proceedings before commencing an action in the Federal Circuit Court of Australia.

As previously noted, paradoxically that obligation does exist, however, in respect to matters not involving family law that are commenced in the Federal Circuit Court.

The Attorney General who introduced the Civil Disputes Resolution Bill 2010 has been criticised for failing to apply the CDRA to Family Law Matters[2]. It has been argued that extending the same principles across the Federal Court of Australia, the Family Court and the Federal Circuit Court of Australia would have made it easier for practitioners to understand their obligations and such uniformity would have had a greater impact in changing culture. I was that Attorney General and my subsequent experience satisfies me that the criticism is justified.

For reference, the relevant family law rules are as follows.

Before starting a family law property case, each prospective party is required to comply with the pre-action procedures which are set out in Schedule 1 of the Family Law Rules 2004 (Cth) ("the Rules").

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(2) The objects of the pre-action procedures are:

(a)to encourage early and full disclosure by the exchange of information and documents;

(b) to provide the parties in dispute with a process to help them avoid legal action by reaching a settlement;

(c) to provide a procedure to resolve cases quickly and limit costs;

(d) to help the efficient management of the case and, if proceedings become necessary, by clear identification of the real issues so as to reduce the duration and cost of the proceedings; and

(e) to encourage parties, if proceedings become necessary, to seek only those orders that are reasonably achievable on the evidence[3].

Subject to specified exceptions, parties must attempt to resolve the dispute using dispute resolution methods; exploring options for settlement and complying as far as practicable with the duty of disclosure[4].

The court may take into account a party's failure to comply with a pre-action procedure when making an order. This includes an order in relation to costs[5].

The court may also consider the extent to which a party has complied with pre-action procedures where a party applies for relief from certain rules or orders[6].

Significantly orders can be made against a lawyer if they fail to comply with a pre-action procedure[7].

The pre-action procedures also impose the additional obligations on lawyers, including to:

3 Family Law Rules 2004 (Cth)sch 1, pt 1, s 1(5) ('Family Law Rules'.
4 Ibid r 1.05, by reference to cl 1(1) of sch 1.
5 Ibid r 1.10(2)(d).
6 Ibid r 11.03.
7 Ibid r 19.10(1)(b).

- advise clients of ways of resolving disputes without starting legal action;
- advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty;
- ... endeavour to reach a solution by settlement rather than start or continue legal action;
- notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement if [it is], in the lawyer's opinion …reasonable …;
- in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay; and
- advise clients of the estimated costs of the legal action[8].

Lawyers are also required to 'actively discourage clients from making ambit claims or seeking orders that the evidence and established principles, including recent case law, indicates is not reasonably achievable'[9].

There is a similar obligation imposed before filing an application for interim relief. Rule 5.03 provides;

> (1) Before filing an application seeking interim, procedural, ancillary or other incidental orders, a party must make a reasonable and genuine attempt to settle the issue to which the application relates.
>
> (2) An applicant does not have to comply with subrule (1) if:
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> (a) compliance will cause undue delay or expense;
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> (b) the applicant would be unduly prejudiced;
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> (c) the application is urgent; or
>
> (d) there are circumstances in which an application is necessary (for example, if there is an allegation of child abuse, family violence or fraud).

[8] Ibid sch 1, pt 1, ss 6(1)(a)–(f).
[9] Ibid sch 1, pt 1, s 6(1)(i).

> Note: The court may take into account a party's failure to comply with subrule (1) when considering any order for costs (see subsections 117(2) and (2A) of the Act).

I will subsequently say a little more about the obligation to "make a reasonable and genuine attempt to settle the issue."

Sanctions for failing to comply with the pre-action protocols

Even before the legislation to which I have referred it was the case that, in some circumstances, a failure to negotiate was a relevant consideration in determining whether a costs order be made (see for example G*reedy & Greedy* (1982) FLC 91-250, referred to in *Jensen & Jensen* (1982) FLC 91-263).

The CDRA and the Family Law Rules now provide a framework for considering and if necessary sanctioning a party or parties or, indeed, their legal advisors, for failing to comply with the genuine steps obligation.

In terms of the family law jurisdiction, in *Cabasso & Cabasso* [2007] FamCA 511 (5 April 2007), Barry J held that a party's failure to comply with the pre-action procedures set out in the Family Law Rules was a relevant factor in awarding costs against a party. In that case his Honour ordered the wife to pay fifty percent of the husband's costs in respect to an application filed by the wife. In so doing his Honour said;

> The attitude of the solicitors for the wife was more reminiscent of a gun fight at the OK Corral than a practitioner and a client prepared to comply with both the letter and the spirit of **pre-action** procedures set out in the legislation and the rules designed to forestall the on-set of litigation. There was no urgency about this matter whatsoever. The parties were financially comfortable. Who needs more litigation? The parties do not; the children do not; the Court does not; lawyers do not."

There are indications that the Federal Court is prepared to apply the genuine steps provisions of the CDRA with a little more zeal than has occurred in the Family Court.

In *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys [2012] FCA 282 (23 March 2012)*[10] Reeves J found that the parties had not made an attempt to resolve what was, in the Court's eyes, a relatively simple matter[11].

His Honour held that the parties' failure to comply with the CDRA should be taken into consideration in determining the question of costs of the proceedings. His honour was critical of both parties and their legal representatives for failing to comply with their obligations to advise and assist their clients in relation to the requirements of the Act.

His Honour noted that, in light of his criticism of the role of the lawyers in that case, there was an obvious conflict likely to arise between the interests of the clients and that of their respective lawyers. His honour therefore directed;

- That each of the two lawyers concerned is to provide a copy of these reasons to his respective client and advise it to seek independent legal advice on the question of the costs of these proceedings.
- That the two lawyers concerned be joined as parties to these proceedings for the limited purpose of determining the question of the costs of these proceedings.

Significantly, his honour stated;

> I intend to direct the Registrar to provide a copy of these reasons to the Queensland Law Society, the Bar Association of Queensland and the Legal Services Commission, so that those bodies may take such action as they consider appropriate in relation to the conduct of the two lawyers concerned.

The Northern Territory case *of Spadaccini v Grice* [2012] NTSC 41 is also interesting in that Barr J held that the plaintiff had not complied with a pre-

[10] http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2012/282.html

[11] (paragraph 4)

action protocol set out in Practice Direction 6 of 2009. The reasons included the failure of the Plaintiff to provide the Defendant with evidence of loss and damage and also, interestingly, in unreasonably refusing a request to attend mediation.

The duty after commencement of proceedings

The Federal Court of Australia Act

The obligation to act reasonably and, specifically, to explore potential settlement options does not end once the court case commences.

In terms of Federal Court practice, in addition to those provisions of the CDRA, to which I have referred, there are significant powers in respect to case management including specific obligations on parties to assist the court to achieve the overarching purpose to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

These powers are set out in Pt VB of the Federal Court of Australia Act. Section 37N(4), which is contained within that part provides that:

> In exercising the discretion to award costs in a civil proceeding, the Court or a Judge must take account of any failure to comply with the duty imposed by subsection (1) or (2).

The duty referred to in this subsection is set out in subs 37N(1) and (2) as follows:

> (1)The parties to a civil proceeding before the Court must conduct the proceeding (<u>including negotiations for settlement</u> of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.

(2) A party's lawyer must, in the conduct of a civil proceeding before the Court (including negotiations for settlement) on the party's behalf:

(a) take account of the duty imposed on the party by subsection (1); and

(b) assist the party to comply with the duty.

The totality of the definition of "overarching purpose" is set out in s 37M(1) of the FCA Act to which I have referred at the commencement of this presentation.

Finally, it should be noted that s 37N(5) of the FCA Act provides:

> If the Court or a Judge orders a lawyer to bear costs personally because of a failure to comply with the duty imposed by subsection (2), the lawyer must not recover the costs from his or her client.

Section 43(3)(f), of the FCA Act, is to similar effect in providing that the Court "order a party's lawyer to bear costs personally."

Family Law Act and Rules

Similar obligations are placed on parties, and practitioners in the Family Law act and the Family Law Rules.

After a matter is commenced in the Family Court, the Rules require parties to attend a case assessment conference before a Registrar of the Court. Rule 12.03 provides that:

(2) the purpose of the conference is:

a) to enable the person conducting the conference to assess and make any recommendations about the appropriate future conduct of the case; and

b) to enable the parties to attempt to resolve the case or any part of the case by agreement.

At the case assessment conference parties have an obligation to identify areas of controversy about the assets, liabilities, superannuation and financial resources of the parties[12].

The Court publishes guidelines for Registrars in respect to case assessment conferences. The Registrars themselves are trained in respect to mediation. The guidelines identify, among the goals of the case assessment conference, one goal is to clearly identify the parameters of the dispute including identifying issues of agreement and disagreement.

Subject to making an assessment as to the preparedness of the parties and/or their legal advisors willingness and capacity to negotiate, the registrar may facilitate and encourage settlement on one or more issues in dispute or, at least, to attempt to reduce the number of areas of disagreement.

Rule 11.01 of the Rules sets out the general powers of the court in respect to case management and, relevantly, includes "with the consent of the parties, order that a case or part of a case be submitted to arbitration."

Significantly, Section 79(9) of the Family Law Act 1975 (Cth) ("the Act") precludes the Court from making a final order in respect to the distribution of the parties' property unless the parties to the proceedings have attended a conference in relation to the matter (usually a conciliation conference) with a Registrar or Deputy Registrar of the Court. There is, however, a power to waive that requirement in situations of urgency or where the Court considers that it would not be practicable.

[12] Ibid r 12.03(3).

The Rules oblige each party at a conciliation conference to make "a genuine effort to reach agreement on the matters in issue between them.[13]"

I will shortly so a little more as to what constitutes "a genuine effort to reach agreement"

Guidelines for Conciliation Conferences published by the Court state that the goals include to;

- Facilitate and encourage settlement of the case.
- Facilitate and encourage reduction in the number of areas of disagreement.
- Restate areas of agreement.
- Extend parties' understanding of potential benefits of a negotiated settlement to include issues of proportionality and costs.
- Generate options for settlement.
- Revisit and refine issues.

Significantly, the role of the Registrar is not merely facilitative. It can also be advisory in so far as, where agreed issues of fact permit, the guidelines identify that it may be appropriate for the Registrar to provide input as to the likely range of outcome or outcomes if the matter proceeds to trial.

The registrar is also empowered to direct the parties to make compulsory offers of settlement.[14] The Registrar may, if appropriate, also discuss the possibility of

[13] Ibid r 12.07(2).
[14] Ibid r 10.06.

the remaining issues in dispute being referred for external dispute resolution including the possibility of mediation or arbitration.

Consequence of unreasonable conduct during the course of litigation.

Recently, in *Simic & Norton* [2017] FamCA 1007 (11 December 2017) Justice Benjamin, of the Family Court of Australia, took the significant action of referring the solicitors, as opposed to the counsel, in that case to the Law Society in respect to what he regarded as the rendering of legal fees that were potentially disproportionate to the issues in dispute.

A reading of his Honour's decision shows that he was concerned at the conduct of the legal representatives for taking an unnecessarily adversarial approach during the course of the litigation. His Honour referred to the correspondence between the parties lawyers stating that;

> Some of those letters were inflammatory and reflected the anger of the parties or one or other of them. The letters were at times accusatory. They were often verbose and at times involved unnecessary tit for tat commentary. Some of the letters served little or no forensic purposes.
>
> ….
>
> Solicitors are not employed to act as 'postman' to vent the anger and vitriol of their clients.
>
> The solicitors are professional legal practitioners and charge significant hourly rates for their time and skills. To that end, they must ensure that correspondence and communication is necessary, balanced, considered and relevant.

Another example of where a legal practitioners have been criticised for sending inflammatory correspondence is *Wilson v Porada; The Estate of Peter Wolfgang Porada, late of Pericoe (No. 2)* [2017] NSWSC 1362 where Slattery J used powers to cap legal fees in respect to estate litigation. In that case his honour capped the legal fees of the plaintiff to $100,000.

In doing so his Honour noted;

> The Court of Appeal has upheld such orders in family provision cases: *Nudd v Mannix* [2009] NSWCA 327. As Palmer J explained in respect of an earlier iteration of this rule, its purpose is to act as a "brake on intemperate and disproportionately expensive conduct of proceedings": *Re Sherborne Estate (No 2)*; *Vanvalen v Neaves* (2005) 65 NSWLR 268

A relevant consideration was the aggressive nature of the correspondence between the lawyers involved in the proceedings. Specifically, his honour noted that;

> The position taken in the correspondence was unnecessarily aggressive on both sides. The lack of objectivity in the correspondence in my view, has contributed to the overall burden of costs.

The concept of genuine steps to resolve a matter

As you will have noted, the statutory provisions requiring parties to focus on resolving matters in dispute refer to an obligation to take genuine or reasonable steps.

Examples of what constitutes genuine steps to resolve the matter are set out in s 4(1) of the Civil Dispute Act as including:

> (a) notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;

(b) responding appropriately to any such notification;

(c) providing relevant information and documents to the other person to enable the other person to understand the issues involved and how the dispute might be resolved;

(d) considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process;

(e) if such a process is agreed to:

(i) agreeing on a particular person to facilitate the process; and

(ii) attending the process;

(f) if such a process is conducted but does not result in resolution of the dispute—considering a different process;

(g) attempting to negotiate with the other person, with a view to resolving some or all the issues in dispute, or authorising a representative to do so.

Section 4(2) of the CDRA states that the list does not limit steps which may constitute genuine steps.

In the decision of the Full Court of the Federal Court of Australia in *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236[15]. Allsop P (with whom Ipp and Macfarlan JJA agreed) observed that:

> '[The obligation to 'undertake genuine and good faith Negotiations] are not empty obligations; nor do they represent empty rhetoric. An honest and genuine approach to settling a contractual dispute … does not constrain a party. … It requires the

[15] At 623 - See also United Group Rail Services Ltd v Rail Corporation New South Wales (2009) 74 NSWLR 618

> honest and genuine assessment of rights and obligations and it requires that a party negotiate by reference to such': at 638.

While the obligation to undertake genuine and good faith negotiations clearly needs to be applied in the context of the relevant legislation, some guidance as to the characteristics of genuine and good faith negotiation can also be found in the area of Native Title Litigation. The issue was the subject of detailed consideration by Nicholson J in *Marjorie May Strickland & Ors v Minister for Lands & Anor* [1998] FCA 868 (24 July 1998).[16] His Honour stated that fundamental elements of the concept of negotiating in good faith include the following;

> Some preparedness to shift position or compromise in order to achieve agreement appears to be an important part of good faith negotiations in its ordinary meaning: [17]

Further,

> Negotiating in good faith may depend on the conduct of the party when considered as a whole. It generally involves approaching negotiations with an open mind and a genuine desire to reach an agreement as opposed to simply adopting a rigid pre-determined position and not demonstrating any preparedness to shift: [18]

[16] His Honour referred extensively to *Walley v Western Australia* [1996] FCA 490; (1996) 137 ALR 561.

[17] *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) AILR 1165; 59 IR 385.

[18] *Public Sector Professional Scientific Research, Technical, Communications, Aviation and Broadcasting Union v Australian Broadcasting Commission* (1994) 36 AILR 419 at 421.

Taking the reverse approach, his honour suggested that the following are usually regarded as indicia of an absence of genuineness and good faith;

> (i)unreasonable delay in initiating communications in the first instance;
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> (ii) failure to make proposals in the first place;
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> (iii) the unexplained failure to communicate with the other parties within a reasonable time;
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> (iv) failure to contact one or more of the other parties;
>
> (v) failure to follow up a lack of response from the other parties;
>
> (vi) failure to attempt to organise a meeting between the [parties];
>
> (vii) failure to take reasonable steps to facilitate and engage in discussions between the parties;
>
> (viii) failing to respond to reasonable requests for relevant information within a reasonable time;
>
> (ix) stalling negotiations by unexplained delays in responding to correspondence or telephone calls;
>
> (x) unnecessary postponement of meetings;
>
> (xi) sending negotiators without authority to do more than argue or listen;
>
> (xii) refusing to agree on trivial matters, eg: a refusal to incorporate statutory provisions into an agreement;
>
> (xiii) shifting position just as agreement seems in sight;
>
> (xiv) adopting a rigid non-negotiable position;
>
> (xv) failure to make counter proposals;
>
> (xvi) unilateral conduct which harms the negotiating process, eg: issuing inappropriate press releases;

(xvii) refusal to sign a written agreement in respect of the negotiation process or otherwise;

(xviii) failure to do what a reasonable person would do in the circumstances.

Conclusion

Most lawyers instinctively and admirably fulfil their obligation to the court and the administration of Justice. I have not attempted to state the full extent of that duty. One element of that duty, however, includes the obligation to act reasonably in attempting to resolve and/or narrow issues in dispute both prior to and subsequent to commencing litigation.

Relevant case law establishes that adopting a formulaic or ritualistic approach, or engaging in unnecessarily inflammatory and aggressive correspondence rather than genuinely attempting to resolve matters has considerable risk for parties and practitioners alike. This includes the prospect of a practitioner having to show cause to their professional association why their conduct was professional and appropriate.

As noted by Allsop P, as he then was, in *Aiton Australia Pty Ltd v Transfield Pty Ltd*, engaging in genuine and good faith negotiations "requires the honest and genuine assessment of rights and obligations" of the respective parties.

It takes considerable self-confidence and often courage of conviction for a practitioner to advise a client what is an appropriate settlement having regard to the circumstances of the case in the context of relevant legal principle.

However by community standards, Lawyers charge a substantial amount for their services. Their client's, their opponents and the Court are entitled to expect them to show such courage and to take genuine steps to resolve matters in dispute rather than put their client through the financial and emotional drain of protracted litigation.

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