***Goodfellow (as executor) v Warren Boyes & Archer (a firm)* [2024] EWHC 2015 (KB)**

The claimant alleged that the partnership of Warren, Boyes and Archer ('WBA') had acted negligently in the purchase and registration of property in 2006. One of the two partners resigned in 2008, and in 2018 the sole remaining partner, Archer, sold the assets (in the form of the ongoing caseload) to another firm, Roythornes.

The claim form referred to WBA as the defendant, and was posted to one of Roythorne's offices.

The claimant argued there had been good service under Civil Procedure Rules (CPR) r.6.9 or, in the alternative, that the court should exercise its discretion under r.6.15 to retrospectively ratify service.

The court noted that a claim against a partnership was a claim against the individual partners at the date that the cause of action accrued (*Brookes v AH Brooks* [2010] EWHC 2720 (Ch)) and should be brought against the name under which the partnership carried on activity at that date (CPR PD7A, 7.1 – 8.3 and *Planetree Nominees Ltd v Howard Kennedy LLP* [2016] EWHC 2302).

CPR r.6.9 permitted service at the usual or last known residence of one of the individuals being sued in the name of the business, or at the principal or last known place of business. However, it also required that if the claimant had reason to believe that this address was an address at which the defendant no longer resided or carried on business, the claimant must take reasonable steps to ascertain the address of the defendant's current residence or place of business. Since the claimant was seeking to sue a partnership that dissolved in 2008, ascertaining and serving Archer at his residential address was an obvious and easy first point to consider. The claimant must therefore be treated as having failed to take reasonable steps to ascertain the defendant's current residence. Even if it was reasonable for the claimant to treat Roythorne's address as Archer's place of business (although it was not in fact his place of business), the claimant's mandatory task was to take reasonable steps to ascertain his residential address. There was therefore never good service under r.6.9(2).

The court held that '[t]he identification of a valid address for service is the central requirement to have been explored under r.6.9(3) in order for r.6.15 to be engaged in the alternative'. CPR r.6.15 provided the court with a discretion to authorise service by a method or at a place not otherwise permitted, if there was a 'good reason' to do so. However, reliance on r.6.15 was less convincing given that the claimant had failed to take reasonable steps to ascertain Archer's residential address. Only documentation which evidenced obvious and uncontentious facts could allow a party to establish 'good reason' under r.6.15. Here the documentation did not support the interpretation put forward but that claimant, and was certainly sufficiently ambiguous to have required him to seek greater clarification. His failure to do this therefore negated the 'good reason' under r.6.15.

Given the lack of either 'reasonable steps' under r.6(3) or 'good reason' under r.6(15), the dismissed the claimant's application and granted the defendant's application that the court had no jurisdiction to hear the claim because there had not been good service.

***Hamilton v Barrow and another* [2024] EWCA Civ 88**

This case involved an appeal against an order that the defendants were jointly and severally liable to pay the claimant the amount of the sum he had invested in a Ponzi scheme. (The earlier judgment was reported in the APP Legal Update September 2023.) The court had found that there was a partnership, that all three defendants were partners, and that the first two defendants were therefore liable for the fraudulent misrepresentations of the third. The third defendant was refused leave to appeal.

The defendants had invested in an unregulated foreign exchange trading business operated by a third party, Arkian, and then recruited other investors whom they managed. The first two defendants and Arkian shared the commission. The business was subsequently split into sections and defendants continued to manage one section, while the third defendant managed another. The first two defendants argued that it was not a partnership because each section was a separate business; there was no profit sharing, and the leaders of each section had their own clients, managed their own section, and kept separate accounts.

The Court of Appeal rejected this argument. It held that partnership was defined in s1(1) of the Partnership Act 1890 as 'the relation which subsists between persons carrying on a business in common with a view of profit' and that this test had to be applied to the facts. It described as 'unexceptionable' the trial judge's ruling:

> 'that labels are not determinative, that business must be carried on "in common" rather than as separate businesses, that profit sharing is not essential, that no formalities are required and that there is no checklist, albeit that a degree of common interest is needed [and] that the absence of paperwork [on the facts of this case] meant that whether a partnership existed or not had to be inferred from conduct.'

The Court of Appeal noted that clients of the sections were told that their accounts would be managed in the same way as before, and the defendants received commission in respect of investments in each section. The different sections shared banking facilities and there was evidence that the split into section was largely administrative as the business grew larger, rather than being intended to split up the business. The overall impression conveyed was that of a single business.

As to whether the second defendant was a partner, she did not merely provide administrative support to the first defendant, but was clearly involved as a partner. She had left her previous job and her participation in the business then increased. She became a director and 50% shareholder of a company whose account the business used. She took a leading role in meetings, and marketing materials and emails referred to both defendants.

The Court of Appeal emphasised that 'profit sharing is not an essential pre-requisite of partnership'. The 'critical question' was whether a business was carried on "in common". Here, the nature of the relationship involved mutual confidence (*Worbey v Campbell* [2016] CSOH 148 referring to *Whywait v Davison* [1997] 1 Qd R 225) because the participants obviously had to trust each other in their joint reliance on the banking arrangements, and in relation to the interactions with Arkian, with whom direct dealings were not permitted. In those circumstances it was inconceivable that the leader of a section would be able to transfer his role to a third party without the others' agreement. The appeal was therefore rejected.

***Watson v Johnson* [2024] EAT 105**

This case involved a dispute as to the status of the claimant who worked as an accountant in the respondent firm. It was agreed that he had been an employee up to 31 March 2019. He could not become a partner until his affiliate application with the ICAEW was completed, but the ICAEW confirmed to the respondent on 9 April 2019 that it was proceeding with the application, and a draft associate partnership agreement was circulated between the existing equity partners on that date. As from April he was paid an additional £9000 pa and ceased to be on the payroll, to have national insurance or income tax deducted or to receive payments to the auto-enrolled pension scheme. The firm ceased to make national insurance contributions for him, and he was also issued with a P45 stating that his leave date was 23 April 2019.

The Employment Tribunal (ET) had concluded that he was a partner and not an employee, and could therefore not pursue a claim for unfair dismissal or breach of contract. However, it held that he was a worker for the purposes of s230(3)(b) of the Employment Rights Act 1996 and so could claim for unauthorised deduction of wages. The claimant appealed the decision that he was not an employee. The respondent firm did not appeal the decision that he was a worker.

The Employment Appeal Tribunal (EAT) upheld the decision of the ET.

In favour of employment status, the ET had noted the following factors (quoted at para 29 of the EAT judgment):

1) It was agreed that the claimant was an employee prior to 2019, and in practice little changed in terms of duties and responsibilities after his change of status/title to associate partner in 2019.
2) The claimant was required to provide personal service and could not provide a substitute, although the ET considered that this was of limited importance when considering the status of a professional.
3) The claimant was obliged to undertake work for the respondent, and the respondent was obliged to pay him.
4) The claimant was paid a fixed sum each month.
5) The claimant was not required to make a capital contribution, and there was no financial risk for him in participating in the partnership.
6) The claimant had not seen the partnership accounts, and the equity partners did not expect him to be involved in financial decisions.
7) There had been no partnership meetings.
8) The equity partners took all the significant decisions about the firm, the decision to reduce drawings paid to associate partners, and the decision to dismiss the claimant, and none of the associate partners were involved in these decisions.
9) The equity partners did not consider the associate partners to be comparable to them, or that the associate partners needed to enter into an agreement with each other when agreeing the partnership deed. The partnership deed was an agreement between one associate partner and the equity partners, not all the partners.
10) The claimant was provided with childcare vouchers for which deductions were made. Such provision and deductions could only be made for employees.

Against employment status, the ET had noted the following factors (quoted at para 30 of the EAT judgment):

1) The claimant was paid without deductions for PAYE, income tax or NI, and no employer NI contributions were paid. The ET considered that this was a 'significantly more important indicator' here given the claimant's tax expertise.

2) The claimant was issued with a P45, which he did not challenge. Again, the ET considered that this was 'more significant' given the claimant's tax expertise.
3) The evidence showed that the parties clearly believed in late 2019 and early 2020 that the claimant was a self-employed partner.
4) The claimant was no longer entitled to overtime pay after his change in status/title.
5) After the change in status/title, the respondent ceased to pay pension contributions in accordance with the auto enrolment requirements, which it had paid until that change.
6) The respondent retained part of the claimant's drawings against the latter's tax and NI liabilities. However, the lack of clarity regarding the reconciliation of these sums meant that this was a factor given limited weight by the ET.
7) Partners were not required to record or account for the amount of holiday taken, whereas employees were.
8) The claimant received consistent payment/drawings throughout his time as an associate partner, even when he was absent on sick leave, whereas employees were only entitled to statutory sick pay.
9) Associate partners were held out as partners to the outside world.
10) Associate partners were involved in pay decisions for other employees, albeit to a 'fairly limited' extent.
11) The promotion to associate partner was genuinely intended to be part of a transition from employment to equity partnership.
12) The potential exposure of the claimant to personal liability for partnership debts and liabilities, and the claimant's concern about this were indicative of genuine partnership, as s9 of the Partnership Act 1890 provides that partners are jointly liable for partnership debts. (Somewhat curiously, the ET and the EAT considered that the parties could have reached an agreement to vary s9 – despite the fact that s9 gives rights to partnership creditors who would not be party to such an agreement and would therefore not be bound by it.)

The ET concluded that the balance of these factors favoured partnership rather than employment status. It considered the tax position and the views of the parties to be of particular weight, but explicitly took all of the matters above into account.

The EAT upheld this decision. It noted that that several matters were not in dispute. First, all parties here were aware of the significance of employee and self-employed status; they advised others in relation to the relevant legal tests, and were plainly alive to the implications of such status in their dealings with each other. Second, there was a desire on both sides that the claimant should move to full equity partner status. Third, it was common ground between the parties that the claimant could not be both an employee and a partner (*Ellis v Joseph Ellis* [1905] 1 KB 324 and *Cowell v Quilter Goodison* [1989] IRLR 392) and it was mutually understood that the claimant would cease to be treated as an employee for tax purposes when he moved to partner status. Fourth, at the start of the new tax year in April 2019, the claimant was taken off the payroll, issued with a P45 and then treated as self-employed for all tax and NI purposes. Fifth, from then until March 2020 the position of both parties was that the claimant was self-employed; it was only from March 2020 that the claimant started to assert that he was an employee, and he had accepted that this 'amounted to a 180 degree turn on his part'.

The EAT held that although the labels applied by the parties of the relationship were not determinative (*Young* & *Woods Ltd v West* [1980] IRLR 201 CA and *Williamson & Soden Solicitors v Briars* UKEAT/0611/10). An objective assessment of all factors was required, and the description used by the parties was just one of those factors. It was common ground that if the parties were in a relationship of partnership, that would not be

consistent with the continued existence of a contract of employment between them, and so the question for the ET was whether the claimant's status had indeed changed from employee to partner. Given the particular expertise of the parties, the ET permissibly gave weight to what it found to have been their intention at the time (*Tiffin v Lester Alldridge LLP* [2012] EWCA Civ 35) and their contemporaneous view of the position, which was that the claimant had moved from employee to partner, albeit that he was treated as junior to the equity partners and was remunerated by way of a fixed share of profits. The EAT noted that caselaw recognised that there could be different levels of partner without falling outside the definition of partner (*Stekel v Ellice* [1973] 1 WLR 191), and a salaried or fixed share partner who did not receive a share of profits could be a partner (*M Young Legal Associates v Zahid* [2006] 1 WLR 2562).

The ET had also held that the claimant was a worker, as defined by s230(3)(b) ERA (3):

> 'In this Act "worker" …. means an individual who has entered into or works under ….
> (a) a contract of employment, or
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'

The ET held that the claimant had undertaken to do or perform work and services personally for the respondent, and it was not in dispute that the work he undertook needed to be undertaken by him personally. The respondent was not in any sense a client or customer of any undertaking carried on by the claimant, and the claimant did not carry on an undertaking except as an integral part of the respondent for its clients.

The EAT noted that the appeal was advanced on the basis that the ET's approach to, and conclusion on, worker status was correct. The ET had referred to Lady Hale's leading judgment in *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, that the Supreme Court in that case did not need to resolve the issue of whether a true partner under the Partnership Act 1890 (as opposed to an LLP member) might also be a worker for the purposes of s230(3)(b) ERA. The ET had concluded that they could, and that the necessary contract required by s230(3)(b) could exist notwithstanding the existence of a partnership. The EAT noted that this approach accepted the distinction drawn in *Lindley & Banks on Partnership* (paras [5-98] and [5-100] between the settled legal position that a partner in law could not be employee, and the position which had not been tested in law as to whether a partner law could be a worker. The EAT itself concluded that the ET was entitled to see the facts of the case as tipping the balance in favour of the claimant being a worker for s230 purposes notwithstanding its conclusion that those facts did not allow a finding of employee status.

***Armour Veterinary Group Ltd v Commissioners for HMRC* [2024] UKFTT 539 (TC)**

Of particular interest to APP members are the FTT's comments in this case on whether there was a partnership, whether goodwill was partnership property, and whether the position would be different for a Scottish partnership.

Hewitt and Alexander had carried on a veterinary practice in partnership. When Alexander retired, Hewitt continued to run the practice as a sole trader until he entered

into partnership with Walker. That new partnership acquired the business of a neighbouring veterinary practice and goodwill was shown as an acquisition in the partnership's accounts. Hewitt and Walker then incorporated a company which acquired the partnership, and goodwill of £1.9m was recognised in the company's accounts. A dispute arose with HMRC as to the correct tax treatment of the goodwill.

The FTT held that when determining whether and when a partner carried on business for the purpose of s884 of the Corporation Tax Act 2009 (CTA 2009), which makes provision for the treatment of goodwill 'in a case in which the business in question was carried on ….by the company or a related party', it would consider, inter alia, whether they were in partnership under s1 of the Partnership Act 1890. Section 1 of the Partnership Act provides that 'Partnership is the relation which subsists between persons carrying on a business in common with a view of profit'. Here, there was no written partnership agreement but the parties had accepted there was a partnership between Hewitt and Alexander, and the FTT agreed with HMRC's conclusion that there was a partnership on the following grounds:

- Hewitt was clearly held out as a partner to clients of the practice.
- Hewitt had acknowledged that he and Alexander regarded themselves as partners, albeit with Hewitt being the junior partner.
- Hewitt was actively involved in running and managing the practice, including supervising and managing staff.
- Hewitt received a share of the profits of the practice and not a salary.
- The returns of the practice and Hewitt's personal tax returns were consistent with him being a partner.

The FTT held that whether a partner was an equity or salaried partner had no bearing on whether they could be treated as carrying on business for the purpose of s884 CTA 2009.

As to whether Hewitt had acquired goodwill from Alexander, the FTT held that the caselaw made it clear that, unless there was a contrary agreement in place (*Burchell v Wilde* [1899] B 5027), partners did not own the assets which comprise the partnership property, but instead had a beneficial interest in the realised value of the property (*Byford v Oliver* [2003] EWHC 295 (Ch), *Hadlee v Commissioner of HMRC (New Zealand)* [1993] UKPC 8 and *Beadnell v Copley v HMRC* [2022] UKFTT 00183 (TC)). It was also clear that the goodwill of a business was usually inseparable from the business itself (*IRC v Muller* [1901] SVC 25). Here there was no agreement in place to displace the analysis of the goodwill being partnership property, and what Hewitt acquired from Alexander was not an interest in goodwill, but Alexander's interest in the partnership property which was distinct from a proprietary interest in goodwill.

As to the possibility that the partnership might be a Scottish partnership, since Hewitt, Alexander and Walker were based in Scotland, the FTT held that this did not affect its conclusions. Although s4(2) of the Partnership Act provided that a Scottish partnership had legal personality separate to its partners, unlike an English partnership, this did not mean that it was the partnership rather than the partners which carried on the business. It therefore did not affect the consideration of whether Hewitt was 'carrying on business' in common with Alexander, because it was still the partners who were in fact carrying on the business. Similarly, the fact that separate personality meant that a Scottish partnership could hold property in its own name did not materially affect the arguments as to goodwill being partnership property.

***Cobden v Cobden* [2024] EWHC 1581 (Ch)**

This judgment concerned a two partner partnership which was dissolved. The question which arose was whether the court should make an order for a buyout of one partner by the other under *Syers v Syers* (1876) 1 App Cas 17, rather than for a full winding up under the Partnership Act 1890, in which its assets would be sold on the open market (and each partner would be free to bid for them) and, if so, which partner should be permitted to buy out the other.

The court noted that neither s39 of the Partnership Act, which provided that on dissolution each partner was entitled to have the partnership property used to pay partnership debts and liabilities, and the surplus paid to the partners, nor s44, which provided for how partnership assets should be distributed on a winding up, expressly mandated a sale of the partnership property. It was clear from *Syers* and later cases, most recently (and after the conclusion of the trial in *Cobden*) *Bahia v Sidhu* [2024] EWCA Civ 605 (included in the APP update for June 2024), that although a sale on the open market was the normal practice, and usually the best means of establishing what, financially, each partner should get out of the former partnership, where may be cases where a partner's entitlement to a share of the realised value of the net assets should be satisfied other than by such a sale.

The court held that the basis of the *Syers* jurisdiction was that there could be exceptional cases where a sale by auction would not serve the interests of justice, because it would not maximise the value of the assets or, even if it would, it would unduly favour one party or unduly disadvantage the other (*Bahia*, paras 44-45). The considerations of what was fair, just, and equitable in the circumstances were wider than purely financial, and one partner might establish an 'equity' on which a precise monetary value could not be put. For example, here, one partner had evidenced his expectation of becoming the successor to the farm which had been the partnership's business, and of having built up the business in reliance on that expectation.

The court summarised its discretion under *Syers v Syers* as follows (in para 191):

i) The "normal" order following a dissolution of a partnership (i.e. in a winding up regulated by the court) will be for the sale of the partnership property.
ii) However, the court has a discretion instead to make a *Syers* order in the context of it supervising the winding up of the partnership.…
iii) As the default position under section 39 is that the partnership assets will be sold, and the usual way in which all of the firm's creditors and all of its partners receive what is due to them is out of the sale proceeds, a *Syers* order is "*exceptional*": see *Bahia v Sidhu*, at [31] and [44]….
iv) The nature of the discretion and the purpose to be served by its exercise – that of achieving justice between the partners on the facts of the particular case – means that the categories of case suitable for *Syers* relief cannot be exhaustively identified. …. Instead, the test is whether, as an exception to the normal rule, a *Syers* order can by justified on the basis it would serve the interests of justice on the facts of the particular case: compare *Bahia v Sidhu* at [45].
v) One other type of case where a *Syers* order *may* be justified is where, unlike an order for the sale of the partnership assets, it accords with the spirit of the parties' agreement or, it was put in *Bahia v Sidhu*, at [40], is consistent with their contractual *intentions* even if it is not justified by the rigid analysis of the contractual position between them….
vi) Likewise… a *Syers* order *may* be justified by reference to wider equitable considerations – akin to those which arise under the doctrine of proprietary estoppel – if it concludes that one partner has established an 'equity' that operates to qualify

what would otherwise be the means of achieving the result ordained by section 39....

vii) The court may make a *Syers* order even though it *might* mean that the selling partner receives less than he would if the assets had been sold on the open market: see *Malik v Hussain*, at [34], and *Bahia v Sidhu*, at [45].…

viii) As noted in *Lindley & Banks* op. cit., at para. 23-341, in a case involving a claim to a *Syers* order, the use of a single joint expert valuer is likely to be encouraged at the case management stage….

ix) The commentary in *Lindley & Banks*, at 23-336, states that it will not always be appropriate to value the selling partner's share on the basis of the sale of the partnership as a going concern. Whether or not the nature of the firm's business is such that its sale as a going concern is unlikely (as it sometimes is in the case of professional firms) would be a matter either for agreement between the parties or determination by the court….

x) Another factor which will feed into the court's assessment of the overall financial position between the parties, for the purpose of exercising its discretion, include the saving of the costs of sale on the open market….

xi) … the aim behind the exercise of the exercise of the discretion is at odds with any assumption that the burden on the party seeking a *Syers* order somehow increases with the size of the share sought to be purchased, so that a *Syers* order in a dissolved partnership of two equal partners will be "extremely rare". Consideration of the respective percentage interests of the purchaser and seller under a *Syers* may well form an important part of the court's overall assessment of what is the fair and just outcome in all the circumstances of the case….

xii) However, as a matter of principle, there seems to be no reason why a *Syers* order should be treated as unobtainable unless the seller's partnership share is below and/or the purchaser's share is above a certain percentage….

The court considered that although no strict proprietary estoppel arose here, 'an equity broadly similar to a proprietary estoppel' did arise, and supported the making of a *Syers* order. It held that that this provided a fifth example of 'exceptional circumstances' justifying a *Syers* order, in addition to the four outlined by the Court of Appeal in *Bahia*. It summarised (albeit at length) this fifth example as follows (in para 392):

> "The equal partners in a partnership at will have, since its inception, shared an understanding that one partner would himself carry on the business when the partnership eventually comes to an end, by being permitted to buy out the other partner at a fair price to be determined at that end point, and that partner has devoted himself accordingly to the firm's business and its development in anticipation of that event. The understanding is sufficiently clear from the dealings between the partners and the subsequent reliance upon it (throughout the life of their partnership) sufficiently identifiable and substantial to support the conclusion that it would be unfair and inequitable for the other, at the partnership's end, then to insist that both partners' shares in the partnership assets should be liquidated through their sale. Any consideration of the "detrimental" nature of the first partner's reliance ("*the partner has devoted himself accordingly*") must make allowance for the fact that the relationship between the partners arises out of their shared endeavour in making profits and that he has benefited equally from any profit during the life of the partnership; and also that any unequal injections of capital will be reflected in the partners' respective capital accounts. Nevertheless, the court is entitled to consider his individual efforts in developing the partnership business and to do so with particular focus upon a comparison with the business as it was at the partnership's inception and the relative efforts of the other partner in that regard. The understanding and reliance upon it give rise to an 'equity' in the first partner which may operate to prevent the liquidation of the partnership's assets

> if the court concludes that, in all the circumstances, an order for sale would be unfair and unjust. Other factors, such as the likely adverse impact a sale may have on third parties (including employees of the business and others whose financial interests may be damaged by a sale) or upon the business's customer base, may feed into the court's assessment of the equity in deciding what is fair and just. The court is entitled to act upon the equity where expert valuation evidence supports the conclusion that the price payable under the *Syers* order is equivalent to what the other can reasonably have expected to receive for his own share. The likely costs of a sale and any potential adverse tax consequences resulting from a sale may be factored into the court's comparison of the two. The court may act upon the equity despite any suggestion by the second partner that he would be willing to pay more for the first partner's share than is offered in return, as the price of himself carrying on the business, and notwithstanding the prospect that such a sale *might* have produced a greater financial return for him than that indicated by the valuation evidence accepted by the court."

The court concluded that the conversation between the two partners at the inception of the partnership, in which the defendant partner made it clear that he would leave the partnership in due course and need to be bought out by the claimant, which was affirmed in a conversation towards its end, established such an equity. This conclusion was supported by the adverse tax income consequences for both parties if the assets were sold on the open market, which would not arise if a *Syers* order was made; the adverse impact of current TB restrictions on the sale price if the farm was sold to a third party purchaser; and the adverse impact on staff retention of a sale, because a farm sale typically took 6-9 months.

The court was satisfied that the valuation evidence in this case provided a reliable indication of market value of the partnership assets, and that making a *Syers* order in reliance on it did not involve an 'unwarranted gamble' with the prospects of the partner being bought out as compared to the usual form of winding up. It therefore ordered the claimant partner to pay the defendant partner the latter's share on the basis of joint dissolution accounts to.

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These were, as set out somewhat more succinctly in *Bahia* (in para 44):

> '(i) where one partner has a very small stake in the partnership, and selling the partnership business as a going concern would create disproportionate injury to the majority partner(s) and/or to third parties such as customers of the business;
> (ii) where, as in *Hammond v Brearley*, a sale in the open market is obviously not going to maximise the value of anyone's share in the partnership, because the assets are worth little or nothing if sold separately from the goodwill, and selling both together would be disproportionate;
> (iii) where, even if its terms were breached, the partnership agreement makes provision for a buy-out on termination of the partnership, or it can properly be inferred that this is what the contracting parties intended, and
> (iv) (possibly) where it is established that one partner intends to use the auction process to drive up the price artificially, to the detriment of the other partner who wants to buy the property.

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