Issue 57

July 2020

Valuation Tribunal Service

Valuation in Practice

News in brief

Listing of ATM and associated appeals

Following the Supreme Court's decision in *Cardtronics UK Ltd* (see page 2), the stay on all ATM and associated appeals is lifted. The President of the VTE has issued a Practice Statement stating that hearings will commence on 5 October 2020 to facilitate parties' discussions regarding the impact of this judgment. The hearing programme for ATMs will be in three separate tranches:
Tranche 1 (from 2nd November 2020) – appeals where valuations have been agreed
Tranche 2 (from 1 December 2020) – appeals where the judgment may result in withdrawals
Tranche 3 (from 1 July 2021) – appeals where valuations not agreed.

Resuming the hearing programme

In this current environment, it is understood that there will be nervousness in parties about physically attending tribunal hearings in our various locations. We are currently reviewing the possibility of reverting to remote hearings as the default process during this COVID period.

Business rates revaluation in 2021 postponed

Following the Government's announcement on 6 May that the planned revaluation will no longer take place in 2021 (to help reduce uncertainty for firms affected by the impacts of coronavirus), it was subsequently announced on 21 July that the next revaluation will take place in 2023.

https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-07-21/HCWS400/

Business rates review

The Call for Evidence (CfE) was published on 21 July for the fundamental review of business rates which can be found online here.
You can submit your responses to the CfE here by 31st October. Alternatively, you can email your responses directly to BusinessRatesReview2020@hmtreasury.gov.uk.

COVID-19 (coronavirus)

In supporting the Government's easing measures, our London and Doncaster offices are now COVID-19 compliant. Whilst we have a small number of staff attending the offices, we continue to encourage all communication with us to be by email wherever possible, as staff are mostly working remotely. We will receive visitors by appointment.

Appeal statistics

Our next quarterly statistics release will be published on 6 August, and our workload in 2019-20 will be detailed in the Annual Report & Accounts later this year, but these are the general data for the year:

* 68,314 appeals were carried over from 2018-19
* 7,900 appeals were received during 2019-20
* 884 hearing days were convened
* 21,972 appeals were listed
* 2,822 decisions were issued for cases argued before a
* Tribunal panel
* 96% of those decisions were issued within one month of the hearing.
* 19,790 appeals were cleared in total.

House of Commons Library: Briefing Paper Number 8938, Coronavirus business support schemes, statistics

Collates data on the number of applications and total support provided under the Government coronavirus business support schemes.
https://commonslibrary.parliament.uk/research-briefings/cbp-8938/

Inside this issue:

Hospital (Parking Charges and Business Rates) Bill

This private member's Bill includes provision for amendment of Sch. 5 (Non-domestic rating; exemption) to the Local Government Finance Act 1988, exempting a hereditament to the extent that—(a) it consists solely of an NHS hospital, or (b)it is used solely in connection with the operation of an NHS hospital. An "NHS hospital" means a health service hospital (as defined by the National Health Service Act 2006) in England. The Bill is due for its second reading on 11 September 2020.
https://services.parliament.uk/bills/2019-21/hospitalsparkingchargesandbusinessrates.html

Non-Domestic Rating (Lists) Bill

The date for the second reading in the House of Lords is still to be announced
https://services.parliament.uk/Bills/2019-21/nondomesticratinglists.html

Non-Domestic Rating (Public Lavatories) Bill

The date for the second reading in the House of Commons is still to be announced
https://services.parliament.uk/Bills/2019-21/nondomesticratingpubliclavatories.html

Appeals stayed by the Valuation Tribunal for England

Class	Issue	Reasons
ATMs	Whether each ATM machine at a site in England is rateable	To commence listing from 2 November (stay lifted 20 July 2020) following Supreme Court decision
Photo booths	Whether occupation of booths is too transient and therefore not capable of rateable occupation	To commence listing from 2 November (stay lifted 20 July 2020) following Supreme Court decision on ATMs
NDR—Museums	Dispute over valuation approach	Judgment from the Upper Tribunal regarding 'contractors test' or receipts and expenditure method to be adopted. Permission to appeal was refused; stay lifted
NDR	2017 list appeals where there is an issue on fitout costs which replace existing items.	Appeal to UT on whether costs to replace existing items on a like for like basis add value and increase the rent of the property. VOA withdrawn appeal. Further test cases identified by the parties.
NDR	Legal—Validity of proposals made under reg. 4(1)(k) and PICO legislation (Mazars reversal)	Circumstances when a relevant proposal can be made.
Church of Scientology properties	VOA dealing with several appeals by the Church of Scientology relating to religious exemption on premises around England	Appeals postponed and not listed. May have to be resolved on legal arguments under PS3 (Complex cases) of the Consolidated Practice Statement
Council tax liability—severe mental impairment	Where retrospective relief is sought for a period when the person was not in receipt of a qualifying benefit	Appeal to the High Court on a point of law. *Derek Brown v Hambleton District Council*

Decision from the Supreme Court

Cardtronics UK Ltd and others v Sykes and others (VOs) [2020] UKSC 21

This significant judgment follows an appeal by the Valuation Office Agency challenging the decision of the Court of Appeal in November 2018, where it was decided that the sites of ATMs found at store locations, whether externally or internally sited, should not be separately assessed for business rates, but rather form part of the 'host' assessment. The Supreme Court upheld the Court of Appeal's position, confirming that the ATM sites in the subject appeals should not be separately assessed.

The Supreme Court asked two questions: are the sites of the ATMs capable of identification in their own right and therefore could be considered as separate hereditaments from the stores they served; and, if so who is in rateable occupation of the site of the ATM?

Decision from the Supreme Court (continued)

In answering the first question, the Supreme Court decided:

- The presence of an item of non-rateable plant and machinery (such as an ATM) should not be ignored when deciding if a separate hereditament exists and can be used to define the boundary.
- In order to be a separate, self-contained hereditament and meet the geographical test it didn't matter that the area in dispute was contained within and only accessible from another hereditament.
- Where the issue concerns a moveable ATM within another hereditament (rather than the 'hole in the wall' type) the issue over whether a hereditament existed was correctly decided by the Upper Tribunal (UT) on the basis of impermanence and mobility.

In respect of the second question, of rateable occupation, the starting point was whether the principal occupier (of the store) remained in exclusive occupation of the whole hereditament. Then, how was that affected by the transfer of the operation to another and did the principal occupier remain in paramount occupation? Here the retailer retained control of the whole premises; it only gave limited possession to the ATM provider and the ATM was part of that business. This could be tested under the principle of 'landlord and lodger', where both benefit from the arrangement, yet the landlord retains control; only limited control is passed by the landlord to the lodger to occupy a room. Such arrangements only ever result in one hereditament.

The Supreme Court found that the mistake the UT had made was to try and distinguish between external and internally facing ATMs, as both provided the same result, albeit that those externally facing also provided facilities for those not using the supermarket. Therefore, just as in the case of a landlord and lodger, the retailers were in paramount occupation of the whole premises including the areas occupied by the ATMs.

Decisions from the Upper Tribunal (Lands Chamber)

Interoute Vitesse Ltd (formerly Vitesse Networks Ltd) v Gidman (VO) [2020] UKUT 0013 (LC) RA/47/2018

This appeal concerns national fibre optic networks. Vtesse claimed that EU law mandated that it and BT ('the dominant operator in the market') be treated equally as regards liability to NDR and by the valuation officer (VO). So its network should have been assessed on the basis of £20 per kilometre (the figure disaggregated from BT's assessment), and its buildings and plant and machinery discounted by 50%. On that basis, the correct assessment on the material day, according to Vtesse's approach, was £234,637 rateable value (RV), not the £2,020,000 RV in the list. Vtesse did not submit its own valuation.

The VO's case was that there was an established tone of the 2010 rating list for long-distance, twin-fibre networks, supported by open market comparable evidence, which gave a value of £250/km for the fibre. This included a letting from Geo to Vtesse at £250 per route km for a fibre pair along 28.6% of the total length of the Vtesse network at the antecedent valuation date. The VO valued the buildings on a conventional basis of a rent per square metre, supported by a schedule of local comparables and they did not agree that a discount of 50% was appropriate to provide equality of treatment with what BT was alleged to pay in rates on the operational buildings within its single hereditament. The same applied in relation to the valuation of the plant and machinery.

The Upper Tribunal (UT) found there was strong evidence of a settled tone of the list for national networks, for both compiled list assessments and subsequent appeals arising from material changes of circumstance, and that the combined rental and settlement evidence supported the respondent's adopted figure of £250/km for a fibre pair.

The differences between the Vtesse and BT hereditaments were restated, having been considered many times by courts, tribunals and regulators; none of their decisions had supported the contention that the two hereditaments were

Decisions from the Upper Tribunal (Lands Chamber)

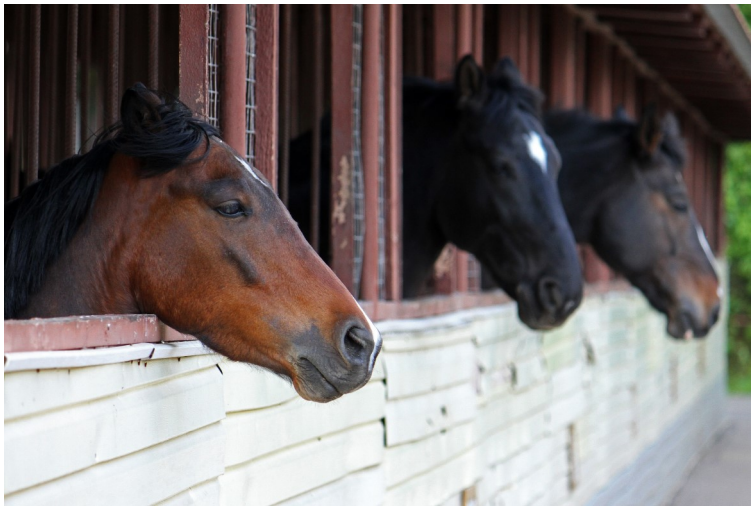
comparable. There was nothing to support the argument that they should be valued by the same method; Vtesse was properly valued by the direct rental comparison method and BT by the receipts and expenditure method, given the differences between the hereditaments.

The UT looked at whether the difference in valuation approach was an infringement of European Law. Both Vtesse and BT were found to be valued with reference to the legislation (the definition of rateable value) even though they were valued by different methods. The appeal failed.

Wall & Wall (re Induna Stables) [2020] UKUT 0166 (LC) RA/3/2020

The appeal was made against the decision of a VTE Vice-President not to grant a review of decision made by a tribunal panel in 2012. The Vice-President had refused to undertake a review as it was made outside the statutory time period and he was not satisfied that the applicant had provided good reasons for it to be considered out of time.

The UT determined that in a case where the VTE has determined the substantive valuation issue(s) arising from an appeal, there is a right of appeal under Regulation 42 of the VTE's Procedure Regulations 2009 against the VTE decision. However, there was no right of appeal under Regulation 42 against the VTE's refusal to review a decision under Regulation 40 which had determined a substantive valuation issue. The right of appeal being restricted to the decision itself as opposed to the review determination.



Decisions from the High Court

Humphrey v Fenland District Council [2018] EWHC 2195 (Admin)

The appellant disputed the VTE's decision that she was resident at the appeal property.

The appellant argued that the Tribunal had misapplied the 'reasonable onlooker' test (in *Williams v Horsham District Council)*. The High Court judge agreed with Mrs Humphrey that the burden of proof was on the local authority, to prove that she resided in the premises during the period in dispute; the required standard of proof being the balance of probabilities. In his findings, the Judge stated that the VTE had approached all of the evidence on that basis and that there were a considerable number of points regarded as indicating that the appellant was in residence. The weight to be attributed to the evidence was a matter for that Tribunal and not the High Court. The judge noted that, it was "*by no means unusual for a tribunal, or indeed the court, to have to reach findings of fact on the basis of incomplete evidence, which it does doing the best that it can on the basis of the evidence that is provided to it. In circumstances in which there was a limited amount of evidence in favour of the council's position, which is noted to have the burden of proof, and no evidence to contradict it or no counter evidence that was accepted as displacing that evidence, it seems to me the tribunal was perfectly entitled to reach the conclusion that it did*".

The appellant's appeal was ultimately dismissed by the High Court and the VTE decision upheld.

Interesting VTE decisions—Non-domestic rating

Is a Pioneer allowance applicable?

An industrial unit built in 2015, comprising a warehouse, an office block, car parking and a loading bay, situated on the Advanced Manufacturing Hub adjacent junction 6 of the M6, three miles from Birmingham city centre. The development site was a Regional Investment site of nine plots. At the material date, this was the first unit to be completed and occupied. The remainder of the site included vacant land, part boarded up buildings awaiting demolition and older industrial and storage land.

The issue in dispute was whether a pioneering allowance was justified. A 25% allowance was sought to reflect the uncertainty of the area in its early stages of development. This, the appellant contended, was supported by the discounted price of the land in 2014 and reference to other sites where a 25% pioneering allowance had been given.

The Valuation Officer's Rating Manual states that pioneering allowances, where a hereditament was in a development which is unfinished, may be justified until the physical environment improves. A pioneer allowance might be made where there were uncertainties facing the hypothetical tenant. However, in this case, there appeared to be no uncertainties or disadvantages to the property. It was not reliant on other occupiers being in the immediate locality. More importantly, for a large distribution warehouse, it had good transport links. The valuation officer cited assessments in other locations where distribution warehouses were built in isolation or on new estates that had not been granted this allowance, and contended that no pioneering allowance was justified for the appeal property.

Reference was made to *Willacre Ltd T/A Davis Lloyd Slazenger Racquet Club v Bond (VO)* [1987], where a 10% pioneering allowance was given to tennis court facilities. Other properties were cited where a 25% allowance had been granted.

The VTE panel did not to place great weight on comparing land purchases on the development, as the rating hypothesis looked at rental values rather than capital values. The price paid for the land in 2014 was less than one would expect. However, this may have indicated that there was a risk element involved rather than substantive evidence to suggest any serious risks with this site. The price paid for the land by the owner may just have been a good deal. The appeal property was in a good location and, by its very nature, it was not dependent on other businesses being on the same site.

The panel noted that the *Bond* decision concerned a new venture, where there was an element of uncertainty. As to three of the properties cited by the appellant, there was no explanation as to why the pioneer allowance was given. Furthermore, they were dissimilar to the appeal property, being a craft workshop and two offices. Though a 25% allowance was given in those cases, it did not automatically follow that the same should be applied to the appeal property. The other examples were retail units where it was suggested that the vacancy levels may have been a factor. With this in mind, the panel determined that no allowance was justified here.

Click here for the full decision

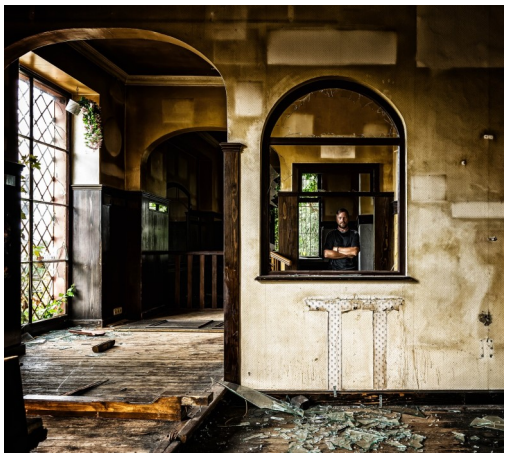
Consolidated Practice Statement (CPS)

Don't forget: changes to the CPS came in on 1 April 2020. In particular the changes relate to complex cases, bundle submission requirements for respondents and the publication of Tribunal decisions.

Click here to sign up to receive an alert when a new Practice Statement is issued or any future change is made.

Interesting VTE decisions—Council tax valuation

Fire damaged pub



The appeal dwelling was a three bedroom first floor flat which sat above a public house. Following a fire, on 20 January 2017, the whole building was incapable of beneficial occupation. The photographic evidence and the surveyor's report showed that the flat was largely a burnt out shell.

The valuation officer had deleted the entry relating to the public house from the rating list with effect from the date of the fire. However, wearing his other hat as the listing officer (LO), he refused to delete the council tax entry for the flat on the basis that it remained a dwelling.

The LO relied on the High Court's judgment in *Wilson v Coll (LO)* and argued that although the flat could not be occupied at the relevant date 20 January 2017, it could be at a later date after a reasonable amount of repairs.

The President decided that the LO's approach was flawed for the following reasons;

- The council tax legislation had altered since the *Wilson v Coll* judgment, so dwellings in need of major repair works to render them habitable were no longer locked into the valuation list, following the abolition of Class A of the Council Tax (Exempt Dwellings) Order 1992.
- The starting point in any valuation exercise was to establish if a dwelling existed in the first place, before the statutory valuation assumptions were applied. No hereditament existed at the relevant date because the former flat was incapable of beneficial occupation, a fact conceded by the LO. Therefore, the LO could not apply the reasonable repair assumption.
- Although there was no economic test for the required repairs in council tax, the amount of repair works that are envisaged to be involved in reinstating a dwelling had to be considered reasonable (para. 40 in *Wilson*). This judicial view, correctly interpreted, suggests that the test is not - as the LO has applied it here - can it be repaired whatever the cost (since it doesn't matter if it is not economic for the owner to effect repairs), but whether it is reasonable to expect, given the amount of work involved, that the repairs would be undertaken in the first place.

In this case, the appellant had spent in excess of £180,000 on a programme of works to enable the whole building (including the public house as well) to be re-occupied and the new flat that came into existence, following the works, was of a different character to the one which was destroyed in the fire.

Ultimately, the appeal was allowed and the entry deleted from the list with effect from the date of the fire, 20 January 2017. It is now open to the LO to band the new flat from the date it became ready for occupation.

Click here for the full decision.

Interesting VTE decisions—Council tax liability

Long term empty property premium and Class E

Should a long term empty property premium apply to a property owned by the appellant who, like her husband, was a member of the armed forces and currently based in Cyprus?

The appellant had referred to government guidance on Gov.uk regarding the application of the long term empty premium in respect of armed forces personnel. This advises that a premium can be charged on a long term empty property "*unless it is an annexe or you are in the armed forces*."

As this was the first appeal of its type, the billing authority (BA) had sought advice from the IRRV. The IRRV's interpretation of the relevant council tax regulations, was that the service member would not be entitled to protection from long term empty property premium in this case, being stationed outside of England, Wales or Scotland.

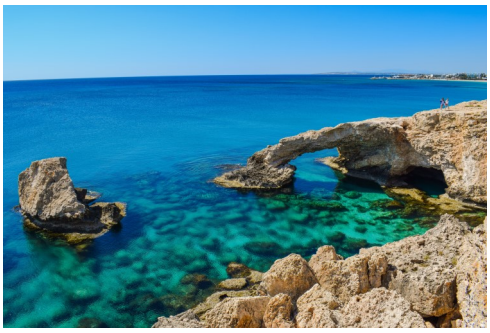
Interesting VTE decisions—Council tax liability (continued)

The appellant argued that Cyprus is governed by UK law, classed as a sovereign base area and even had an English postcode. Also the Armed Forces Covenant had been put in place to ensure that personnel serving abroad were provided the same rights as those residing in England.

The panel noted the government advice that members of the armed forces would not be subject to a long term empty property premium. However, as this was guidance only, it was necessary to refer to the relevant regulations. The matter to be determinec was whether the appeal property fell within Class E of The Council Tax (Prescribed Classes of Dwellings) (England) Regulations, as amended. In particular, the panel referred to the definition of a 'qualifying person' given in regulation 2.

The panel determined that to meet this definition, an individual would have to be liable for council tax on both dwellings; there is no exemption from the long term empty property premium where one of the dwellings is outside England, Wales or Scotland. As such, it was satisfied with the interpretation that the BA presented. The appeal was dismissed.

Click here for the full decision



Class N exemption – a flat at a stables

Does Class N exemption apply to the appeal property, as a dwelling occupied only by students and school or college-leavers.

The billing authority referred to the stables' website information, in support of their view that the stables did not fulfil the criteria for a 'prescribed educational establishment' and that the courses offered did not qualify as full-time.

The appellant argued that the flat was occupied by full-time equine students training for coach and groom qualifications, with the length of courses dependent on the qualifications each individual was aiming to achieve. All students living in the flat were on full-time courses; evidence showed that 90% of the students were on courses in excess of one calendar year, which included at least 38 hours' training a week. All of the courses were for professional qualifications recognised by the British Horse Society. However, the appellant accepted that there was not an academic year, as the students could begin their training at any point throughout the year.

The panel recognised that there were two tests to establish if a person qualified as a full-time student:

- Were the students undertaking a full-time course of education at a 'prescribed educational establishment', as defined in Part 1 of Sch. 2 to the Discount Disregards Order?
- Several activities carried out at the stables did not relate to education (training horses, riding lessons, hacking, preparing horses for sale etc) and activities were available for those aged four upwards. The panel determined that the stables could not be said to have been established solely or mainly for the purpose of providing further or higher education. The British Horse Society had no authority in relation to the state regarding educational regulations and the stables did not appear on the Edubase government approved list. Therefore, the appeal failed on the first test
- Were the stables offered full-time courses of education, according to the legislation? There was no formal academic year and the students could sign up at any time, with each study module leading to a distinct qualification. This was not the same as college modules which together lead to a single qualification. The stables' website confirmed that each qualification took less than 12 months and the length of course depended on the ability of the student and could be tailored to suit. Therefore, the appeal also failed on the second test.

The panel concluded therefore that there was no entitlement to Class N exemption and dismissed the appeal.

Click here for the full decision

Interesting VTE decisions—Council tax liability

Backdating discounts

The appellant was severely mentally impaired and both he and his wife had applied for a 25% discount in respect of their council tax liability. They wanted it backdated to 2009, this being when the appellant's GP certified severe mental impairment, and from when entitlement to disability living allowance commenced.

In awarding the discount disregard, the billing authority (BA) restricted backdating to 18 March 2013, six years from the date of application. The BA had principally relied on the VTE decision *Arca v Carlisle City Council* to justify this.

However, the panel considered the VTE decision *S v Leicester City Council* to be more relevant as that case specifically concerned discount. There was a duty on all BAs to take reasonable steps to ascertain entitlement to discounts under regulation 14 of the Council Tax (Administration and Enforcement) Regulations 1992. *Arca* was not relevant as it concerned the disabled persons (reductions for disabilities) regulations, which relied on an application being made for each financial year.

The tribunal noted that the BA had submitted no evidence of what information it provided to the taxpayer concerning discounts between 2009 and 2013. There had also been an unsuccessful council tax benefit application at the time circumstances changed in 2009; it appeared the BA had not alerted the appellant to their possible entitlement to a discount disregard.

On the issue of backdating, the correct interpretation in the *Leicester* case was to determine when the 'cause of action' accrued under section 9 of the Limitation Act 1980. In this case, it was when the appellant became aware he was entitled to a discount, so the six years ran from that date, not in the way the council had applied it. The appellant had six years to submit a claim retrospective discount to the first date of entitlement.

Having reviewed the evidence, the Tribunal was satisfied the appellant and his wife made a claim for the discount disregard within six years of becoming aware of entitlement. They only became aware of it in 2019, after reading information on Martin Lewis's Money Saving Expert website. Back in 2009, the appellant had sought help from their local MP, Citizens Advice Bureau, a benefits officer for the Stroke Association and a local welfare rights officer. No one had highlighted a possible discount disregard in respect of their council tax liability, even though the appellant had qualified for disability living allowance.
The tribunal therefore decided to backdate discount to 2009.

Click here for the full decision

Application for an extension of the time limit for making an appeal

The appellant's service of a notice of appeal, dated 29 May 2019, stated that he had written to the billing authority (BA) about his dispute on 15 February 2019 but had not received a response within two months. Ordinarily, this would be considered as an appeal having been made within the time limit. Therefore, the appeal was registered and listed for a hearing.

However, after the Tribunal provided the appeal documents to the BA, an objection was raised, namely that the appellant's grievance was on the same issues as raised in earlier grievances, the responses to which were not appealed.

In determining a preliminary matter, the VTE senior member found that the appellant's letter of 15 February 2019 sought to remake the earlier grievances (whether the appeal dwelling was a house in multiple occupation for the periods covered by liability orders dated 7 February 2012, 12 June 2012, 18 June 2013 and 23 July 2014), which was identical to the matters responded to in the BA's letters of 4 July 2012 and 18 June 2014. It was concluded that it was not open to the appellant to remake the same grievances as he had done years earlier, but not appealed, as to do so would render the appeal time limit provisions a nullity.

The senior member was not satisfied that the delay in bringing the appeal was by reason of circumstances beyond the appellant's control. Accordingly, the appeal could not be entertained outside of the time limit and was dismissed.

Click here for the full decision

VALUATION TRIBUNAL SERVICE

We welcome any feedback.

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