IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY

No A30 of 2017

BETWEEN: **LEON PIPIKOS**

Appellant

10 AND: **VELIKA TRAYANS**

Respondent

APPELLANT'S REPLY

Filed on behalf of the Appellant by
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Part I

1. These submissions in reply are in a form suitable for publication on the internet

Part II

Submission in reply on the appeal

Statement of relevant facts

2. It is noteworthy that the respondent (**Velika**) does not dispute the facts stated in [9]-[31] of the Appellant's Written Submissions (**AS**). The only qualification is that in propounding her cross appeal Velika posits five points set out at [11] below. The first and fifth are not matters of fact. The second, third and fourth relate to the characterization of primary facts by the Full Court and not to findings of primary fact by the Full Court. So far as Leon's appeal proper is concerned, Velika does not dispute any of the facts set out at AS[9]-[31].

Maddison v Alderson and Steadman v Steadman:

3. The principal burden of Velika's submissions at RS[9]-[20] is the proposition that prior authority of this Court[1] forecloses a reappraisal of the principles of the doctrine of part performance as stated by the Earl of Selborne LC in *Madison v Alderson*[2] of the kind performed by the House of Lords in *Steadman v Steadman*[3] without the correctness of prior authorities of this Court being re-opened. Velia also submits that unless those authorities are overruled this Court is bound to follow the test of Lord Selborne. That submission should be rejected for the following reasons.

4. First, *Steadman v Steadman* was not a repudiation of *Madison v Alderson,* but was a re-examination and interpretation of the elements of the doctrine of part performance as expressed in the "somewhat Delphic" (at 567D-E) speech of the Earl of Selborne in the light fundamental of equitable principles. *Steadman v Steadman* developed the doctrine of part-performance by clarifying the speech of the Earl of Selborne in at least two relevant respects:

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[1] In particular, *McBride v Sandland* (1918) 25 CLR 69, *Cooney v Burns* (1922) 30 CLR 216, *JC Williamson Ltd v Lukey and Muholland* (1931) 45 CLR 282 and *Regent v Millet* (1976) 133 CLR 679.
[2] (1883) 8 App Cas 467.
[3] [1976] AC 536.

(a) the test of "unequivocal referability" was satisfied if on the balance of probabilities the acts of part performance indicated the existence of a contract (at 541H – 542A; at 556E; at 563D-564C). This was no innovation. As Lord Reid (at 542E-F) and Lord Simon (at 564A-B) indicated, this was presaged by the Earl of Selborne's use of the phrase "reasonably to be inferred" in *Madison v Alderson* (at 476); and

(b) in rejecting the requirement that the contract indicated by the acts of part performance be identifiable, without reference to the oral agreement, as one relating to the creation of an interest in the land concerned (at 542B-C; 555A; 561H-562E). Again, this was no innovation. As Lord Simon pointed out, the Earl of Selborne's reference to "some such agreement" was not so specific (562G) and support for the view adopted in *Steadman v Steadman* could be traced to *Fry on Specific Performance* (6th Ed, p278, §582) which gained the approval of Upjohn LJ in *Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169 at 189.

5. Second, none of the decisions of this Court relied on by Velika contain a *ratio* which precludes the development by this Court of the doctrine of specific performance in the various respects identified in *Steadman v Steadman.* In *McBride v Sandland* the claim for specific performance was rejected on the basis that no contract had been established (at 88-90 per Isaacs and Rich JJ; at 91 per Higgins J; at 99-100 per Powers J). In *Cooney v Burns* Isaacs J (at 236-238) and Higgins J (at 242-243) (with whom Gavan Duffy J agreed at 243) rejected the claim for part performance on the basis that the acts relied on did not of themselves sufficiently indicate the existence of a contract. Starke J rejected the plaintiff's claim on the basis that the alleged reliant acts did not change the position of the parties relative to the subject matter of the contract (at 244). Knox CJ dissented. The claim for specific performance failed in *JC Williamson* on the basis that contract was not one which could be specifically enforced and that the doctrine of part performance did not support a claim for an injunction (at 294 per Starke J; at 301 per Dixon J; at 310-311 per Evatt J; at 317-318 per McTeirnan J). In *Regent v Millet* the Court was satisfied that the plaintiff succeeded without the need consider *Steadman v Steadman* (at 683 per Gibbs J).

6. Therefore, and contrary to RS[18], this Court can proceed to re-examine the doctrine of part performance in the light of *Steadman v Steadman* without re-opening any previous decision or applying the criteria in *John v Federal Commissioner of Taxation.*[4] The development of the law in that direction would be consistent with the underlying principle of part performance as stated

[4] (1989) 166 CLR 417 at 438-439.

by Lord Cranworth LC in *Caton v Caton*[5] and approved by this Court in *Regent v Millett* (at 682), namely, the prevention of unconscientious or fraudulent (in an equitable sense) reliance on the absence of writing to prevent the enforcement of a contract on which the other party has been induced or allowed detrimentally to rely. Against the background of that principle, two matters emerge. First, no superadded requirement of proof of the contract by the relevant acts of part performance (if that is suggested by the word "unequivocal" in the Earl of Selborne's formulation) can be justified beyond "the appropriate degree of cogency to establish ... the intervention of equity".[6] Second, as PD Finn has pointed out, the relevant relationship between the acts of part performance and the land is not to be assessed according to whether the acts prove the existence of a contract for the creation of an interest in the land (if that is suggested by the words "some such contract" in the Earl of Selborne's formulation), but according to whether the appropriate remedial response to the detriment occasioned by the reliant acts is to enforce the contract for the creation or transfer of the interest in the land.[7]

7. Development of the law of part performance in the two above respects would also be consistent with the developments in the law of proprietary estoppel. The affinity of part performance with proprietary estoppel has long been recognized.[8] The rejection of any limitation on estoppel to representations of existing fact[9] and the greater willingness reflected in recent authorities to grant relief for proprietary estoppel by enforcing the expectation founding the estoppel has increased that affinity.[10] Following the statutory abolition of the doctrine of part-performance in England, the remedial space so created has been filled by the doctrines of proprietary and promissory estoppel together with constructive trusts.[11] The close relationship between equitable estoppel and part performance has also been observed in the United States.[12] The United States doctrine of part performance bears much similarity to the doctrine as developed in *Steadman v Steadman.*[13] In §129 of the Restatement (Second) of Contracts, the doctrine of part performance is expressed as follows:

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[5] (1866) LR 1 Ch App 137 at 148.
[6] *Millett v Regent* [1975] 1 NSWLR 62 at 74C – E per Mahoney JA.
[7] PD Finn, "Equity and Contract" in Finn (ed) *Essays on Contract* (1987), p104 at p125.
[8] *Cooney v Burns* (1922) 30 CLR 216 at 241 per Higgins J.
[9] Being the supposed rule in *Jorden v Money* (1854) 5 HLC 185; 10 ER 868, cf., *Waltons Stories (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 399, at 415-416.
[10] *Sidhu v Van Dyke* (2014) 251 CLR 505 at [79]-[86].
[11] *Yaxley v Gotts* [2000] Ch 162 at 176-177, at 181-182 per Robert Walker LJ, at 188-189 per Bedlam LJ.
[12] C Brown, *Corbin on Contracts* Vol 4, (1997), §18.1, p501.
[13] The development of the doctrine of part performance through the editions of the Restatement of Contracts is traced in PA Ridge "The Equitable Doctrines of Part Performance and Proprietary Estoppel" (1988) 16 *MULR* 725 at 738-741.

> A contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the Statute of Frauds if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific performance.[14]

8. The law in New Zealand has also developed consistently with *Steadman v Steadman.*[15]

9. To the extent that any of the previous decisions of this Court may be thought to stand in the way of a reconsideration of *Madison v Alderson* in the light of *Steadman v Steadman,* the Court ought not be inhibited from doing so. There is no well-defined rule determining when this Court will reconsider an earlier decision.[16] The present is a circumstance where such reconsideration is appropriate because, as demonstrated above, the ongoing development of equitable jurisprudence in Australia and overseas in relation to the doctrine of part performance and more widely, has left those older authorities adopting a rigid application of the *dicta* of the Earl of Selborne LC in *Madison v Alderson* isolated and weakened.[17] No principle carefully worked out through a succession of cases emerges from those authorities. There is nothing to suggest that they have been acted upon in a way which militates against their reconsideration by this Court.[18] Significant academic[19] and lower court[20] opinion points towards a reconsideration of the meaning and effect of the principles stated in *Madison v Alderson* by this Court. Moreover, special leave was surely granted in this case so as to permit a fairly rigorous reexamination of the principles of part performance.

Part performance in this case:

10. At RS[29]-[33] four matters are identified which are said to deny the application of the doctrine of part performance. The first two (at RS[30]-[31]) are erroneous. Leon was not a party to the Penfield Road contract, which recorded the purchaser as George or his nominee (AB 385). It is incorrect to say that Leon's payment of the purchase price or execution of the transfers and other documents were acts *required* by that contract. On no view were his payment of the whole of

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[14] The formulation at §18.6, p512 of *Corbin on Contracts* is to the same effect.
[15] *Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88 at 99-109; *Mahoe Buildings Ltd v Fair Investments Ltd* [1994] 1 NZLR 281 at 284-287; *Fleming v Beevers* [1994] 1 NZLR 385 at 391-394.
[16] *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [67]- [70]; *Beckett v New South Wales* (2013) 248 CLR 432 at [52].
[17] See, analogously, *Wurridjal v Commonwealth* at [71] (in the context of constitutional jurisprudence) and *Beckett v NSW* at [52]-[54].
[18] cf., *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439.
[19] DW Greig "Expectations in Contractual Negotiations" (1979) 5 *Mon ULR* 165 at 177-190. DW Greig and JLR Davis, *The Law of Contract* (LBC, 1988), p734. PD Finn, op cit n7, p124-126; DSK Ong, *Ong on Specific Performance* (Federation Press, 2013), p153-157. ICF Spry, *The Principles of Equitable Remedies* (9th Ed, LBC, 2014), p272. NC Seddon and RA Bigwood, *Chesire & Fifoot The Law of Contract* (11th Ed, LexisNexis, 2017) at [16.62], p923.
[20] *ANZ Banking Group Ltd v Widin* (1990) 26 FCR 21 at 37. *Khoury v Khoury* (2006) 66 NSWLR 241 at [89].

the owners' contribution for the Penfield Road property, his execution of a transfer and his agreement to George and Sophie taking a half interest in the Penfield Road property acts required by or done in performance of the Penfield Road contract. The third matter - the finding that there had been no payment of the additional $8000 (RS[32]) - is not fatal to the application of the doctrine of part performance. The doctrine of part performance can be engaged by significant, but *partial*, as well as complete performance by the plaintiff: *Steadman v Steadman* at 558H. Leon has always accepted that any order for specific performance would be conditional on his payment of the additional $8000.

11. As to the fourth matter referred to at RS[33] (the relationship between the acts of part performance and the Clark Road property), whether assessed on the balance of probabilities or by any more stringent standard, there can be no doubt that Leon's acts of part performance pointed towards the existence of a contract between Leon, on the one hand, and Velika and George on the other. As the Full Court observed at FC[26], it is inherently probable Leon that would seek something in return for financing George and Velika's acquisition of a half interest in the Penfield Road property. Equally, there can be no doubt that Leon's acts of part performance were consistent with the contract found by the Full Court for the transfer to him of an interest in the Clark Road property and that Leon detrimentally relied on the existence of that contract in agreeing to finance George and Velika's acquisition of a half interest in the Penfield Road property. Having acquired her interest in the Penfield Road property with the knowledge that Leon was financing the acquisition of that interest on the basis that he would obtain a half-interest in the Clark Road property (FC[58], AB504-505), it would be unconscientious or fraudulent (in an equitable sense) for Velika to deny enforcement of that contract because of the absence of writing. This is especially so where she has admitted existence of the contract at the trial.[21] Enforcement of the contract for the transfer of an interest in the Clark Road property is the appropriate remedial response to Leon's reliant acts of part performance because otherwise Leon's position will be converted from being the holder of an equity interest in property (with the attendant capital growth) by reason of his reliant acts to being a mere creditor of George and Velika to recover the amounts paid to acquire their interest in Penfield Road. These matters are sufficient to engage the doctrine of part performance. No other relationship between the reliant acts of part performance and the acquisition of the interest in the Clark Road property is relevant or necessary. In particular, it is not necessary for the acts of part performance considered in isolation to prove the existence of a contract for the transfer of the land.

[21] *Steadman v Steadman* at 571F per Lord Salmon. The law in the United States is to a similar effect; namely, where the defendant admits the contract, the burden of proof resting on the plaintiff is greatly lightened: *Corbin on Contracts*, §18.23, p564.

Submissions in reply on the respondent's cross appeal

12. Reduced to their essentials, the propositions advanced by Velika in support of her cross appeal can be identified as follows: first, that the Full Court accorded insufficient respect to the trial judge's advantage of having heard and seen the evidence of the witnesses (RS[42.1] and [53]); second, that the Full Court misunderstood Velika's admission as to her knowledge of the agreement for the sale of an interest in the Clark Road property prior to the purchase of Penfield Road which, it is said, did not extend to an understanding that it was a condition of the purchase of the Penfield Road property or that it was intended that Leon would obtain a capital profit from an interest in the Clark Road property (RS[43] and [62.2]) ; third, that the "2009 writing" indicates only a "very broad" knowledge by Velika of the discussion between Leon and George concerning the sale of an interest in the Clark Road property (RS[60.4]); fourth, that the Full Court erred in regarding it as inherently probable that Leon would agree to finance Velika and George's acquisition of an interest in the Penfield Road property only in return for an interest in the Clark Road property (RS[42.4] and [61]); and fifth, the difficulties in identifying the precise interest in the Clark Road property the subject of the agreement, in identifying any means of dealing with the registered mortgage over the Clark Road property and in enforcing Leon's asserted interest in the Clark Road property give rise to ambiguities or uncertainties sufficient to prevent any enforceable agreement arising (RS[42.2], [42.3], [63] and [64]).

13. Each of these propositions should be rejected for the reasons given below. Contrary to Velika's submissions, the contract found by the Full Court is not a "sophisticated legal edifice on slight evidential foundations" (cf., RS[58]); nor one reached without any "finding of an agreement involving [Velika]" (cf., RS[62.1]). On the contrary, the Full Court's conclusion is a product of orthodox legal analysis whereby parties, outside of a mechanical observance of the notions of offer and acceptance, but through a course of words and conduct, may be said to have manifested an understanding or agreement revealing an intention to be legally bound to the essential elements of a contract.[22] The Full Court correctly concluded that such an analysis was open on the appellant's case at trial (FC[74]-[80]). The Full Court's characterisation of the contract as one involving a sale of a half interest in the Clark Road property together with an obligation of

[22]See eg., *Integrated Computer Services Pty Limited v Digital Equipment Corp (Aust) Pty Limited* (1988) 5 BPR 11,110 at 11,117 – 11,118 per McHugh JA. *Vroon BV v Foster's Brewing Group Ltd* [1994] VR 32 at 79-83 per Ormiston J. *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at [71]-[82] per Heydon JA. *Branir Pty Limited v Owtson Nominees (No 2) Pty Limited* (2001) 117 FCR 424 at [369] per Allsop J. *Husain & Ors v O&S Holdings (Vic) Pty Limited* [2005] VSCA 269 at [51] per Nettle JA.

the appellant to account to Velika and George for the value of the improvements was not the illegitimate erection of a "sophisticated legal edifice" divorced from the parties' intentions, but a conventional processes of giving legal effect to the intention of the parties as reflected in the substance of an agreement reached informally, through a combination of discussions and conduct, and without attention to precise legal forms.[23]

14. As to the first point, no aspect of the Full Court's conclusions rested on their rejection of a conclusion of the trial judge which was, or appeared to be, based on credibility findings.[24] On the contrary, the aspect of the evidence which the Full Court found "determinative" (FC[6]) was Velika's admission that she knew of George's agreement with Leon to finance their purchase of the Penfield Road property via a transfer of an interest in the Clark Road property before acquisition of the Penfield Road property (FC[58]). The trial judge had accepted Velika as a honest witnesses, but as the Full Court observed, a witness whose credit is accepted may make concessions adverse to his or her case (FC[54]). That is what occurred. Far from a rejection of any findings of the trial judge based on an assessment of the credibility of a witness, the Full Court's findings gave full effect to the evidence of witnesses whose credit the trial judge had accepted (see FC[65]). To the extent that the trial judge was critical of Leon's evidence, those criticisms did not go to issues of credit and, in any event, suffered from the defects identified by the Full Court at FC[22].

15. As to the second point, on no fair reading of Velika's evidence can it be said that she failed to understand that the transfer of an interest in the Clark Road property was a necessary condition of Velika and George's acquisition of an interest in the Penfield Road property. Contrary to the submission at RS[62.2] there was no doubt on Velika's evidence about when she learned of the proposal to transfer a half interest in the Clark Road to Leon. On her account George informed her, prior to the purchase of the Penfield Road property, that he was "giving Leon half of the share of our property" because "we don't have the funds" to purchase the Penfield Road property (FC[58], AB p505.19). That necessarily carried with it the conclusion that absent a transfer of the interest in the Clark Road property, the purchase of the Penfield Road property by Velika and George would not be possible. Nor can it be sensibly said that Velika failed to understand that by "giving Leon half of the share of our property", as she put it, Leon would necessarily enjoy the appreciation in the value of the property equal to that share. That was also implied by her

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[23] See eg., *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 436-437 per Barwick CJ. *Hawkins v Clayton* (1988) 164 CLR 539 at 571-573 per Deane J.
[24] cf., *Fox v Percy* (2003) 214 CLR 118 at [29]-[31].

characterisation of the agreement reached between George and Leon as giving Leon "a claim to our family home" (FC[58]; AB, p505.22).

16. As to the third point, Velika's full understanding of the force and effect of the agreement reached for the transfer of an interest in the Clark Road property is confirmed by the 2009 acknowledgement. That document recorded that Velika "agree[d] that Leon Pipikos is the owner of half of the land" at Clark Road (FC[33]; AB, 405). It recorded not merely knowledge of a discussion between George and Leon, but knowledge and acceptance by Velika of the legal effect of those discussions. As the Full Court correctly concluded the execution of and terms of the 2009 acknowledgement by Velika confirmed the substance of the agreement reached just prior to the purchase of the Penfield Road property in 2004 (FC[59] and [73]).

17. As to the fourth point, it is to be recalled that the context of the discussions concerning the transfer of the Clark Road property was an agreement to purchase jointly the Penfield Road property in equal shares notwithstanding Velika and George's inability to fund their share of the purchase (AS[13]). In a situation where Leon was prepared to fund the acquisition by Velika and George of a half equity interest in the Penfield Road property, it is, as the Full Court found, inherently likely that he would agree to do so only in return for an equity interest in the only asset Velika and George had to offer – the Clark Road property (FC[5] and [26]). Velika's characterisation in her submissions of the discussions between Leon and George in relation to a transfer of an interest in the Clark Road property – which appears to conceive of it as the creation of a security for repayment of Velika and George's share of the owner's contribution Penfield Road property funded by Leon - is inconsistent with Velika's own evidence as to her understanding of those discussions (FC[58]; AB 505.1 - .22), with Leon's evidence (FC[28]) and with Sophie's evidence (FC[39]) of those discussions. It is also inconsistent with the 2009 acknowledgement (FC[33]) and the absence of any attempt by Velika or George at any time after 2004 to repay to Leon their share of the purchase price for Penfield Road. Why Leon would permit George and Velika to enjoy the capital growth in the Penfield Road property whose acquisition he funded and receive only a debt interest in return is nowhere explained by Velika.

18. As to the fifth point, being an agreement reached by way of the manifestation of a mutual assent through a combination of words and conduct in an informal familial setting, it is to be expected that the terms of the agreement would leave much to implication or to be worked out in the future. However, none of the matters to which Velika points are of such weight as to lead to the

conclusion that the 2004 agreement was so uncertain or ambiguous as to lack the legal character of an enforceable agreement:

(a) contrary to Velika's submission at RS[42.2] and [63.2], there is no difficulty in identifying the nature of the interest sold: it was identified in Leon's evidence as a half interest in the Clark Road property less the value of the improvements which would remain with Velika and George (FC[30]). George's evidence was consistent with that identification of the interest in the Clark Road property the subject of the transfer (FC[50]). The evidence of Sophie is also consistent with that, as the Full Court demonstrated at FC[39]-[44] (cf., RS[60.1]). There is nothing novel about an agreement of that type.[25] Contrary to the suggestion at RS[60.1], nothing in Sophie's evidence is reflective of any notion of "the agreement about Clark Road ... facilitating payment of the equalisation obligation", whatever that might mean;

(b) contrary to the submission at RS[63.4], the presence of a prior registered mortgage over the Clark Road property presents no difficulty. Leon's later interest would obviously take subject to that mortgage; and

(c) when the agreement concerning the transfer of an interest in the Clark Road property in 2004 was reached, identifying the precise mechanism by which the parties' interests in the Clark Road property would subsequently be disentangled was doubtless something left to the future. Possible mechanisms are partition or sale (FC[41]).[26] However, as the Full Court correctly concluded, what was clear, on the whole of the evidence, was that the effect of the agreement in 2004 was that in any division the value of the unimproved land was to be divided evenly between George and Velika, on the one hand, and Leon, on the other, and the value of the improvements was to remain with George and Velika (FC[72]-[73]).

Relief, orders and costs:

19. At RS[38] and [70] it is suggested that the December 2014 order for the sale of the Clark Road property (referred to at FC[21]) is inconsistent with, or obviates the possibility of, an order for specific performance of the contract to transfer a half interest in Clark Road to Leon. The nature

[25] P Butt, "Selling land separately from fixtures" (2000) 74 *ALJ* 130.
[26] See ss69 and 60, *Law of Property Act 1936* (SA).

of the inconsistency is not stated. In truth, there is no inconsistency. An order for the transfer of a half interest in the Clark Road property to Leon (subject to the obligation to account for the value of the improvements and pay the additional $8000) will entitle Leon to a half share of the equity in the (unimproved) Clark Road property released by the sale and thus effectuate the basis on which he agreed to finance George and Velika's acquisition of an interest in the Penfield Road property.

20. At RS[66] it is conceded that Leon is entitled to an account for his greater contribution to the Penfield Road property from the proceeds of sale. This, it is suggested, will supersede "the sole purpose of the alleged sale of part of Clark Road". This submission erroneously characterizes the purpose of the agreement to transfer a half-interest in Clark Road as the creation of a security interest to secure repayment of George and Velika's share of the owner's contribution for the purchase of the Penfield Road property. As noted above, however (see [17]) the evidence demonstrated that the purpose of the transfer of the interest in Clark Road was to give Leon an equity interest in Clark Road in return for the equity interest he funded for George and Velika in Penfield Road. To relegate Leon to the status of a mere creditor in relation to his financing of George and Velika's interest in Penfield Road would not adequately remedy the detriment suffered by Leon. This fact underlines the point made in [11] above that relief short of enforcement of the contract for the transfer of a half interest in Clark Road (subject to the obligation to account for the value of the improvements) will not meet the justice of the case.

21. If Leon succeeds in his appeal, he should be entitled to his costs both in this Court and in the courts below. No sufficient basis has been demonstrated for remitting the question of costs to the Full Court (cf., RS[71]). If Leon is unsuccessful in his appeal there is no reason for this Court to intervene to disturb the costs orders made by the Full Court (cf., RS[68]).

22. The appellant otherwise joins issue with the contentions in the respondent's submissions.

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