MINERALS MATTERS

Autumn 2014

Welcome to the latest edition of Minerals Matters.

Whilst the economic picture has certainly improved over the last six months, there have been a number of stops and starts along the way. Data suggests further improvements during the first half of 2014 in the sales volumes of mineral products, aligned to a construction sector that saw reasonable expansion over the period, albeit a relatively flat second quarter. Housebuilding expansion reportedly levelled off over the summer period but there is some confidence for stronger growth for the remainder of the year in particular in relation to order books for the commercial sector.

We have of course also very recently had the results of the Scottish Independence Referendum. As would be expected, there were many predictions of gloom or doom for the minerals, oil and gas and power sectors in Scotland but hopefully with a decision now having been reached greater certainty can be felt across the board going forward.

In this edition of Minerals Matters we have articles on various topics including the proposals for replacing much of the legislation on health and safety in mines, the Government's recent consultation on a framework to make fracking and other extraction less vulnerable to landowner legal challenge, the need to consider importation issues in the mining sector and a discussion relating to a landmark court judgement on environmental private nuisance. We also have a guest article from Chris Smith of Grant Thornton in relation to UK tax authorities challenging mining companies – we aim to have further guest articles in future editions.

We are always happy to receive any comments that you may have in relation to this edition as well as requests for future articles.

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PROPOSALS FOR NEW REGULATIONS ON HEALTH & SAFETY IN MINES

The Health & Safety Executive recently issued a consultation document on proposals for new regulations on health and safety in mines which will replace most of the existing legislation. These proposals are one of the responses to the recommendations in the Löfstedt Report calling for the consolidation of sector-specific health and safety legislation to make it more accessible to duty holders.

The existing legislation on health and safety in mines is highly complex, being set out in 32 sets of regulations or orders, 13 amending instruments and two Acts of Parliament. Much of the legislation contains highly prescriptive requirements that are inappropriate in modern conditions and are generally disapplied by exemptions. Moreover, much of the legislation has been made redundant by additional legislation required to implement the EU Extractive Industries Directive (92/104/EEC) or other EU Health & Safety Directives of more general application.

Many of the duties set out in the existing legislation are placed specifically on the mine manager rather than on the "owner" or operator of the mine. This is stated by the consultation paper to be a legacy of nationalisation. However, in fact, this approach long pre-dates the nationalisation of the greater part of the former coal-mining industry in the late 1940s. It reflects a much earlier business structure in which mines were typically owned either by landowners (or their trustees) or by (often distant) business partnerships. In such a context, the manager of the mine was the individual with effective operational control on the spot, and placing primary duties on the manager made good sense.

That approach is, however, inconsistent with the requirements of the Health & Safety at Work Act 1974, the Management of Health & Safety at Work Regulations 1999, and other modern health and safety legislation. These typically focus the principal duties on the employer, which, in the context of a modern mine, is almost invariably a corporate entity, in the name of which the mine is operated. There is then also a potential secondary liability for managers and other officers whose neglect or other individual fault can be shown to have led to a breach of duty by the corporate entity.

The HSE is recommending that virtually all of the existing sector-specific legislation be replaced by a single new set of regulations, and the consultation paper included a draft of the proposed regulations. These place on the company or other person operating the mine (the mine operator) an overarching duty to ensure the adequate management of safety, a requirement to provide a management structure for that purpose, and documented demonstration of risk assessment and implementation of control measures. There are also specific requirements relating to typical underground mining hazards connected with fire, flammable or explosive gases and dust, ground movement, transport, explosives and further requirements relating to escape and rescue, ventilation, and the management of waste tips.

Readers of the draft regulations will note that the drafting style, and the content, of many of the provisions owe much to the existing Management and Administration of Safety and Health of Mines Regulations 1993 and the quite separate legislation relating to quarries set out in the

Quarries Regulations 1999. The regulations do not unnecessarily duplicate the requirements of health and safety regulations of more general application.

While all mine operators will be required to maintain adequate provision for rescue, coal mine operators will no longer be required to participate in a specific approved mines rescue scheme. Similarly, the HSE approval of particular mining qualifications, and the requirement for particular post holders to hold them, will be replaced by a general requirement for competent personnel.

The proposed new regulations do not make any move towards a permissioning regime for mines. A permissioning regime is a system under which the operation of a mine would require some form of prior permit or consent from the HSE (which might be subject to specific conditions), or prior acceptance by the HSE of a safety case or report, as applies in the case of certain other significantly hazardous industries or activities. Indeed the new regulations remove many requirements under the existing law which require regulatory consent or approval for certain actions, and the emphasis is on the mine operator having adequate risk control systems in place. However, the consultation paper reserves a move towards a permissioning regime as a possible future option which might be required in the context of changes to the Extractive Industries Directive.

The HSE envisages that, following the conclusion of the consultation, a final draft set of regulations will be prepared for the HSE board and then submitted to ministers. It is hoped that the new regulations will be laid before Parliament in December with a view to coming into force on 6 April 2015. However, certain provisions relating to the appointment of a mine operator will come into force on 1 March 2015. There will also be transitional provisions, to be developed further in the light of responses to the consultation to allow mine operating businesses time to adapt to the new legislation.

Moreover, the new regulations will retain the definition of the term "mine" as set out in S180 Mines & Quarries Act 1934. The new regulations will therefore not only apply to mines currently being worked for the extraction of minerals, but also to tourist mines, and storage mines.

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IMPORT ISSUES IN THE **MINING SECTOR**

As the cost of input products rises, companies across the globe are looking to reduce their costs by sourcing from competitive suppliers, wherever those suppliers may be found.

Equally, UK companies are looking to the global markets to sell their products as widely as possible. This article looks briefly at some of the steps companies involved in the minerals industry within the UK can take to reduce the costs and minimise the risks associated with importing goods into the EU.

The starting point for the customs treatment of any product is tariff classification. A tariff number allows customs authorities to easily identify what that product is, for customs purposes. Natural, unprocessed products tend to be classified under lower headings, and tend to attract lower duty rates. Section V of the tariff deals with mineral products. So, as a simple example, natural graphite is found under heading 2504. Natural graphite in powder or flakes would fall under the ten digit classification 2504900000, and would attract a headline duty rate of 0%.

The ten digit classifications give the headline duty rates; if you get the tariff classification wrong, you may well be either under or over paying customs duties (and in any event will be committing a technical violation).

You may well consider that, in circumstances where the duty rate is 0%, inaccurate classifications are not a big issue. However, duty rates fluctuate across the minerals sphere. For example, Portland cement clinkers fall under the heading 2523100000. They attract a headline duty rate of 1.7%. In circumstances where significant amounts of product are being imported, these duty rates can have a serious impact on the profit margin.

Another important factor to consider is where your products originate from. Certain countries (such as Mexico and South Korea) have preferential trade agreements with the EU, and many developing countries benefit from general arrangements such as the Generalised System of Preferences ("GSP"), under which the import of certain products will benefit from reduced or zero duty rates. However, to take advantage of these benefits, importers will need to show (through an origin certificate or a supplier's declaration) that the goods in question qualify for preferential treatment. Minerals importers should assess their supply chain to see whether it is possible to take advantage of preferential trade agreements and, if so, whether suppliers are contractually obliged to provide the relevant documentation on import.

The origin of goods also matters because the EU often imposes additional import duties, known as anti-dumping duties, on certain products from certain jurisdictions (in particular, non-market economies such as China). Depending on the "dumping" margin identified, these duties can be very significant and may drastically increase the import price of input products. In a very well-known case[1], an importer of Chinese silicon was found to be liable for anti-dumping duties of 49% of the value of the product – a backdated bill of €99,974.74 (plus possible penalties). Clearly, therefore, assessing your supply chain to ensure that you are not and will not be liable for anti-dumping duties (and amending the sourcing of products if you are) can very significantly reduce the cost of importing into the EU and could free up additional working capital for your business.

Conversely, in certain circumstances, the EU will suspend or withdraw customs duties from certain products in certain circumstances. Typically, tariff suspensions or quotas will be put in place where the product in question is not available (either at all or in sufficient quantities) in the EU. This has significant implications for the minerals industry, where certain minerals or mining products are only available in particular jurisdictions. If your input products are not available in the EU, or are not available in the quantities you require, it is worth assessing whether an application for a tariff suspension is worthwhile to reduce your customs duty burdens.

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[1] Hoesch Metals, Case C-373/08

SCOTLAND TO STAMP OUT **UK LAND TAXATION**

From 1 April 2015, Scotland will have its own land transfer tax – Stamp Duty Land Tax (SDLT) in Scotland will be no more.

Although full details of the new tax (known as "land and buildings transaction tax" or "LBTT") have yet to be published, the Scottish parliament has already legislated for the framework of how LBTT will work. The missing details – including the thresholds and rates of tax – will be confirmed over the coming months. This is the first step in Scotland taking on greater powers of taxation and will not be affected by the recent results of the referendum on Scottish independence.

Deals to buy Scottish property that are struck today, but not completed until April 2015, will be subject to LBTT, not SDLT. Property investors and traders in particular will need to take into account the potential effects on land values and transaction cashflows.

HOW IS IT DIFFERENT TO SDLT?

In many respects, LBTT will be very similar to SDLT. It will apply to almost all land transactions in Scotland, will be payable within 30 days and will have (more or less) the same reliefs and exemptions.

However, it will differ in a number of significant ways:

1. It will be a progressive or "slice" tax (like income tax), as opposed to a "slab" tax (like SDLT). The relevant rates of tax will only be applied to the portion of the price falling within the relevant bands. One of the principal criticisms of SDLT is that it causes price distortions around the rate thresholds; it is hoped that LBTT will remove this distortion on the Scottish property market.
2. The rates are likely to be different to SDLT. At present, these have not been confirmed, but the consultation documents include indicative rates of 3% for prices between £150k and £250k, and 4.4% on the excess.
3. Longer leases will have to be reviewed every three years (rather than five years, for SDLT) to establish whether any more tax is payable. This will increase the compliance burden for businesses that tend to occupy property through lease arrangements.
4. At present, no form of "sub-sale" relief has been legislated for (the concern being that it has often been the subject of aggressive planning in an SDLT context). A form of sub-sale relief, aimed at transactions involving site assembly and proper commercial development, is the subject of an ongoing consultation. However, it is likely to be restricted in scope and the current consultation document notes that the relief is intended to apply only where the underlying development is completed within five years (although this may change). If the Scottish legislature chooses not to enact a form of sub-sale relief, it would of course increase the costs of development and regeneration projects in Scotland. If sub-sale is relevant, it may be worthwhile considering incorporating a special purpose vehicle (SPV) to acquire land in Scotland and then selling the SPV to ensure there is only one charge to LBTT.
5. It is not clear if any transitional rules for existing reliefs will apply. Usually, pre-existing contracts or agreements that qualify for relief are protected, but there are no hints on LBTT.
6. The collection mechanism will be different. The tax will be collected by the Scottish Land Register at the point of title registration, and enforced by Revenue Scotland (the new Scottish tax authority).

The following table provides a brief summary of the key differences between LBTT and SDLT.

LBTT vs SDLT

	LBTT	SDLT
"Slab" or "slice" tax?	Slice (like income tax)	Slab
Starting threshold*	TBC – likely to be £150k**	£150k
Rates*	TBC – possibly 0%, 3% and 4.4%**	0%, 1%, 3% and 4%
Collection	Revenue Scotland (through the Scottish Land Register), within 30 days	HMRC, within 30 days
Leases with variable rents	Reviewed every 3 years	Reviewed every 5 years
Sub-sale relief?	Probable restricted relief (subject to further consultation)	Yes

* Commercial property

** Possible rates and threshold noted in most recent consultation documents.

HOW WILL IT AFFECT BUSINESSES?

Businesses will have two different land transfer taxes to pay – one in Scotland (LBTT) and one in the rest of the UK (SDLT). The collection mechanism will be different for each as, potentially, will the rates. Although the compliance aspects are likely to be dealt with by the transactional lawyers, businesses will need to factor in the varying costs and differences in the types of relief available. The requirement for more regular rent reviews will be a larger compliance burden on businesses that lease property in Scotland.

Portfolio acquisitions will become more complicated with different rates of tax applying to properties depending on where they are in the UK. This needs to be properly priced into transactions at the outset (not assuming it is 4% across the board when pricing).

Development agreements need to be carefully considered if they are likely to complete after 31 March 2015. The rate of tax is likely to be higher and the ability to claim sub-sale relief will be impacted, all of which goes to pricing and could, if missed, affect a developer's profit.

In summary, the changes announced are not huge, but there is potential for the two regimes to differ more widely over time.

WHAT HAPPENS NEXT?

A number of further consultations (including one on sub-sale relief) need to run their course and the Scottish parliament will, in the next few months, publish details of the rates and thresholds.

For now, it is a case of "watch this space" for the final details. Businesses can prepare for the changes by checking whether or not, since May 2012, they have entered into contracts to acquire land in Scotland (which, if completed after 31 March 2015, would be subject to LBTT).

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COURT OF APPEAL PROVIDES IMPORTANT GUIDANCE ON PRE-ACTION COSTS PROTECTION IN ENVIRONMENTAL CLAIMS AGAINST MAJOR PROJECTS

In a landmark judgment the Court of Appeal has held there is no automatic right to costs protection for litigants in private law environmental litigation, and has laid down new criteria which litigants must satisfy to claim costs protection.

THE SIGNIFICANCE OF PRIVATE NUISANCE CASES

Private nuisance is attractive to environmental campaigners because it allows them to continue a disruptive crusade against developments after the planning process has concluded. However, the costs of private nuisance claims are often disproportionate to the damages recovered. On average, a claimant might recover £5-10,000 in damages for a claim costing several hundreds of thousands of pounds in legal costs.

For campaigners, such disproportionate costs may be an end in themselves by undermining the profitability of the operation they are seeking to disrupt. However, the holy grail for campaigners is maximising the adverse costs risk for the operator whilst ensuring their costs exposure is capped or eliminated.

In this context, the status of the Aarhus Convention, ratified by the UK in 2005, has come to the fore. One of the key functions of the Convention is to ensure administrative and/or judicial remedies are fair and effective and the processes for challenges are equitable, timely and not prohibitively expensive (Article 9.4).

The UK Government has introduced fixed reciprocal cost caps in what are termed "Aarhus Convention Claims" (CPR 45.41), limited to judicial reviews. However, the question of whether private nuisance claims are automatically encompassed by the Convention has remained unresolved.

For the courts there is a fine line to tread between:

- ensuring individuals of limited means have recourse to the courts where the quiet enjoyment of their home is genuinely disturbed; and
- allowing private nuisance to become a vehicle for costly and potentially unmeritorious litigation brought by campaigners to disrupt operations at a site that is operating within the terms of its permits.

LANDMARK COURT OF APPEAL JUDGMENT

Now, the Court of Appeal in **Austin v Miller Argent (South Wales) Limited [2014] EWCA Civ 1012** has sought to determine these issues. Mrs Austin applied for a Protective Costs Order ("PCO") to hold her harmless from any cost liability to Miller Argent if she lost her claim in private nuisance. She also claimed Miller Argent should remain fully exposed to her costs if she won.

Miller Argent is undertaking a land reclamation operation, ultimately to restore the natural landscape scarred by mining and industrial waste north of Merthyr Tydfil. The operation is self-funded by the

extraction of coal at the site. Mrs Austin is an environmental activist whose campaign against the operation included unsuccessful challenges to the planning process and a Group Litigation Order ("GLO") application to bring private nuisance claims on behalf of around 500 local residents.[2]

Miller Argent submitted that the Convention does not require signatory states to ensure that *all* remedies are not prohibitively expensive. As there are a range of compliant remedies available in the UK, including the statutory remedy of public nuisance, there is no requirement to make private nuisance Convention compliant.

The Court rejected this; it considered one of the Convention's purposes is to encourage the public to engage in activities to ensure environmental compliance. The Court decided certain private nuisance claims may come within the Convention's scope and laid down the following criteria:

- there must be significant public interest to justify conferring special costs protection;
- the complaint must have a close link with the particular environmental matters regulated by the Convention; and
- the claim must, if successful, confer significant public environmental benefits.

Crucially, the Court accepted Miller Argent's submissions that the existence of an alternative, potentially cheaper procedure, was a factor to consider when exercising its discretion on whether to grant a PCO pursuant to Article 9.4.

The Court rejected Mrs Austin's arguments that they were obliged to interpret domestic law to give effect to Convention obligations. It decided the Article 9.4 obligation is "*no more than a factor to take into account when deciding whether to grant a PCO*". Having regard to Article 9.4 as a factor to be considered, the Court was not satisfied that it would be just to impose a PCO in Mrs Austin's case. In exercising this discretion, the Court took account of the following factors:

- the strong element of private interest;
- there was no satisfactory evidence demonstrating the potentially cheaper statutory nuisance route had been adequately explored; and
- Miller Argent is a private body which had already paid considerable costs in the GLO claim unsuccessfully brought by Mrs Austin.

CONCLUSION

This achieves a balance for litigants who will, in appropriate cases, be able to bring private nuisance claims with costs protection. However, this should be a last resort. The onus is on applicants to assess whether they will satisfy the criteria required to qualify for a PCO by showing their case is genuinely in the public interest, that they have properly engaged with public authorities and adequately explored other potential remedies.

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Paul and Joanna acted for Miller Argent (South Wales) Limited in *Austin v Miller Argent (South Wales) Limited* [2014] EWCA Civ 1012 and also *Austin v Miller Argent (South Wales) Limited* [2011] EWCA Civ 928.

[2] See the Court of Appeal's decision in **Austin v Miller Argent (South Wales) Limited [2011] EWCA Civ 928**

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THE UK TAX AUTHORITIES ARE CHALLENGING **MINING COMPANIES**

ARE YOU DOING ENOUGH TO RECOVER YOUR INPUT VAT?

Optimising the tax position of your business is an important consideration for any mining company and ensuring that the group has sufficient presence in the UK for VAT registration purposes has been an on-going challenge for groups with a small scale head office in the UK. Two recent comparable, but separate, decisions in the First Tier Tribunal considered whether the provision of loan finance and management services by a holding company to its overseas subsidiaries amounted to a substantial economic activity and the making of taxable supplies, so that the holding company was eligible for UK VAT registration and subsequent input tax recovery.

In the case of Norseman Gold plc the input tax incurred related to the services of a UK-resident director and fees for financial services, public relations and website design. The Tribunal decided that the services were, in principle, capable of amounting to a taxable supply, but because a price was not agreed for them there was no obligation to pay at the time they were made. The services did not, therefore, constitute an economic activity for VAT purposes and consequently, neither VAT registration nor input tax recovery was possible.

Similarly, in the case of African Consolidated Resources plc, management services were provided by its sole UK-based director to one of its subsidiaries. The services were billed annually for a fixed fee, however no cash payments were ever made, rather, the services were settled by increasing the level of debt due from the subsidiary. As no consideration had been received for the services, the Tribunal decided they should not be treated as a taxable supply. African Consolidated Resources also provided loan funding to other subsidiaries in the group, but on terms which the Tribunal decided a third party lender would not have accepted. As such the loan funding was more closely aligned to an equity investor than a commercial lender and therefore not an economic activity for VAT purposes.

First-tier Tribunal decisions are only binding on the parties involved and do not set any binding legal precedent. However, we have seen the UK authorities challenge a number of UK head offices of mining groups. These cases highlight the need for businesses in the mining sector to ensure that their VAT position is given due consideration and, where necessary, agreed in advance with HMRC.

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PROPOSED CHANGES TO THE UK SHALE AND GAS INDUSTRY

The UK shale and gas industry offers significant fiscal and labour market growth, with projections of £33 billion in spend and the creation of 64,500 jobs for period 2016-2032[3]. As a result, the Government has taken action to expedite its ability to exploit UK shale gas opportunities.

Shale gas extraction is achieved through hydraulic fracking, which involves the high pressure injection of specialist fluids into subterranean rocks, releasing the natural gas enclosed which is then extracted.

Access to the subterranean rocks often requires operators to function beneath private land. The existing framework governing access rights to private subsurface land is considered by the Government to be substantially inhibitive to those seeking to invest and operate in the UK shale gas industry and they have therefore proposed changes to the current legal position.

THE CURRENT LEGAL POSITION

In the UK there exists a legal presumption that a freehold owner of land owns everything from the surface of his land down to the strata below, with the Crown retaining ownership of the rights to all oil and gas present in the subsurface strata.

Companies seeking to undertake shale gas extraction in the UK are required to obtain various licences and permissions from the Government (including a Petroleum Exploration and Development Licence (**"PEDL"**) and all necessary planning permissions and environmental permits). They are also required to obtain consent from individual landowners to access private subsurface land before shale gas extraction activity can begin under that land.

It was held by the Supreme Court in *Bocardo SA -v- Star Energy [2010]* that any access to subsurface land without the individual landowner's consent (or a court order pursuant to the Mines (Working Facilities and Support) Act 1966) would be a trespass in relation to that land. Should a trespass occur, landowners may seek an

[3] Getting Ready for UK Shale Gas: Supply chain and skills requirements and opportunities

injunction preventing further extraction activity from taking place, grinding operations to an unwelcome halt. Operators are therefore likely to be required to obtain consent from a large number of individual landowners.

There has been a high level of media coverage relating to the vigorously debated extent of environmental risk caused by fracking activity. This has led to many landowners exercising their legal rights and significantly constraining fracking activity in the UK.

The above requirements can cause time and cost burdens which are unattractive to investors who require certainty prior to committing to extraction activity. Investors are therefore likely to be put off by the potential for protracted negotiations and/or court proceedings.

THE GOVERNMENT'S PROPOSAL FOR REFORM

The Department of Energy and Climate Change (**"DECC"**) have investigated these concerns and the Consultation on Proposal for Underground Access for the Extraction of Gas, Oil or Geothermal Energy (**"Consultation"**) proposes a tripartite response to the current legal position that would, if implemented, eradicate the existing risk of substantial delays and the threat of trespass action.

The key proposal is the implementation of a statutory right of access to subterranean private land. This would allow companies wishing to undertake fracking activities at a subsurface level of at least 300 metres below ground direct access to subsurface land without having to obtain individual consent. Companies would still be required to obtain a PEDL, together with all necessary planning permissions and environmental permits, and the existing regime will remain in place in respect of any operations less than 300 metres below the surface. Given that fracturing is commonly undertaken at least a mile below the surface, this grants fracking operators a much improved amount of freedom and certainty in their ability to efficiently undertake extraction operations.

A voluntary payment system has also been proposed that would see operators being encouraged to make payments (likely to local communities as opposed to individual landowners) as compensation for the default right of access. The voluntary payment would be supported by a statutory reserve power in the event of default by industry operators. Whilst anti-fracking groups have referred to this idea as bribery, it would allow for the consistent injection of private funds into the public sector at a local level.

The third aspect would be to introduce a public notification system. Operators would outline to the local community relevant matters, including the area of underground land that will be subject to fracking activity, together with details of the voluntary payment made in accordance with the above. This would increase transparency and as it is proposed that this notification system be delivered through the same voluntary agreement as the voluntary payment system, industry operators will be more obliged to comply with the voluntary system thereby reducing the burden on any regulatory enforcement measures.

CONCLUSION

The DECC is firmly of the opinion that the existing access rights framework is stalling the ability of the UK to maximise its development potential in the shale gas industry. The Consultation outlines the benefits of supporting their proposed developments, including significant economic and employment growth at a local level, whilst safeguarding the minimal risk position regarding land and water contamination.

The deadline for a response to the DECC's proposals expired on 15 August 2014 and whilst history suggests that these responses will be divisive, the DECC is keen to stress that the Government is committed to developing the shale gas industry in a responsible manner by maintaining a robust regulatory system including retaining existing licencing, planning and environmental regulatory procedures.

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With more than 70 offices throughout Asia, Europe, the Middle East, the Americas and more recently Australia, DLA Piper is ideally positioned to help your business obtain local legal advice in the mining and minerals sector, anywhere in the world.

Whilst Minerals Matters largely focuses upon legal and regulatory topics impacting on day to day operational matters in the UK, we, together with our international colleagues, can support all of your business needs in all of the major mining regions throughout the world.

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