Case No: F92YJ697

IN THE COUNTY COURT AT SHEFFIELD

The Law Courts
50 West Bar
Sheffield, S3 8PH

Date: 12th January 2023
Start Time: 11.37 Finish Time: 12.23

Before:

HIS HONOUR JUDGE SADIQ

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Between:

DRURY

Claimant/Respondent

- and -

YORKSHIRE AGGREGATES LIMITED

Defendant/Appellant

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MR LATHAM for the **Claimant/Respondent**
MR HOGAN for the **Defendant/Appellant**

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Approved Judgment

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JUDGE SADIQ:

Introductions

1. Throughout this judgment, the appellant will be referred to as "the defendant" and the respondent as "the claimant". This appeal concerns the issue of whether the District Judge was wrong in finding that the claimant had not acted unreasonably in initially valuing the claim in excess of £25,000 and pursuing the claim under the Pre-Action Protocol for Personal Injury Claims rather than the Pre-Action Protocol for Low-Value Personal Injury (Employer's Liability and Public Liability) Claims with the result that the claimant was not limited to fixed costs under CPR 45.

2. The appeal arises from the decision of District Judge Preston sitting in the Doncaster County Court on 9 May 2022 who decided that the claimant was not limited to fixed costs under CPR 45. I gave permission to appeal on all four grounds on 17 October 2022. The defendant was represented by Mr Hogan of counsel at this appeal who appeared also in the court below. The claimant was represented by Mr Latham of counsel who did not appear in the court below. I repeat my thanks to them for their helpful and concise submissions.

Background

3. On 11 August 2017, the claimant suffered an accident at work. Whilst he was unloading a tipper truck, he trapped and suffered a fracture to his right dominant index finger. The medical report obtained from Mr Knight, Consultant Plastic and Hand Surgeon, dated 1 December 2018, confirms that (i) four days after the accident the claimant underwent an operation; (ii) two weeks after the accident, he returned to work; (iii) approximately four weeks after the accident, the wound had healed well but the claimant was left with a slightly shorter right index finger, approximately eight millimetres shorter, some impaired sensation and pain when he knocked his fingertip and in the cold. There was no loss of earnings whilst the claimant was off work and there is no suggestion that the claimant required any care and assistance. The only special damages claimed at any time was modest expenses totalling £69.43.

4. On 12 December 2017, the claimant instructed solicitors. On 27 June 2018, the claimant's solicitor, Miss Jessica Lee, submitted a letter of claim. That appears at page 144 of the bundle, which I have considered. The letter of claim was submitted under the Pre-Action Protocol for Personal Injury Claims, not the Pre-Action Protocol for Low-Value Claims. That was because it was alleged on the information available about the injuries suffered, the claimant's solicitors considered that it was reasonable to conclude that the value of the claim was likely to exceed the upper limit of the Pre-Action Protocol for Low-Value Claims. The note also confirmed that the claimant had suffered a fracture to his right dominant index finger and that he wished to obtain expert evidence from Mr Knight.

5. Regarding expenses and losses, the note confirmed that, on the present information, expenses and losses included claims for inter alia care and attendance and future expenses and losses. Regarding function and prognosis, the note confirmed that the injuries were still affecting the claimant's day-to-day functioning but that the claimant's

solicitor was unaware of the prognosis which was to be dealt with by expert evidence. The note also asked a series of questions, some of which were clearly relevant to a potential disadvantage on the open labour market claim, in particular paragraphs 7 and 8 which were concerned with the risk of unemployment. The solicitor's view on the present information was that the claim, if proceedings were issued, were suitable for allocation to the multi-track i.e. claim worth over £25,000. It was said in the note that if the defendant disagreed with that analysis, please let them know.

6. By email of 5 July 2018, which appears at 157 in the bundle, the defendant's claim handler, Mr Andrew Hanson, replied, noting the claimant's solicitors had provisionally valued the claim at in excess of £25,000. Referring to the JS Guidelines applicable at the time and the bracket of between £7,990 to £10,730 for a fracture of an index finger, Mr Hanson asked questions inter alia why the claimant's solicitor believed the claim was worth over £25,000. On 17 August 2018, the defendant admitted liability in correspondence.

7. On 1 December 2018, a medical report was indeed obtained from Mr Knight and that appears at page 158 of the bundle.

8. Regarding disadvantage on the open labour market, Mr Knight said this at paragraph F8 of the report:

> "The injury will not prevent him from performing any specific work. It does, however, put him at a modest disadvantage compared with his uninjured peers on the open labour market were he to have to perform repetitive jobs at speed requiring fine manual skills. I would expect him to work at a slower pace than his uninjured peers".

9. That medical report, having been dated 1 December 2018, was received after the claimant's solicitors had submitted the letter of claim in June 2018 under the Pre-Action Protocol For Personal Injury Claims and, therefore, the medical report was not known to the claimant's solicitor at the time she submitted the letter of claim.

10. On 8 May 2019, the defendant made a Part 36 offer to the claimant of £11,000 plus costs. The offer was not accepted. On or around 14 October 2019, the claimant served a claim form with a particulars of claim valuing the claim at in excess of £25,000 but limited to £50,000, attaching a medical report from Mr Knight dated 1 December 2018, and claiming disadvantage on the open labour market. It also attached a schedule of loss claiming expenses and losses limited to £69.43 but no value was put on the claim for disadvantage on the open labour market. A second schedule of loss, dated 17 December 2020, did put a claim on the disadvantage on the open labour market namely for £50,000 for disadvantage based on two years net income of £25,000 per annum.

11. On 16 November 2020, the claimant accepted the defendant's Part 36 offer of £11,000 out of time and a consent order was prepared and approved by a court order dated 8 September 2021, which included the following at paragraph 2:

> "The defendant do pay the claimant's costs of the action up to 29 May 2019", which is the date when the Part 36 off should have been accepted, "To be assessed if not agreed".

And at paragraph 4:

> "The issue of whether the Portal costs/fixed recoverable costs applied and that be dealt with as a preliminary issue on an application by either party".

12. On 24 September 2021, the claimant's solicitors submitted a bill of costs of £18,590.04 which was limited to the costs up to 29 May 2021. On 9 December 2021, by consent, it was ordered that the preliminary issue regarding fixed costs be listed before a District Judge on 9 May 2022 with a time estimate of two hours plus 30 minutes' reading time.

The District Judge's Decision

13. That preliminary issue was listed before District Judge Preston on 9 May 2022 where the defendant was represented by Mr Hogan of counsel who appears before me on this appeal. The claimant was represented at that time by Mrs Beasley, the claimant's solicitor. The evidence before the District Judge was limited to the following: (i) the claimant's solicitor's letter of claim, dated 27 June 2018; (ii) the insurer's email reply on 5 July 2018; (iii) the claimant's solicitors file note dated 16 February 2018, which appears at page 196 of the appeal bundle, the file note having been prepared over four months prior to the letter of claim.

14. Dealing with the file note, it was prepared by Jessica Lee, the claimant's solicitor. It starts with, "reviewing expenses and losses and injury questionnaire returned by client". In fact, the claimant's injury questionnaire was not disclosed by the claimant for the hearing below before District Judge Preston or on the appeal before me. The file note also confirmed that the claimant had suffered no loss of earnings since he had been paid in full for his time off work. It did, however, describe the claimant's detailed working history, namely that he had previously trained as a mechanic, then he had worked as a machine operator/technician, then a self-employed carrier and then from 2011 as a HGV driver with the defendant.

15. The file note also referred to the claimant having sent photographs of the machinery as well as his injury. It described the mechanism of the accident and the injury to the claimant's right index finger and the treatment, including an operation. At the end of the file note, it referred to part of the bone having been removed from the claimant's right index finger and that the claimant's present symptoms included impaired sensation to the tip of the finger that he used the middle finger for tasks instead of the index finger.

16. I now deal with the District Judge's decision. There is an approved transcript of the proceedings and the judgment in the appeal bundle which I have read and re-read. In summary, in deciding that the claimant's solicitor had not acted unreasonably in valuing the claim at over £25,000 at the relevant time, the District Judge considered the following:

    i) Regarding general damages that it was not unreasonable to value general damages in bracket (k) of the relevant JS Guidelines, namely the 14th edition, which involves a partial loss of the index finger and a bracket of between £10,600 up to £16,420 (see paragraph 27 of the transcript of judgment).

ii) Regarding special damages, by the date of the letter before action on 27 June 2018, the amount was £69.43. At this time, it was not in dispute there is no loss of earnings and the District Judge said, "This was not a strong case for thinking there was going to be a loss of earnings claim in the current job" (see paragraph 30).

iii) Regarding disadvantage on the open labour market, the District Judge decided at the time of the letter before action it was reasonable for the claimant to claim for handicap on the open labour market (see paragraph 41 of the transcript of the judgment) and that the claimant might or could get an award for handicap on the open labour market and the claimant was reasonable to think this was the case (see the top of page 69 regarding the reasons given for refusing oral permission to appeal).

Defendant's counsel, Mr Hogan, applied for oral permission to appeal which was refused by the District Judge on 9 May 2022.

The Grounds of Appeal

17. There are four grounds of appeal:

i) First, the District Judge was wrong in principle and erred in law by making his own valuation of what the claim was reasonably valued at when the court's role was to evaluate whether the claimant had acted reasonably in valuing the claim at more than £25,000.

ii) Second, the District Judge was wrong in principle and erred in law by failing to take as his starting point the evidential burden and onus of persuasion was upon the claimant as the receiving party and recipient of an £11,000 settlement to explain why the claim could reasonably have been valued at more than £25,000 when the letter of claim was written in June 2018.

iii) Third, although the District Judge found that general damages could have fallen within bracket (k) of the relevant edition of the JS Guidelines, there was no evidence before the court that the claimant had valued the general damages claim within that bracket before or at all prior to submitting the letter of claim.

iv) The fourth and final ground of appeal was that, although the District Judge found that there could have been a claim for handicap on the open labour market, there was no evidence before the court that the claimant had valued damages for handicap on the open labour market or at any figure prior to submitting the letter of claim.

The Relevant Legal Principles and the Relevant CPR Rules

18. Under CPR Rule 52.11(3), an appeal court will allow an appeal where the decision of the lower court was (a) wrong or (b) unjust because of a serious procedural or other irregularity in the proceedings in the court below. Wrong means that the lower court (a) erred in law, (b) erred in fact and/or (c) erred in the exercise of its discretion.

19. Since this is an appeal regarding the evaluation or assessment of the claimant's reasonableness in valuing the claim, it is common ground that the appeal court must not conduct the evaluation exercise afresh but ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be asked such as a gap in logic or lack of consistency or a failure to take account of some material factor which undermines the cogency of the conclusion - see paragraph 76 of *Prescott v Potamianos* [2019] BCC 1031 CA.

20. Regarding an appeal in relation to the sufficiency of evidence, it is also common ground that the appellate court must be satisfied there was no evidence which can support the finding made which is criticised. The claimant also relies upon the following first instance decisions by District Judges, namely *Scott v MOJ* and *Platkilikus v Etills Limited* which are, in my view, clearly only persuasive authority. They do not highlight any significant legal principles and they demonstrate that each case is fact sensitive.

21. It is also common ground that the relevant Pre-Action Protocol was for Low-Value claims and the relevant CPR Rules are Rules 45.2(4), 44.4 and 44.3(2). Paragraph 7.59 of the Pre-Action Protocol for Low-Value Claims provides as follows:

> "Where the claimant gives notice to the defendant that the claim is unsuitable for this Protocol, for example because there are complex issues of fact or law, or where the claimants contemplate applying for a group litigation order, then the claim will no longer continue under this Protocol. However, where the court considers that the claimant acted unreasonably in giving such notice, it will award no more than fixed costs in Rule 45.18".

22. CPR Rule 45.24 provides as follows:

> "(1). This Rule applies where the claimant:
>
> (a) does not comply with the process set out in the relevant Protocol, or
>
> (b) elects not to continue with that process and starts proceedings under Part 7;
>
> (2). Subject to paragraph 2(a) where a judgment is given in favour of the claimant, but ...
>
> (b) the court considers that the claimant acted unreasonably ...
>
> (ii) by valuing the claim at more than £25,000 so that the claimant did not comply with the relevant Protocol, the court may order the defendant to pay no more than the fixed costs in Rule 45.18 together with the disbursements allowed in accordance with Rule 45.1(9)".

In this case, a judgment was obtained and a consent order was approved on 8 September 2021.

23. CPR Rule 44.4 provides that the conduct of parties is relevant regarding the broad assessment of costs. CPR 44.4(1) provides that the court will have regard to all the circumstances in deciding whether the costs were (a) if it is assessing costs on the standard basis (i) proportionally and reasonably incurred or (ii) proportionate and reasonable in amount. The relevant part is CPR44.4(3) which states:

> "(3) The court will have regard to:
>
> (a) the conduct of all the parties including in particular -
>
> (i) conduct before, as well as, during the proceedings and
>
> (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute".

24. The parties also rely in this appeal, as they did in the court below, on the Court of Appeal authority of *Williams v Secretary of State for Business, Energy and Industrial Strategy* [2018] 4 WLR 147. In *Williams*, the Court of Appeal considered the position of a claimant who had unreasonably failed to follow the Pre-Action Protocol that provides for fixed costs, but the claim had been settled by an acceptance of a Part 36 offer but before Part 7 proceedings and there had been no judgment. In that context, Coulson LJ held at paragraph 40 that CPR 45.24 did not apply to this case since there was no Part 7 proceedings and no judgment, but the provisions of CPR 44.4 regarding the conduct applied instead as well as CPR 44.11".

At paragraph 52, Coulson LJ said:

> "These provisions contain numerous ways in which a party whose conduct has been unreasonable can be penalised in costs. In my view, the Part 44 conduct provisions provide a complete answer to a case like this. They provide ample scope for a district judge or a costs judge when assessing the costs in the claim which were as unreasonably made outside the EL/PL Protocol to allow the fixed costs set out in the EL/PL Protocol".

25. He also said at paragraph 61 that in a case not covered by CPR 45.24 a defendant can rely upon the Part 44 conduct provisions to argue that only the EL/PL Protocol fixed costs should apply. Whether it is by operation of CPR 45.2(4) or CPR 44.4, the court needs to consider whether the claimant acted unreasonably regarding the valuation of the claim in excess of £25,000. It is also common ground between the parties that the assessment should take place at the date the letter of claim was submitted under the Pre-Action Protocol for Personal Injury Claims. The test is an objective one: was the valuation in excess of £25,000 objectively reasonable at the time of the assessment, namely the date of the letter of claim on 27 June 2018 based on the evidence available at that time?

26. Regarding the burden of proof, in my view it is unhelpful in this case to decide the issue before the District Judge on the basis of the burden of proof. Neither party in their written skeleton arguments referred to the burden of proof issue adequately or at all and Mr Hogan, counsel for the defendant, did say at the hearing before the District Judge that the burden of proof was decisive in the circumstances of this case.

27. The test is a relatively simple one. Was the valuation in excess of £25,000 objectively unreasonable or not as at the date of the letter of claim in June 2018 based on the evidence available at that time?

28. I now turn to the grounds of appeal. Ground 1, which I will paraphrase as "the substitution point" fails. My reasons are as follows. First, in my judgment, it is clear that the District Judge did evaluate the reasonableness of the claimant's evaluation. At paragraph 9 of the transcript, he said, "…do I think the claimant has acted unreasonably by valuing the claim at more than one £25,000…" Further, at paragraph 10 he said, "In answering that question about whether the claimant has been unreasonable…" Still further, at paragraph 18 of the transcript of the judgment, he said, "I think there needs to be a positive finding of unreasonableness by the claimant in valuing the claim at more than £25,000". Further, in the context of the evaluation of the claim for general damages at paragraph 23, he said, "Mrs Beasley [that is the claimant's solicitor] says, based on what the claimant/the claimant's solicitors knew or ought to have known at the time, it was not unreasonable for the claimant to think the claimant could value a claim for general damages in accordance with bracket (k). On the evidence, I agree and conclude it was not unreasonable to value the claim in accordance with bracket (k)".

29. Then, regarding the District Judge's decision at paragraph 42, he said this, "For me to make a finding on reasonableness, I consider I need to have sufficient evidence to lead me to have sufficient doubt that the claimant could not reasonably value the claim at more than £25,000 at that time". He then continued, "However, my judgment is that, in light of what appears the claimant knew at the time of valuing the claim as more than £25,000, I am not going as far as to find that the claimant acted unreasonably in valuing the claim at that time at more than £25,000". All these paragraphs of his decision point to the fact that it is clear that the District Judge did evaluate objectively the reasonableness of the claimant's valuation and did not substitute his own view for it.

30. Second, when evaluating the reasonableness of the claimant's evaluation the District Judge undertook the assessment at the date of the letter of claim in June 2018, which was the correct date. I repeat here paragraphs 23 and 42 of the transcript of the judgment which refer to the "relevant time" issue. Further, at paragraph 29 regarding the special damages claim, the District Judge referred to "At the point of the LBA (namely, the letter before action) on 27 June 2018…"

31. In the context of the disadvantage on the open labour market claim, the District Judge referred to at paragraph 33, "…it was reasonable at the time of doing the LBA to conclude that he would be disadvantaged on the open labour market…". At paragraph 34, he said "At the time of the LBA…". At paragraph 39, midway down, he said "…at the time of valuing the claim in the LBA".

32. The third reason for why Ground 1 fails is that, in my judgment, it is also clear that the District Judge undertook the assessment of the claimant's valuation based on the information known to the claimant's solicitors at the relevant time in June 2018. Regarding the general damages claim, he referred to the relevant edition of the JS Guidelines in force at the time accepting the claimant's solicitor's submission (see paragraph 19). The District Judge also referred to the claimant's file note of evidence dated 16 February 2018 over four months prior to the letter of claim in June 2018 (see in particular at paragraph 25 and again at paragraph 32) and he considered the letter

before action or letter of claim regarding the assessment of the claimant's valuation (see in particular paragraphs 28, 33 and 39 midway down).

33. The defendant submits that there was no quantum advice to support the claimant's valuation and/or there was no evidence of any calculation of value in the attendance note or otherwise. However, I am satisfied that the District Judge considered this point. Mr Hogan, counsel for the defendant, raised this point in oral submissions (see page 57 of the transcript of proceedings). The valuation is not unreasonable simply because it has not been recorded in writing in detail. The simple question for the District Judge was whether the claimant's valuation of the claim in excess of £25,000 at the relevant time in June 2018 was reasonable or not. It appears to me that the District Judge was able to decide that issue based on (i) the file note which included the description of the injury, the treatment and the work history which was relevant to the disadvantage on the open labour market claim; (ii) the letter of claim; and (iii) the claimant's solicitor's submissions regarding the valuation.

34. Finally, regarding the test to be applied on the appeal as per *Prescott*, in my view there is no identifiable flaw in the District Judge's treatment of the question to be decided such as a gap in logic, a lack of consistency or a failure to take account of some material factor which undermines the cogency of the conclusion. For all those reasons, Ground 1 fails.

35. Ground 2 is what I would describe as the “burden of proof” point. Just to repeat ground 2 is as follows: "The district judge was wrong in principle and erred in law by failing to take as the starting point the evidential burden and onus of persuasion was on the claimant as the receiving party and recipient of £11,000 settlement to explain why the claim could reasonably be valued at over £25,000 when the letter of claim was written in June 2018".

36. Ground 2 of the appeal also fails for the following reasons. Firstly, the simple question for the District Judge to answer was whether the claimant's valuation of the claim in excess of £25,000 at the relevant time in June 2018 was reasonable or not, which the District Judge did consider and address. Second, in my view the burden of proof issue did not assist in the circumstances of this case. Neither party in their written skeleton arguments referred to the burden of proof issue adequately or at all. Mr Hogan, counsel for the defendant, did not say in the hearing below that the burden of proof was decisive in the circumstances of this case (see the middle of page 66 of the transcript of the proceedings).

37. What Mr Hogan did say is that this being an assessment of costs on the standard basis and, therefore, CPR 44.3(2)(b) applied. But I agree with Mr Latham, counsel for the claimant, in his written submission that the difference between the settlement figure and the £25,000 threshold should have little or no bearing on where the burden of proof lies. I would also agree with his submission regarding where the line should be drawn regarding the settlement figure.

38. But, in any event, one has to consider the whole of the District Judge's judgment, not just one paragraph which was relied upon by Mr Hogan for the defendant. It is clear to me that the District Judge did acknowledge that he was performing a costs assessment on the standard basis and that any doubt should be resolved in favour of the paying party i.e. the defendant. At paragraph 15, he said, "If CPR 44.3(2)(b) is then the relevant

guide, then I take it that Mr Hogan says the court should have "sufficient doubt" as per CPR 44.3(2)(b)"... Further, at paragraph 42, he said, "For me to make a finding of unreasonableness, I consider I need to have sufficient evidence to lead me to have sufficient doubt that the claimant could not reasonably value the claim at more than £25,000 at that time". For all these reasons, Ground 2 fails as well.

39. Grounds 3 and 4 are an appeal regarding the sufficiency of evidence. Given that they are appeals against the sufficiency of evidence, it is common ground that I have to be satisfied that there was no evidence in support of the District Judge's findings regarding the claimant's solicitor's assessment of (i) general damages and (ii) disadvantage on the open labour market. That is a high threshold to overcome for the defendant. I cannot conclude that there was no evidence regarding the District Judge's findings in relation to these matters and, therefore, Grounds 3 and 4 also fail. My reasons are as follows.

40. Firstly, in relation to the general damages claim, based on the claimant's solicitor's file note of 16 February 2018, there was evidence from which the claimant could reasonably conclude that the claimant's injury fell within bracket 7(k) of the relevant JS Guidelines in force at the time for partial loss of index figure which covers also injuries to the index finger giving rise to disfigurement and impairment of grade 4 dexterity and the bracket between £10,670 up to £16,420.

41. The District Judge, in fact, dealt with this in some detail in his judgment at paragraphs 23 to 27, noting in particular from the file note that the claimant had suffered a crush injury resulting in a fracture to the dominant index figure which required an operation. There was impaired sensation and dexterity and disfigurement. As regards the claim for disadvantage at open labour market, based on the file note and the claimant's solicitor's submissions to the District Judge, I am unable to conclude that there was no evidence in support of the District Judge's findings that there could have been a claim for disadvantage on the open labour market.

42. Again, District Judge Preston dealt with this matter in some detail at paragraphs 31 to 39 of the transcript of judgment. In particular, he considered the file note and the note of the claimant's working history which was clearly relevant to a claim for disadvantage on the open labour market. He also considered the claimant's solicitor's submissions that, if the claimant could not work as a HGV driver in the future for whatever reasons, there were other jobs that the claimant had previously done which he was now unable to do or disadvantaged from doing because of the impaired dexterity caused by the injury (see in particular paragraph 33). He also considered the later medical report of Mr Knight which supported a potential claim for disadvantage in the open labour market, but was careful to acknowledge that the claimant did not have that medical report at the time (see paragraph 39).

43. I have also taken into account that the decision regarding the valuation of which Protocol to follow is taken at an early stage based upon limited evidence. I have also taken into account the defendant's submission that there was no evidence of a written valuation of the case in excess of £25,000 at the time and no reasons given why the Part 36 offer of £11,000 was accepted. Regarding the first point, in my view that was not a determining factor. The question simply is whether the claimant's valuation was reasonable or not based upon the information known at the time. I have no doubt that the district judge was alive to this point, namely the lack of a written valuation of the case in relation to quantum because it was raised in oral submissions by Mr Hogan,

counsel for the defendant, at the hearing below (see pages 57 and 58 of the transcript of the proceedings).

44. Regarding the second point and the lack of reasons given for accepting the Part 36 offer of £11,000, again I have no doubt that the District Judge was alive to that point as well given that it was raised by Mr Hogan in his oral submissions in the court below (see the bottom of page 67). But, in any event, this is no discrete ground of appeal that the District Judge failed to consider that no reasons were given by the claimant for accepting the offer of £11,000. Grounds 3 and 4 both focus on there being no evidence of any valuation of the claim for general damages or disadvantage on the open labour market. There was, in any event, a potential reason. Part 35 of the replies from the claimant's medical experts at page 170 and dated 13 July 2020 undermined any significant claim for disadvantage on the open labour market. For all these reasons, Grounds 3 and 4 fail and, therefore, the appeal is dismissed.

(This Judgment has been approved by HHJ Sadiq.)

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