IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-8082

BETWEEN	BANK OF NEW ZEALAND Plaintiff
AND	DEAN GEDDES AND ANGELA JANE POPE Defendants

Hearing: 21 May 2009

Appearances: T Allan for Applicant
PH Lowndes for Defendants

Judgment: 28 May 2009 at 10:00 am

JUDGMENT OF ASHER J

This judgment was delivered by me on 28 May 2009 at 10:00 am pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

……..
Date

Solicitors:
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Copy:
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[1] The Bank of New Zealand ("the BNZ") seeks summary judgment against Dean Geddes and Angela Pope. The claim is based on a mortgage advance by the BNZ to Mr Geddes and Ms Pope, and a following mortgagee sale. It is for the shortfall owed after the mortgagee sale of $289,429.70 together with interest. Mr Geddes and Ms Pope oppose the application on a number of grounds.

Background

[2] Mr Geddes is a nutritionist and Ms Pope is presently unemployed, although until December 2008 she had a job in sales and marketing. Mr Geddes in the course of his work as a nutritionist got to know a Phillip Cavanagh ("Mr Cavanagh"), who was a real estate agent. In due course Mr Cavanagh introduced Mr Geddes to his business partner, Mr Raghu Aryasomayajula ("Mr Aryasomayajula").

[3] Mr Geddes in his affidavit deposes that Mr Cavanagh and his partner, Mr Aryasomayajula, appeared to be successful property developers. They offered him the opportunity to be involved in one of their transactions. The focus became a property at 8 Trafalgar Street, Onehunga. It was owned by a company controlled by Mr Cavanagh and Mr Aryasomayajula, Allwin Holdings Limited. The essence of the transaction is set out in paragraphs 27 and 35 of Mr Geddes's affidavit as follows:

> 27. The deal was that I would buy 8 Trafalgar Street, Onehunga from Philip Cavanagh and Ragu's company, Allwin Holdings ("Allwin"). Over a period of approximately three months Allwin would complete the subdivision and I would sell the property back to Allwin in exchange for a fee. Allwin was to pay all costs associated, including legal costs, insurances, rates, contractor fees and other incidental expenses.
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> …
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> 35. The purchase price is shown as $960,000. During my initial discussions with Phil Cavanagh it had been agreed that the purchase price would be $760,000. I was told at this meeting by Ragu that the price had been increased to $960,000 to reflect the end value of the subdivision. I recall Ragu A saying that the price did not matter because they (Allwin) were going to be purchasing it back from me at the same price and that by doing so Allwin would reduce the amount of tax they would have to pay. I didn't understand the details but understood their desire to reduce the amount of tax they would pay.

[4] After the sale and purchase agreement was signed Mr Geddes and Ms Pope gave Mr Aryasomayajula information about their financial position so that finance could be arranged. They signed a Westpac assets and liabilities form. They left it to Mr Cavanagh and Mr Aryasomayajula to endeavour to arrange the finance. Mr Geddes does not disclose the amount of the fee that he and Ms Pope would receive in his affidavit. However, Ms Pope in her affidavit in opposition to summary judgment states that it was $20,000.

[5] Mr Cavanagh then spoke to a BNZ employee, Colin McTaggart ("Mr McTaggart") on 30 May 2007, about arranging the finance of $768,000. The file note made of this meeting shows that Mr Cavanagh told Mr McTaggart that the purchase price of the property was $960,000, and that the $192,000 difference between the BNZ funding and the purchase price would come from $2,000 cash, and the sale proceeds of a property owned by Mr Geddes and Ms Pope in Napier, of $190,000. There was in fact no such property or sale.

[6] On 5 June 2007 Mr Geddes was contacted by Mr McTaggart. In a short call Mr McTaggart advised Mr Geddes that a loan of $760,000 had been approved by the BNZ. There was no discussion about the details to the transaction. The property being purchased was identified as 8 Trafalgar Street, Onehunga.

[7] Following this the BNZ loan disclosure documents were forwarded to Mr Geddes and Ms Pope on 5 June 2007. Following a nutrition appointment the next day, Mr Cavanagh produced the BNZ personal customer information form for Mr Geddes. It was a single photocopied page with Mr Geddes and Ms Pope's driver licence information written in. He told them that they needed to sign the document and then fax it to Mr McTaggart. This was done.

[8] On 11 June 2007 Mr Geddes and Ms Pope met with their solicitor, Mr Tim Lewis. Mr Geddes advised Mr Lewis that he knew the vendor and that the property was going to be subdivided and sold as soon as the subdivision was completed. Mr Lewis had received an acknowledgement of debt form from lawyers acting for Mr Cavanagh and Mr Aryasomayajula, which showed a debt of $191,000

owed by Mr Geddes and Ms Pope to Allwin Holdings Limited. Mr Geddes stated in his affidavit at paragraphs 60 and 61:

> 60. Tim Lewis was aware that I was buying the property from someone I knew. He simply presumed the sum of $191,000 was legitimate. He did not check that the funds were in the appropriate account. Angela and I did not know that Tim should have checked to see if the money was in the correct account.
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> 61. I was not particularly concerned about the acknowledgement of debt as I presumed it was a necessary part of the process and I trusted Philip Cavanagh.

[9] Ultimately the advance from the BNZ to Mr Geddes and Ms Pope was made by way of two separate loans, one of $118,000, which was by way of a housing loan term facility, and one of $650,000, which was by way of a housing term loan agreement. Both were secured by way of a first mortgage over the property.

[10] The purchase of the property by Mr Geddes and Ms Pope from Allwin Holdings Limited duly settled, and the mortgage was registered against the title. Within two months there was a default in making the payments. The subdivision did not proceed and Mr Geddes and Ms Pope claim that Mr Cavanagh and Mr Aryasomayajula failed to meet the promises they had made to look after the transaction and arrange for the property to be purchased back. The BNZ issued Property Law Act Notices. The property was sold by mortgagee sale on 11 July 2008 for $595,000. The $289,429.70 claimed is the shortfall.

The defences raised

[11] The defendants' submissions were filed very late. The defendants' position as presented by their counsel Mr Lowndes is that Mr Geddes and Ms Pope were dupes of Mr Cavanagh and Mr Aryasomayajula, and that the BNZ was in some way complicit in Mr Cavanagh and Mr Aryasomayajulas' actions. He submits that the BNZ was in a conflict of interest position, that it breached its duty to Mr Geddes and Ms Pope, that there was a contractual mistake, and that there was a failure to disclose all relevant information by the BNZ. He submitted, finally, that in the Court's discretion summary judgment should be denied.

The criticism of the bank

[12] Mr Lowndes was very critical of the BNZ's conduct, and in particular the position of its employee at the time, Mr McTaggart. Mr McTaggart has not sworn an affidavit. Mr Lowndes submitted that there was evidence to indicate a close association between Mr McTaggart, Mr Cavanagh and Mr Aryasomayajula. It is necessary to examine this submission, and its implications.

[13] While Mr McTaggart has not sworn an affidavit, his file note of his meeting with Mr Cavanagh to discuss the proposed loan to Mr Geddes and Ms Pope has been produced by the BNZ in the second affidavit of its employee, Ms Ramsey. It reads:

> Dean Geddes & Angela Pope
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> File Note 30/05/2007
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> Accounts to be opened
>
> Purpose
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> Dean Geddes has been referred through to me by existing client Phil Cavanagh. Dean is a nutritionalist who contracts out to several gymnasiums in Auckland, including Les Mills. Dean's partner Angela, currently works for Melview Developments as a sales rep.
>
> We understand that Dean currently owns a freehold property in Napier which he has sold for $190,000. These funds will be used towards the purchase of a new property situated at 8 Trafalgar Street, Royal Oak. The new property to be purchased currently has a house on a 809m^2 block of land. The previous owner has obtained consent to subdivide the property and following discussions with a valuer, once subdivision has been completed, the house on the front site would be valued around $600,000. It is Dean's intention to onsell the house subject to new titles being issued. Funds from this would be used to reduce debt down to around $150,000. At that point, Dean and Angela will be looking to construct their own house on the back section. At this point no commitment has been given to Dean around funding this part of the project, however discussion has been had around the risks/benefits between a fixed price construction (such as GJ Gardner) and managing the project either himself or by way of a contract builder.
>
> **Required**
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> | | |
> |---|---|
> | Purchase price of property | $960,000 |
> | Sale proceeds from Napier property | $190,000 |
> | Cash | $2,000 |
> | | |
> | Funding from Bank of New Zealand | $768,000 |

Financials

IRD Certificate for Angela attached confirming annual income of $130,822 for period ending Mar 2006. P&L from Dean reflecting an average EBIT over 2005 & 2006 of $23,150. Balance sheet of Dean's company does not look flash, however, company has been set up as a vehicle for trading as opposed to a sole trader situation. If we also consider the current Napier property in the mix, the position looks much more favourable.

Debt servicing

As per attached. To be held in consideration is the intention that approximately $600,000 of debt will be reduced within the next 6 months.

Security

To be a first registered mortgage over the property situated at 8 Trafalgar Street, Royal Oak, CT NÄ 606/182. PP $960,000 @ 80% is $768,000 CAT B.

Structure

HTLN, Table 25 year term, Variable $650,000, Interest only 6 months then P&I $5,956.75 pmth.

HTLN, Table 25 year term, Fixed 2 years, $118,000, Interest only 6 months then P&I $978.86 pmth.

Recommendation

Approved under writers DCA

BCC

Please prepare ALOC

[14] The file note shows acceptance of a purchase price of $960,000. It also proceeds on the basis that Mr McTaggart was informed that Mr Geddes and Ms Pope owned the property in Napier, which was being sold for $190,000, and that the funds would be used for the purchase of 8 Trafalgar Street. Clearly Mr McTaggart had been told this by Mr Cavanagh. Equally clearly the statement was untrue.

[15] Mr Lowndes submits that it was clear that the BNZ had been given a statement of assets and liabilities for Mr Geddes and Ms Pope. This was a document that they say they signed in blank. It had been filled in and amongst the assets shown was an item worth $190,000, without any detail being given. It appears to have been assumed by the BNZ that this was the proceeds of sale of the fictitious Napier property. The handwriting in the document is not that of Mr Geddes or

Ms Pope, and it is suggested that it is Mr Aryasomayajula's handwriting. Mr Geddes and Ms Pope say they did not know of the misrepresentation about the sale of a Napier property.

[16] Mr Lowndes submitted that the close contact between the BNZ's employee Mr McTaggart, Mr Cavanagh and Mr Aryasomayajula meant that the BNZ was in a conflict of interest position, the conflict being between the BNZ's duty to Mr Geddes and Ms Pope, and the duty to Mr Cavanagh and Mr Aryasomayajula. He pointed out that the BNZ had advanced a first mortgage to Allwin Holdings Limited on the Trafalgar Street property earlier in the year, which mortgage was owing at the time of purchase by Mr Geddes and Ms Pope and discharged on settlement of that purchase. Mr Lowndes asserted that the BNZ "failed in its duty to the defendants in lending an amount in excess of the true value of the property and did not undertake all the usual checks required in a transaction of this nature".

[17] It is necessary, therefore, to consider the duty of a bank in this situation.

The nature of the BNZ's obligations to their customers

[18] The duty allegedly owed by the BNZ to Mr Geddes and Ms Pope has not been specified. There are theoretically three ways in which a duty could arise, by contract, by tort, or by equity through a fiduciary duty.

[19] There was undoubtedly a contract between the BNZ and Mr Geddes and Ms Pope. They were not, prior to obtaining the mortgage, customers of the BNZ. They had had no contact with it, and in the period leading up to the advance there was only one discussion with Mr McTaggart. The groundwork to obtaining the loan had been carried out by Mr Cavanagh and possibly Mr Aryasomayajula. In doing so they acted as the authorised agents of Mr Geddes and Ms Pope. There can be no doubt about the authority, as Mr Geddes and Ms Pope had expressly arranged with Mr Cavanagh and Mr Aryasomayajula that they would seek mortgage finance on their behalf, (although there had been no express arrangement about finance being sought from the BNZ). When Mr Geddes received the phone call from Mr McTaggart of the Bank of New Zealand, he was not surprised. He was expecting

that the material he had given to Mr Cavanagh and Mr Aryasomayajula would lead to a mortgage being arranged

[20] The relationship between BNZ and customers was, therefore, that of an orthodox arm's length contract between two parties driven by mutual commercial advantage. The BNZ offered finance, and would receive interest, from which it would achieve a profit. The customers would obtain a loan, which they could use to fund the purchase.

[21] The terms of the contract were written. There was no term imposing any duty on the BNZ to warn of any dangers or risks in the underlying transaction. How can it be said, then, that it was implicit that the BNZ would consider the position from the point of view of the borrowers and warn them of dangers? There is no custom or rule of law implying such a term. A term arising by implication from the express terms and context of the contract of the type referred to by Cooke P in *Vickers v Waitaki International Limited* [1992] 2 NZLR 58, at 64, could not be said to arise. The terms and conditions indicate only an arm's length loan. Such an obligation did not need to be assumed to give the contract business efficacy, and was not so obvious that it "goes without saying" to meet the test set out in *Devonport Borough Council v Robbins* [1979] 1 NZLR 1, at 23. In *Dovey v Bank of New Zealand* [2000] 3 NZLR 641, at 652-654, it was held that there was no implied term in a banker-customer contract requiring a bank to warn the customer of the risk of dealing with an insolvent foreign banker, when transferring money off-shore. Such a term was not necessary to make the contract work, and it did not go without saying. I conclude that no term can be implied requiring the BNZ to warn of any risks involved in the transaction.

[22] No duty of care in tort can be said to have arisen. The parties chose to govern their position by contract. In such circumstances, the BNZ can be seen as the offeror of a commercial service, and the customers as the purchasers of that service. Contract should be allowed to govern their legal rights, as they had intended. There was no proximity in the sense of vulnerability or reliance on the part of the borrower. As was stated by Ralph Gibson J in *Williams & Glyn's Bank v Barnes* (1981) ComLR 205, 207-208:

> … Does the relationship impose the duty to tell the customer that the borrowing, and the application of the loan intended by the customer are or may be imprudent, if the bank knows or ought to know that such borrowing and application are imprudent and therefore may be the cause of financial loss to the customer? In my judgment in such circumstances no duty in law arises upon the bank either to consider the prudence of the lending from the customer's point of view or to advise with reference to it. Such a duty could arise only by contract express or implied or upon the assumption of responsibility in reliance stated in *Hedley Byrne* or cases of fiduciary duty. The same answer is to be given to the question even if the bank knows or ought to know that the borrowing and the application for the loan as intended by the customer are imprudent.

The position in New Zealand was referred to by Paterson J in *Clarke v Westpac Banking Corporation* (1996) 7 TCLR 436 at 444:

> A banker is generally under no duty to explain the nature and effects of documents which it is asking other persons, including guarantors, to sign … There are exceptions, namely, that a bank is under a duty to take reasonable care to ensure that a proffered explanation is accurate or that the reply to any inquiry is both honest and correct.

[23] The trend of authority in New Zealand is entirely against the imposition of a tortious duty of care to new customers such as Mr Geddes and Ms Pope: *Dungey v ANZ Banking Group (New Zealand) Limited* (1997) 6 NZBLC 102,194, at 102,200; *Shivas v Bank of New Zealand* [1990] 2 NZLR 327 at 329; *Morrison v Bank of New Zealand* [1991] 3 NZLR 291. Banks in New Zealand will examine a transaction from the point of view of their own purposes. In doing so they take on no duty to the person who is seeking the loan to advise or warn. The imposition of such a duty would disrupt current banking practice, and add to the cost of bank loans. There is no policy reason why it should be imposed, particularly in a situation such as this, where the bank and customer have no ongoing relationship, and the customers had the opportunity of getting their own advice.

[24] There is no general rule that a fiduciary duty is owed by a lender bank to a customer: *Clarkes v Westpac Banking Corporation* at 449. It is not a contract uberrimae fidei, of the utmost good faith: *Shivas v Bank of New Zealand* at 363. It has been stated in *Tyree's Banking Law in New Zealand* (2ed 2003) at 450, in relation to guarantees, that "in general, the Courts have interpreted the duty of disclosure restrictively", referring to *Hamilton v Watson* (1845) 12 Cl & Fin 109 at 119, *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674 at 690; and *Scales Trading*

Limited v Far Eastern Shipping Co. Public Limited [1999] 3 NZLR 26 at 35 (overturned on appeal but not on this point: *Far Eastern Shipping Co. Public Limited v Scales Trading Limited* [2001] 1 NZLR 513). Here, in any event, there were none of the complications that may arise from a bank obtaining the benefit of a guarantee from a third party, of a customer's borrowing. There was a straightforward loan advance.

[25] In an ordinary lender-borrower transaction such as this, the relationship is commercial, with the two sides openly having different interests that they compromise in a bargain for their mutual financial advancement, the bank to make interest on the advance, and the customer to have the use of the money. There were, between the BNZ and Mr Geddes and Ms Pope, no particular circumstances from which a relationship of trust could be inferred. Indeed, the relationship was so much at arms length, that there was no meeting between the BNZ and them, prior to the advance, and only one meeting with their agent.

[26] If a lending bank chooses to give advice to its customer borrower about the quality of the investment, or promote itself on the basis of the provision of a particular service, the bank may assume a duty in tort to give sound advice to a customer: *Wilkins v Bank of New Zealand* [1998] DCR 520. It was stated in *Banbury v Bank of Montreal* [1918] AC 625 (HL) at 654:

> If [a banker] undertakes to advise he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so he will incur liability if he does so negligently.

A bank may assume a duty to explain a product accurately: *Wilkins v Bank of New Zealand.* However, that issue does not arise as there is no suggestion that Mr McTaggart or anyone from the BNZ gave any advice to Mr Geddes or Ms Pope about the quality of the investment.

[27] It cannot be said against the background in this case that there has been a disclosure failure or conflict of interest by the BNZ. The BNZ may or may not have had the ability to appreciate unusual features of the purchase. Given the fact that a valuation of the property of $850,000 was produced on 20 August 2007, the actual sale price of $960,000 was not out of the possible range. On the basis of the file note

of Mr McTaggart, he was misled by Mr Cavanagh or Mr Aryasomayajula about the purchaser contribution from the sale of the Napier property. The unfortunate loss on mortgagee sale would be seen as primarily a result of the downturn in the economy, contributed to by a purchase at an overvalue. But even if there were odd aspects of the purchase by Mr Geddes and Ms Pope, the BNZ was not obliged to take on the mantle of their advisor.

[28] Mr Lowndes in his submissions hinted at some special relationship between Mr Cavanagh and Mr Aryasomayajula and Mr McTaggart, referring to Mr McTaggart's acceptance of Mr Cavanagh as the agent of Mr Geddes and Ms Pope, and his acceptance of the higher purchase price than the price paid earlier in the year for the same property. If there was some such relationship, that itself could not elevate the BNZ into a position of liability. There were no misrepresentations by Mr McTaggart. He gave no advice. He did no more than accept the information and a request for finance that on agency principles Mr Geddes and Ms Pope had authorised Mr Cavanagh to pass on.

[29] The BNZ was supplying a product which Mr Geddes and Ms Pope wanted. They had a lawyer advising them. It could be expected that the lawyer would have pointed out any unusual features of the transaction. Except the lawyer was misled by Mr Geddes. Mr Geddes acknowledged that he deliberately did not tell Mr Lewis that the deed of acknowledgement of debt was a sham, and there would be no indebtedness, as the transaction was falsely inflated. Mr Geddes agreed to the inflated purchase price and did not inform the BNZ about it so he and Ms Pope could get $20,000. Mr Geddes and Ms Pope cannot blame the BNZ for believing the material that was put to it with their knowledge. And they cannot complain about the BNZ not pointing out the high purchase price, when they knew themselves that it was artificially high. If any person was fooled by the transaction it was the BNZ, not Mr Geddes and Ms Pope.

Mistake

[30] The defence of contractual mistake is put forward, without any specific reference to which subparagraph of s 6(1)(a) of the Contractual Mistakes Act 1977 is

relied on. There was reference to the case of *Conlon v Ozolins* [1984] 1 NZLR 489, but that case has been restricted to its own facts in *Paulger v Butland Industries Ltd* [1989] 3 NZLR 549. The section relied on in those two cases was s. 6(1)(a)(iii), which concerns the parties being influenced in their respective positions by a different mistake about the same matter of fact or of law. Here there was no mistake at all by Mr Geddes or Ms Pope. They both knew that they were getting an advance from the BNZ on a property with an inflated purchase price. The BNZ does appear to have made the mistake of thinking that the price was genuine, and that cash of $192,000 was being provided. Mr Geddes and Ms Pope knew the amount that they were borrowing, and knew that the price in the agreement was inflated. They made no mistake.

[31] Mr Lowndes submitted that Mr Geddes and Ms Pope made the mistake of believing that the BNZ knew that the $192,000 difference between the mortgage sum and the agreement for sale and purchase sum was not to be paid in cash, whereas in fact the BNZ did not. There is no satisfactory evidence to support this assertion. Moreover, this was not a different mistake about the same matter of fact or law. The mistake of the BNZ was about the terms of the purchase, whereas the alleged mistake of Mr Geddes and Ms Pope was about the bank's state of mind. The mistakes relied on were about different facts. As was observed by Somers J in his dissenting judgment in *Conlon v Ozolins* at 507-508, a mistake in such circumstances can only be a unilateral mistake. The only sort of unilateral mistake that triggers the Court's jurisdiction under the Act is that referred to in s 6(1)(a)(i), which requires knowledge of the "other party,". In this case, as could be expected, the BNZ did not know that the purchase price was inflated. It did not know that it was being duped. There was no knowledge of the "other party".

[32] In a case such as this where the mistake was induced, at least in part, by the party seeking to take advantage of it, a Court is unlikely to intervene in its discretion under s 7(2). In any event, in this situation there was no unequal exchange of values or disproportionality of the type that s 6(1)(b) states must exist if s 6 is to be applied. The loan was advanced by the BNZ, and Mr Geddes and Ms Pope had the advantage of receiving the funds. The BNZ was entitled to interest, and a mortgagee's rights of sale. This was not disproportionate, and there was no unequal exchange of values.

Discretion

[33] There are no discretionary factors which should dissuade the Court from granting summary judgment. Mr Geddes and Ms Pope created their indebtedness, knowing what they were doing and not fully disclosing it to their lawyer, so they could make a quick $20,000. The fall in property values, and possible failures on the part of those who promoted the venture to them, have meant the purchase and mortgage have gone disastrously wrong for them, but that is not the BNZ's fault. They have only themselves, and their partners in their joint venture, Mr Cavanagh and Mr Aryasomayajula, to blame. There is no extraordinary factor warranting relief against the BNZ from the usual consequences of indebtedness.

Summary

[34] The plaintiff seeks summary judgment for:

a) $285,000, being the balance of the term loan, and interest at 10.45%;

b) $4,429.70, together and interest at 23.60% being the overdrawn current account; and

c) costs on a solicitor and client basis in accordance with the contract document. I do not have any calculation or submissions on the amount of interest or costs. The plaintiff is entitled to judgment for the amounts claimed together with interest.

[35] The summary judgment application is granted. Judgment is entered against the defendants for the sum of $289,429.70, together with interest at 10.45% on $285,000.00 and 23.60% on $4,429.70. The amount of interest cannot be specified on the information before the Court. Further submissions will be required if judgment is sought for a specific amount of interest.

Costs

[36] The plaintiff is entitled to costs and disbursements, but I will require submissions as to the amount.

[37] Further submissions as to the quantum of interest and costs should be filed within seven days by the plaintiff, the defendant having a further seven days in which to reply.

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Asher J