

30.1.2002.



1 IN CHAMBERS
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS
3 CAUSE NO: D44 OF 1998
4

5 BETWEEN: CHRISTINE DUTY PETITIONER
6 AND: CHARLES ALEXANDER DUTY RESPONDENT

7
8 Appearances:
9 Mrs. Sheridan Brooks-Hurst of Brooks & Brooks for the petitioner
10 Mr. Phillip Boni of Truman Bodden & Co. for the respondent
11
12 Before: Chief Justice Anthony Smellie
13
14

15 JUDGMENT
16

17 The parties seek the resolution of ancillary matters following the grant of the petition for
18 divorce.

19 The petition followed on a brief five-year marriage which was the second for both
20 parties. Brief though it was, the marriage unfortunately became tumultuous and
21 eventually marred by domestic acrimony and violence at the end.

22 There are no children of the marriage.

23 Both parties are in their mid-fifties and having raised families from their previous
24 marriages, are concerned in the present proceedings only with their own entitlements.

25 The task presented to me is therefore to arrive at the just and fair division of such
26 matrimonial property as exists.

27 A complicating aspect of the matter relates to the health of the parties and to the health of
28 the petitioner in particular.

1 She invites the Court to have regard to injuries she sustained at the hands of the
2 respondent and which she asserts have exacerbated chronic spinal and other back illness,
3 resulting in her inability to work. She seeks payment of maintenance as the result.

4 The respondent's own chronic health problems are also to be considered as a factor going
5 to question his continuing ability to work in his business as an electrician in the
6 construction field. I will return to consider those issues below.

7 A further complicating factor is presented by the respondent's claim to have acquired an
8 interest in the matrimonial properties, not primarily by virtue of financial contributions,
9 but by virtue of the contribution of construction labour, expertise and know-how - in
10 other words, contribution in kind. The measurement of that contribution and the
11 assignment of value to it, will be issues to be specifically addressed.

12 The third complicating factor arises from the absence of full disclosure in support of the
13 respondent's stated position, as deriving his income entirely from a company known as
14 Electrical Enterprises 2000 Ltd; in which he is a shareholder. This company is the
15 successor to Caribbean Construction Consultants Ltd. now defunct and through which the
16 respondent formerly carried on his electrician's business.

17 A concern of the petitioner's is that the defunct company once held lucrative subcontracts
18 for electrical work in very large projects, some of which she believes must have been
19 assigned to Electrical Enterprises. She believes that new contracts are also being won and
20 that the respondent obtains significant income through Electrical Enterprises which he
21 has not disclosed.

22 The respondent admits to receiving a monthly salary of CI\$4,500, pension and health
23 benefits from the company, but nothing more.

1 On his behalf, Mr. Boni argued that as neither company can be regarded as a party to the
2 divorce, they are to be regarded as third parties and that enforced discovery against third
3 parties can only be permissible in certain well defined circumstances not presented here.
4 Further that as the petitioner did not seek to invoke the appropriate process of the Court
5 for discovery from Electrical Enterprises 2000 (as the company now being operated), she
6 is not entitled to discovery from it as a third party. Thus, in effect, the Court must rely
7 upon what the respondent says about his relationship with and entitlements from that
8 company.

9 When despite this argument, it was made plain to Mr. Boni by the Court that his client's
10 obligation remained to give full and frank disclosure of his own entitlements (actual or
11 potential), the respondent submitted to being put on oath and testified about the affairs of
12 Electrical Enterprises. He also presented some corporate records including bank account
13 statements. Among other things, these showed total deposits of more than USD 4 million
14 over a period of 2 years and 10 months (from 1st January 1998 to the 3rd October 2000).
15 These deposits represented income from the many electrical subcontracts which were
16 also then identified.

17 These records represented unaudited accounts prepared for the company by the
18 respondent himself. He cited the "astronomical" costs of having the accounts of the
19 company independently audited by a recognized firm of accountants.

20 The respondent also testified that Electrical Enterprises has a staff of some 50 workers,
21 including some for whom work permit fees must be paid. He said that the fortnightly
22 payroll averaged CI\$40000.

1 This would represent an annual payroll of CI\$960,000 or CI\$2,720,000 over the 2 year
2 10 month period during which the company earned more than USD 4 million.

3 From that information latterly disclosed, it appears that while the company doubtless has
4 had will continue to have significant expenses, as its 49% shareholder, the respondent
5 will expect to have significant income by way of dividends.

6 Such dividends will doubtless be diminished by the fact that the construction industry has
7 been severely impacted by the local economic recession which has only deepened since
8 the hearing in this matter. There is notably some evidence that the company operated an
9 overdraft of up to CI\$45000. While this would be consistent with a cash flow problem
10 arising from the untimely payment out of dividends to shareholders, the respondent
11 insisted that it was due to the maintenance of the full payroll even while the company's
12 earnings diminished due to the recession. He said the company's policy was never to lay
13 off workers if it had a choice.

14 I also take account of the fact that the level of earnings disclosed might well be
15 diminished by the gross costs, not only of labour but also of materials to be supplied by
16 the company for contracts. Nonetheless it is well known and in the absence of complete
17 disclosure I take notice that in the construction industry here contractors typically seek a
18 net markup of between 15% and 25% above costs.

19 To conclude on this issue, while I have no evidence which directly refutes the
20 respondent's account that he receives only a monthly salary of CI\$4500, I am able to
21 infer that he receives and will likely continue to receive significant dividends form the
22 company as well. This will of course fluctuate in the future in keeping with the changing
23 fortunes of the company.

1 The assets of the parties

2 At the time of the marriage the petitioner was by far financially the better off of the
3 parties.

4 As at the date of marriage, - 7th August 1993 - she held or had an interest in the following
5 properties, a number of which were subsequently disposed of on the dates and for the
6 prices indicated:

7	<u>Registration section</u>	<u>Block</u>	<u>Parcel</u>	<u>Date of transfer or sale</u>	<u>Price</u>
8	1. George Town	14D	280	3.2.94	CI\$231000
9					
10	2. George Town	14D	284	(At cost of \$72000 bank loan, 11 small office building 12 constructed on this parcel).	
13					
14	3. George Town	14D	309	8.7.96	CI\$183000
15					(petitioner's
16					1/3 share of
17					sale price of
18					CI\$549,000)
19					
20	4. George Town	14D	301, 302	11.1.99	CI\$225500
21	5. George Town	14BH	105	22.11.94	CI\$4825
22					representing
23					petitioner's
24					(2/18 th share)
25					
26	6. George Town	25C	6	30.5.95	CI\$226800
27	7. George Town	20C	3	(the petitioner has a	
28				right to a 2/18 th share)	
29					
30	8. George Town	27C	38	transferred into joint	None
31				names of petitioner	
32				and adult daughter	
33				of former marriage.	
34					
35					

1 Six of these eight parcels of property or interests in them, were obtained by the petitioner
2 by way of family inheritance.

3 One - G.T. Block 25C Parcel 6 - she bought from personal savings in 1989, some 4 years
4 prior to the marriage.

5 The eighth property - Savannah 27C Parcel 38 - she acquired in the divorce settlement of
6 her previous marriage. It was her former matrimonial home and was transferred into the
7 joint names of herself and her daughter. From that property she prior to the transfer
8 received rental income of CI\$1500 per month. That property is now however, intended
9 to serve as the home of her daughter and her grandchildren. The petitioner has deposed
10 to the fact that no further income comes to her from it.

11 It will be seen that 5 of the 8 parcels of property were sold after the date of the marriage.

12 The petitioner therefore retains the interests described in the other three. More will be
13 said about those below.

14 At this juncture, it is convenient that I note my finding as to the disposal of the proceeds
15 of sale which she received from the 5 parcels.

16 Here evidence in her affidavit, (and in her 3rd affidavit in particular) carefully sets out the
17 history of the matter. I accept, as she explained, that all the proceeds – some CI\$870,000
18 - were effectively contributed by her to the marriage. They went to the following areas of
19 expenditure:

20 (i) The acquisition of the parcel on which the matrimonial home of the parties
21 now stands - Spotts 24B P74 (purchased for USD58, 800).

1 (ii) The construction of the matrimonial home on that site as well as the
2 construction of a block of apartments on an adjacent site (Spotts 24B
3 Parcel 67); which had been owned by the respondent prior to the marriage.
4 The funding for the project was made available through an account taken
5 by the petitioner in their joint names and into which she paid the various
6 amounts.

7 The funding for these two construction projects was initially obtained by way of loans
8 from Cayman National Bank in the amount of CI\$250,000.

9 (iii) Those loans were however redeemed from the proceeds of sale of the
10 properties of the petitioner and from the sale of the apartments on Block
11 24B Parcels 67. That property had become jointly registered in the names
12 of the parties to reflect the petitioner's financial investment in the project.
13 Prior to the sale of the apartments, the petitioner had been responsible for
14 the repayment of the bank loans in the amount of CI\$4,000.17 per month.

15 (iv) Improvement in value of approximately CI\$50,000 made to the
16 matrimonial home by the petitioner after the breakdown of the marriage
17 and after the respondent was ordered by the Court to vacate the home.
18 These included the addition of a swimming pool and deck.

19 (v) Repayment of a loan of CI\$100,000 to the petitioner's mother, the
20 proceeds of which had been used by the parties in the construction projects
21 of the apartments and the matrimonial home. These projects ran over two
22 years from 1994 – 1996.

- 1 (vi) Redemption of charge with the Bank of Butterfield in amount of
2 CI\$72907 over GT Block 14D Parcel 284, in respect of loan taken to
3 construct small office building on that site.
- 4 (vii) Living and personal expenses of the parties which also came from the joint
5 account during the course of the marriage.
- 6 (viii) Some CI\$16,000 towards redemption of a personal loan of the petitioner's.

7

8 At the time of the marriage, the petitioner also had income from the rental of the
9 Savannah home of CI\$,1500 per month; from the small office building in George Town
10 of CI\$1,500 per month and significant monthly trust income of CI\$11,000 per month.
11 She deposed however, to the fact that the trust capital is depleted and so no further
12 income comes from the trust.

13 With the discontinuance of the rental income from the Savannah home, she can therefore
14 expect an income of only CI\$1,500 per month in the future; being the rental income from
15 the George Town office building.

16 The respondent admits to having had little by way of capital when he entered the
17 marriage. He asserts a net worth at that time of CI\$143,000 but admits that the bulk of
18 that sum represented debts owed to him for electrical work he had performed for others.
19 His only tangible asset was in Spotts Block 24D Parcel 67, the parcel on which the
20 apartments were constructed.

21 The petitioner asserted that that parcel had an undeveloped value of CI\$23 000 at the
22 time and the respondent has not sought to refute this.

1 Shortly before the marriage, the respondent had invested some CI\$60 000 in the
2 construction of a studio flat beneath his son's house in Grand Cayman. The respondent
3 occupied the flat and so too for a short period did the petitioner with him, prior to moving
4 into their matrimonial home.

5 The respondent lays no claim to this property however, it having become affixed to his
6 son's house and regards it as a gift made to his son.

7 Even though he now lives in what he describes as "substandard accommodation" since
8 being excluded from the matrimonial home, the respondent has not sought to reoccupy
9 the flat. In a further expression of altruism, he was concerned that doing so would
10 involve evicting the in-laws of his sons who tend daily to the grandchildren. That need
11 arises because his son and his son's wife work full-time with him in the business of
12 Electrical Enterprises.

13 The consequence of all events, is that the primary tangible asset of the parties is now the
14 matrimonial home. For it, differing valuations of CI\$520,000 (Cadriff & Co.) and
15 CI\$438,000 (J.E.C. Consultants) have been presented. Mr. Boni and Mrs. Brooks-Hurst
16 agreed however, that I should adopt the median of those values at CI\$476,000; although
17 this will be academic in light of the conclusion at which I have arrived.

18 The acquisition of the matrimonial home, as has been shown above, was almost
19 exclusively capitalised by the petitioner.

20 The respondent accepted this when he asserted that his were payments in kind – the
21 contribution of his and his workers' expertise and labour.

22 Even here though, the record goes against him. The transactions through the joint account
23 of the parties at Cayman National Bank - (through which their construction projects were

1 funded) - reveal that the workers were pay-rolled through that account and that there were
2 significant payments by way of cheques made out in his own name, by the respondent.
3 Although he claims that these latter payments were used to purchase "miscellaneous
4 materials" for the projects, the cancelled cheques show payments to himself and it is odd
5 that as an experienced contractor and businessman, he would have overlooked the
6 importance of proper record keeping. Some of these cheques were for relatively large
7 amounts.

8 As to arriving at their respective contributions to the costs of the projects there is,
9 however, a significant area of uncertainty. While monies from the sale of the apartments
10 were also contributed to this account, it is now impossible to tell whether this was at a net
11 loss or gain to the parties. For her part, the petitioner claims that the construction and
12 sale of the apartments carried at a loss. This was due to large overruns resulting from the
13 assignment of the responsibility for the project by the respondent to his son, who was
14 then a novice in the construction business. Similarly, she avers that serious overruns were
15 experienced in the construction of the matrimonial home.

16 For his part, the respondent asserts that one of the four apartments was sold to the
17 petitioner's adult son at an undervalue and that the difference should be factored in now
18 as a benefit to her. The evidence shows, however, that this apartment was sold "pre-
19 construction" and at a price which was nonetheless comparable to that obtained for two
20 of the other three. A final factor mentioned by the petitioner, was the failure of the
21 respondent and his son to complete the house to the point of obtaining the certificate of
22 occupancy. This resulted in her having to expend considerable further sums in respect of
23 the electrical works and other areas, costs which she says should have been avoided.

1 Regrettably, that is now all to be regarded as spilt milk and is relevant only to show the
2 respective contributions in the past. As noted at the outset, I can divide between the
3 parties only such assets as exist. With that in mind, I now turn to express my findings.

4

5 Findings

6 What we have here is as unfortunate marriage from which the petitioner has emerged
7 clearly less well-off than she was before. As she approaches her autumnal years, she
8 faces the threat of failing health probably exacerbated by abuse suffered at the hands of
9 the respondent. She also faces the unhappy prospect of dwindling capital from which she
10 must extract her income. Apart from the matrimonial home, that capital will be the office
11 building.

12 Unsupported allusions by Mr. Boni to her “wealthy and supportive” family, were
13 properly objected to by Mrs. Brooks-Hurst as being unsubstantiated by the evidence. In
14 any event, any such considerations must be irrelevant as not going to the means of the
15 parties themselves.

16 Despite the relative large expenditure of capital during the marriage, the respondent does
17 not appear to have benefited either.

18 Apart from such income as he might have personally taken for working on their
19 construction projects, there is no evidence of his earnings during that time. Nor is there
20 evidence that he had acquired or retained any significant personal assets from his efforts
21 on those projects.

22 This all points to the fact that the projects were indeed, as the petitioner asserts, overly
23 expensive due to inefficiencies.

1 The fact that all that remains of significance is the matrimonial home at the unimproved
2 value of less than one half the total expenditures, is proof positive of the failed nature of
3 the investments.

4 This however, is a loss the brunt of which the petitioner has had almost exclusively to
5 sustain and must be factored in at the end.

6 The respondent for his part, also faces the unhappy prospect of his autumnal years in
7 failing health. From the medical records he submitted, it appears he has suffered but
8 fortunately recovered from a form of skin cancer. There is also a debilitating arm injury
9 which could affect his long-term ability to work in construction.

10 While I have concluded that his income potential is more favourable than he has chosen
11 to disclose, I must accept that there are realistic limitations on this continuing much into
12 the future.

13 Given the rigours of his work, his ability to earn substantial income past age 65 must be
14 regarded as unlikely. That is even if there again emerges the favourable economic
15 climate in which to do so. Such are the risks that he will confront as an entrepreneurial
16 electrician. To be taken account of in his favour, are two small pension funds to which he
17 has contributed. Present day values combined total less than \$10, 000.

18 The petitioner once worked as a secretary and has acquired no other vocational or
19 professional skills. She now says that her problems with her back (which indicate the
20 need for surgery) would prevent her from returning to work. The medical evidence
21 supports this prognosis. Here I have in mind in particular the final report from Dr.
22 English, the orthopedic surgeon. But for the aggravation of the assault by the respondent,
23 she says she would have been able to return to work. She now faces the risk of losing her

1 home (which she describes as her "dream house") as she may not be able to get by only
2 on the income from the rental of the office building. She argued that she should be
3 compensated by way of an order for maintenance.

4 I have concluded that the conduct of the respondent (for which he was convicted on a
5 charge of assault occasioning actual bodily harm) can properly be taken into account in
6 the manner proposed by the petitioner. I also find that its result is of sufficient
7 seriousness to justify doing so.

8 The guiding provisions of the Matrimonial Causes Law (1997 Revision) are in section 19
9 and which provide as follows:

10 "In dealing with all ancillary matters arising under this Law, the Court shall have
11 regard first of all to the best interests of any children of a marriage and thereafter
12 to the responsibilities, needs, financial and other resources, actual and potential
13 earning power and the deserts of the parties".

14 The term "deserts of the parties" connotes an unrestricted obligation and discretion in the
15 Court ultimately to do what is just between the parties. This is the result to be arrived at
16 by reference to the other factors mentioned in the section and to the relative contributions
17 to the marriage and family; relative benefits already enjoyed and to be enjoyed and, it
18 seems to me - by parity of reasoning - the relative consequences of the conduct of the
19 parties.

20 Where, in the throes of the breakdown of marriage, the conduct of a spouse causes harm
21 and results in the physical and financial impairment of the other, it must certainly be
22 within the purview of the Court to adjust the awards to reflect that situation in terms of
23 the "deserts of the parties".

1 As is shown in the cases of Jones v Jones [1975] 2 All E.R. 12 and Kyte v Kyte [1987] 3
2 All E.R. 1041; the English Courts have taken account of conduct by reference to express
3 statutory provisions there. The provision in operation at the time of Kyte v Kyte was
4 section 3 of the Matrimonial and Family Proceedings Act 1984 which provided in
5 relevant part:

6 “(1) It shall be the duty of the Court in deciding whether to exercise its powers
7 (for resolution of ancillary matters) and, if so, in what manner, to have
8 regard to all the circumstances of the case, first consideration being given
9 to the welfare while a minor of any child of the family who has not
10 attained the age of eighteen.

11 (2) As regards the exercise of the powers --- in relation to a party to the
12 marriage, the Court shall in particular have regard to the following matters
13 --- (g) the conduct of each of the parties, if that conduct is such that it
14 would in the opinion of the Court be inequitable to disregard it----”.

15 In that case, the blameworthy conduct of the wife was dealt with in the following manner
16 as described in the headnote to the report of the case:

17 “For the purposes of (section 3(a)(g) of the Act) “conduct” of a party which it
18 would be inequitable for the Court to disregard when determining an application
19 for ancillary relief, included any relevant conduct during and after the marriage
20 which might have contributed to its breakdown or which it would otherwise be
21 inequitable to ignore, regardless of whether or not the other party’s conduct was
22 blameless. The wife’s conduct, not only in actively assisting or taking no steps to
23 prevent the husbands suicide attempts when she knew she would gain financially

1 if he succeeded, but also in forming a deceitful relationship with another man was
2 gross and obvious conduct which it would be inequitable to disregard even taking
3 into account the husband's conduct. The husband's appeal would therefore be
4 allowed and the lump sum order reduced to £5,000".

5 The consequential order following from domestic abuse as between husband and wife
6 was the reverse in Jones v Jones. There the Court of Appeal held:

7 "(i) The Court was entitled under (the Act) to have regard to the husband's
8 conduct in attacking the wife in determining what award should be made
9 to her.

10 The word "conduct" in (the Act) was not limited to events which had
11 taken place before the breakdown of the marriage or indeed before the
12 decree was made absolute. Furthermore, conduct was a relevant factor not
13 only when the question was whether a claim by a wife to a share of the
14 matrimonial property should be cut down but also where the question was
15 whether it should be increased, for in cases involving conflicting claims to
16 matrimonial property, an increase of one party's share inevitably involved
17 a decrease of the other's. The conduct of the husband in attacking the
18 wife was of such a gross kind that it would be offensive to a sense of
19 justice that it should not be taken into account in deciding what should be
20 the appropriate shares of the parties in the family assets.

21 (ii) When the youngest child ceased to be dependent, the wife would be over
22 50 and incapable of working or earning by reason of the injuries inflicted
23 on her by the husband; in those circumstances it would be unjust that she

1 should be required to sell the home and look for somewhere else to live.
2 Accordingly the judge ought to have made an order vesting the whole of
3 the beneficial interest in the home to her”.

4
5 While the harm inflicted in Jones v Jones was more egregious than in this case, here the
6 petitioner’s disability is none the less likely to have been hastened by the harm she
7 suffered from the respondent’s assault. I feel obliged to accept that any hope she may
8 have had of returning to the work place, for however limited a period, has therefore been
9 denied.

10 When this is considered in the context of dividing the primary matrimonial asset,
11 consideration will be taken first of what his entitlement in the matrimonial home should
12 be and then to what extent it should be denied.

13 The preponderance of the evidence is already heavily in favour of allowing the petitioner
14 to keep the home in which she has continued to reside. Her contributions to its
15 acquisition far outweighed the respondent’s and she has added significantly to its value
16 since his departure.

17 The only question then was whether he should receive some value for his contributions. I
18 have been able to attribute no more than 10% of its value at the time of separation
19 (CI\$42,600) exclusively to his efforts. This would reflect mainly his contribution of the
20 land for the apartment project, and on the most favourable view that some net proceeds
21 were ultimately paid into the costs of the matrimonial home.

22 Taking also into account the modest income of CI\$1,500 per month which she will likely
23 be able to realize from the rental of the GT Block 14D Parcel 284 and any income which

1 her interest in Savannah Block 27C Parcel 38 might yet yield in the future, as well as the
2 needs and circumstances of the petitioner, I award the matrimonial home in its entirety to
3 her.

4 I should explain that this award is intended also partially to compensate her loss due to
5 his conduct by the denial of the respondent's interest in that property.

6 As to the issue of maintenance: In a clear case of ability to pay the circumstances here
7 would doubtless be appropriate for such an award. However, the nature of his disclosure
8 of his interests in Electrical Enterprises present some difficulty in deciding whether the
9 means of the respondent allow for such an order and I am obliged also to consider his
10 needs and circumstances.

11 He must now provide a home for himself for which he has no capital, at least none that
12 has been shown. The evidence presented about the affairs of Electrical Enterprises
13 suggests that he ought to have earned some significant dividends over the last 2 years in
14 particular. The unaudited accounts presented by him do not however, establish this.

15 The respondent's failing health is also a factor. In order to secure his welfare during
16 retirement, he will have to redouble his efforts to make hay while the sun shines.

17 Also in this regard, this was a relatively short marriage during which it could not be said
18 that the wife had become financially dependent upon the husband.

19 Any award of maintenance must therefore reflect the foregoing competing
20 considerations.

21 None the less, whatever doubts there may be about the respondent's potential income
22 from Electrical Enterprises cannot be resolved entirely in his favour. To do so would be
23 to reward his recalcitrance over disclosure.

1 I conclude, as already stated, that he must be taken as being likely to obtain significant
2 dividends whatever they might be. When taken with his admitted monthly salary of
3 CI\$4,500, I conclude that he must be required to make some contribution to secure the
4 future financial position of the petitioner which I accept he has impaired by his conduct.
5 The award of maintenance will be in the lump sum of CI\$40,000.

6 Complicated as this case is by the factors discussed above, this is not a case as in White v
7 White [2001] 1 All. E.R.1. in which the House of Lords decided upon a starting point for
8 division of matrimonial assets of equality, as suitable in that and in other cases where the
9 available assets exceed the parties' financial needs for housing and income.

10 Here the available tangible assets have been contributed virtually all by one party, the
11 petitioner, who is now at risk of not being able to meet her own needs.

12 The order is that the petitioner will retain the matrimonial home and the respondent
13 directed to transfer his joint legal interest to her immediately, failing which the Clerk of
14 the Courts is directed to execute the form of transfer. The petitioner will also retain her
15 interests in George Town Block 25C Parcel 6 and George Town Block 14D Parcel 284.
16 two other properties mentioned above. She will also receive the sum of CI\$40,000 by
17 way of maintenance; as to which I will hear submissions as to the terms of payment.

18 This sum I regard as representing a potential year's salary working as a secretary in a
19 professional environment. It is a sum which she could have realistically expected to have
20 saved after working for a further five to ten years.

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1 As to costs, I will also hear further submissions, if any are proffered.

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Anthony Snellie

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Chief Justice

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Dated this 30th day of January

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