

Pauline Arnold Falkiner and another - - - - *Appellants*

v.

The Commissioner of Stamp Duties - - - - *Respondent*

FROM

**THE COURT OF APPEAL OF THE SUPREME COURT OF
NEW SOUTH WALES**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 7TH NOVEMBER 1972

Present at the Hearing :

LORD REID
LORD MORRIS OF BORTH-Y-GEST
VISCOUNT DILHORNE
LORD SIMON OF GLAISDALE
SIR RICHARD WILD

[*Delivered by* LORD SIMON OF GLAISDALE]

On 4th October 1961 the deceased settlor, George Brereton Sadleir Falkiner, executed ten settlements in relation respectively to ten separate sums of one hundred thousand dollars (\$100,000.00) which he paid that day to Canberra Estates Property Ltd. (a company incorporated in the Australian Capital Territory), named as the trustee of the settlements. Clause 3 of the first settlement reads as follows:

“ 3. The Trustees shall hold all moneys from time to time forming part of the Trust Fund UPON TRUST to invest the same in any one or more of the modes of investment hereinafter authorised and subject thereto shall hold the Trust Fund and the income thereof upon the trusts hereinafter expressed concerning the same that is to say:

- (a) During the minority of any person or persons who under the trusts hereinafter declared would for the time being if of full age be entitled to receive the income of the Trust Fund the Trustees shall invest the rents profits and income of and from the Trust Fund in or upon investments in or upon which the Trustees are by this Deed authorised to invest money and may from time to time vary such investments and (subject as hereinafter provided) shall accumulate the yearly produce of the said investments in the way of compound interest by from time to time similarly investing the same and the yearly produce of the investments thereby from time to time acquired.
- (b) Subject as hereinafter provided the Trustees shall stand possessed of the Trust Fund and all accumulations of income

derived from such rents profits and income as aforesaid and the investments representing the same:

- (i) UPON TRUST subject to and contingent upon GEORGE BRERETON SADLEIR FALKINER the son of the Settlor (hereinafter called "the Contingent Beneficiary") attaining the age of twenty-one (21) years thereafter TO PAY the income arising therefrom to the Contingent Beneficiary until he shall attain the age of twenty-two (22) years or die under such age.
- (ii) UPON TRUST subject to and contingent upon the Contingent Beneficiary attaining the age of twenty-two (22) years as to the corpus of the said Trust Fund and all accumulations thereof for the Contingent Beneficiary absolutely.
- (iii) UPON TRUST should the Contingent Beneficiary die before attaining the age of twenty-two (22) years leaving children him surviving for such of his children as shall attain the age of twenty-one years or marry under that age in equal shares or should no such child attain that age or marry under that age or should the Contingent Beneficiary die before attaining twenty-one years of age leaving no children him surviving then
- (iv) UPON TRUST for such of the children of the Settlor as shall be living at the date of the death of the survivor of the persons in this Clause previously mentioned and the children or remoter issue then living of any then deceased child of the Settlor in equal shares per stirpes and should the Trust Fund not vest as aforesaid then
- (v) UPON TRUST for the next of kin of the Settlor as determined by the provisions now in force of the Wills Probate and Administration Act 1898-1954 of the State of New South Wales."

The other nine settlements were similar, except that in place of the age of 22 years specified in clause 3 (b) (i), (ii) and (iii) the ages specified ran respectively from 23 to 31 years.

Thereafter, also on 4th October 1961, the trustee of the settlements applied the whole of the settled sums in the purchase of shares in companies incorporated in the Australian Capital Territory.

The settlor died on 15th October 1961, domiciled and resident in the State of New South Wales. He left surviving him three children, namely George Brereton Sadleir Falkiner (the person called "the Contingent Beneficiary" in the settlements), Frances Dorothy Falkiner and Suzanne Enid Falkiner; all were under the age of twenty-one years and were unmarried. The record is silent as to other kindred. Probate of the last will of the settlor was on 14th February 1962 granted to the two appellants and to one other joint executor since deceased.

The Commissioner of Stamp Duties, in assessing the death duty payable in respect of the estate of the deceased, claimed that by virtue of ss. 102 (2) (a) and 102 (2A) of the Stamp Duties Act, 1920-1959, the shares the subject-matter of the ten settlements of 4th October 1961 were to be included in the dutiable estate of the deceased, and the Commissioner assessed the death duty payable in respect of the estate accordingly. The

appellants, being dissatisfied with the assessment and claiming that the shares should not be included in the dutiable estate of the deceased, required the Commissioner to state a Case for the judgment of the Court of Appeal of New South Wales. On this being done, the Court of Appeal unanimously upheld the assessment of the Commissioner. By their leave the appellants have appealed to Her Majesty in Council.

Section 102 (2) (a) is in the following terms:

“ 102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property:—

(1)

(2) (a) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person:

Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust.”

(It is unnecessary to set out section 102 (2A): it is common ground that its effect is to make the shares part of the dutiable estate of the deceased notwithstanding that they are in companies, and held by a trustee, incorporated outside New South Wales, if they would have been part of it had the trustee been resident in, and the shares been in companies incorporated within, New South Wales.)

Before the Court of Appeal the appellants took three points:— (1) the effect of the proviso to s. 102 (2) (a) is that there is brought into the dutiable estate by the main provision of the paragraph only so much of the actual property “disposed of” by way of settlement as was, at the time of the death of the deceased, still subject to the trusts of the settlement; and that, the property in the instant case which was so disposed of being cash which was converted into shares (so that no cash remained at the time of death subject to the trusts of the settlement), none of the property disposed of by way of settlement on 4th October 1961 was part of the dutiable estate of the deceased; (2) for s. 102 (2) (a) to take effect, the relevant trust must be expressly conditioned to take effect after the death of the settlor—in other words, the condition precedent of the settlor’s death must be expressed in the settlement in literal terms; (3) upon their proper construction the settlements did not contain any trust, either expressly or impliedly, to take effect after the death of the settlor—in particular, the trust in Clause 3 (b) (v) in each of the settlements for next of kin did not give rise to any trust to take effect after the death of the settlor within the meaning of s. 102 (2) (a).

On the first point—namely, the relevant construction of the proviso to s. 102 (2) (a)—the Court of Appeal followed their previous decision in *Atwill v. Commissioner of Stamp Duties (N.S.W.)*, holding that the effect of the proviso on its proper construction was not to exempt the shares from duty under the paragraph merely because they were the proceeds of the property originally settled, and not that property itself. Subsequent to the decision of the Court of Appeal in the instant case their decision in *Atwill’s* case was reversed by a majority of the High Court of Australia ([1971] 45 A.L.J.R. 703). The Commissioner appealed to Her Majesty in

Council from the judgment of the High Court in *Atwill's* case; and the appeal of the instant appellants on this point was argued before the Board in conjunction with the appeal in *Atwill's* case. The point is covered in the reasons which their Lordships have given for the advice which they have humbly tendered to Her Majesty in *Atwill's* case.

On the second point the Court of Appeal also followed a previous decision of their Court (*Keighley v. Commissioner of Stamp Duties (N.S.W.)*), which itself purported to follow earlier decisions such as *Rosenthal v. Rosenthal* (1910) 11 C.L.R. 87 and *Kent v. Commissioner of Stamp Duties (N.S.W.)* (1961) 106 C.L.R. 366; they held that, for a trust to be caught by s. 102 (2) (a), the death of the settlor need not be an express condition precedent to its operation—it is enough that the settlement contains any trust the provisions of which make it impossible to operate on the trust property before the settlor's death. The decision of the Court of Appeal in New South Wales in *Keighley's* case was also reversed by the High Court of Australia ([1971] 45 A.L.J.R. 620), but on the ground that, on the proper construction of the relevant trust of the settlement in that case, its taking effect was neither expressly nor impliedly conditional upon the settlor's death. Menzies J. (Windeyer J. agreeing) at p. 621 cited with approval Herring C.J. in *In the Estate of Nicholas, deceased* [1955] V.L.R. 291, 294: "Settlements were . . . caught [. . .] if any trust therein had to await the death of the settlor before it could take effect." Gibbs J. (McTiernan, Windeyer and Owen JJ. agreeing) at p. 623 cited with approval from *Kent v. Commissioner of Stamp Duties (N.S.W.)* at p. 374: "the expression 'containing any trust to take effect after his death' postulates a trust which at the death is still capable of taking effect." Before their Lordships these were accepted on behalf of the appellants as correct statements of the law; so that, where any will or settlement contains a trust which either expressly or impliedly depends on the settlor's death as a condition precedent to the vesting in possession or enjoyment of the trust property and interest therein in a beneficiary, the provisions of s. 102 (2) (a) are satisfied.

The point argued independently in the instant appeal was therefore whether the settlements on their proper construction contained any trust which was still capable of taking effect at the death of the settlor, and which had to await the death of the settlor before it could take effect—specifically, whether the trust for next of kin contained in Clause 3 (b) (v) had such effect.

Certain words have been legally construed as having a *prima facie* meaning (not, generally, differing from their most ordinary meaning) when contained in documents intended to have legal effect—particularly, wills and settlements. In the absence of a contrary intention appearing, the court will assume that it is this *prima facie* meaning which was intended. Such a rule has manifest advantages. In the first place, the existence of the rule will enable legal advisors to predict how a court will construe the words in various circumstances within the contemplation of client and advisors; and, if the *prima facie* legal meaning does not represent the client's intention, to make that intention plain. Secondly, the rule leads to economy: the meaning need not be spelled out at length, but words can rather be used in the knowledge that they will *prima facie* carry the meaning put on them by the law. Thirdly, if, as often happens, the actual forensic situation was probably not foreseen by settlor or testator, the court is relieved from a purely impressionistic interpretation, which might well vary from judge to judge; and the unsuccessful litigant will at least have the consolation of knowing that his case has been adjudged by an objective standard, which has been applied in the past to others in a

similar situation to his, and which will be so applicable to others in future. (In this connection, their Lordships bear in mind that there is no evidence of the present ages or status of the settlor's children; and that Clause 3 (b) (v) of the settlements, or some of them, might still be invoked to determine private interests of parties not now before the court.)

Such reasons as these are still potent to recommend the *prima facie* rules of construction to which their Lordships have referred, even if those rules were not, as their Lordships think, so firmly established in law as to compel adherence. But they are, of course, only *prima facie* rules; and it is always open to a settlor or testator to demonstrate that he intends his words to bear a meaning other than the *prima facie* one which the law ascribes to them.

So far as the expression "next of kin" is concerned, there are numerous statements of the rule; the earlier cases were extensively reviewed by Page Wood V.C. in *Wharton v. Barker* (1858) 4 K. & J. 483 and by Viscount Finlay in *Hutchinson v. National Refuges for Homeless and Destitute Children* [1920] A.C. 794. It is unnecessary to refer to other than some of the more illuminating and authoritative decisions and pronouncements. *Gundry v. Pinniger* was decided at first instance by Sir John Romilly M.R. ((1851) 14 Beav. 94). There was a bequest to A.B. for life and afterwards to her children; but, in default of children, to C.D. if living, but if dead, then to his next of kin in legal course of distribution *ex parte materna*. At pp. 98-99 Romilly M.R. said:

"The rule has very properly been admitted to be, that in ordinary cases of a gift to the next of kin of a person, such a class is to be ascertained at the death of the person himself, unless there be some special words to shew that such a construction cannot properly apply. I never accurately understood how the 'next of kin' of a person could properly be ascertained at any other period than at the death of such person himself. The words 'next of kin' have a distinct legal meaning. They naturally point to persons to be ascertained at a fixed period—viz., at the death of the person whose next of kin they are, and not to different persons existing at different periods. When, therefore, you speak of the next of kin of a person, meaning that they should be ascertained at a period when he did not die, you really are giving no sensible meaning to the expression, unless you designate the class as the persons, who *would have been* the next of kin of a person, if he had died at a period other than when he did actually die." (His italics.)

(The case is also of importance for another part of the instant appeal, since the word "then" was construed as pointing to the event, and not to the time.) The decision was affirmed on appeal (1 De G.M. & G. 502), Lord Cranworth L.J. saying:

"My conclusion (founded on the rule of Mr. Justice Burton [*Warburton v. Loveland* (1 Huds. & Brooke 648) cited by Baron Parke in *Toldervy v. Colt* (1 M. & W. 264)] is, that the meaning of the 'next of kin' is next of kin at the death of the person whose next of kin is spoken of."

In *Bullock v. Downes* (1860) 9 H.L.C.1 the testator left the residue of his property on various trusts, on failure of which "then to stand possessed of the same, in trust for such person or persons, of the blood of me, as would by virtue of the Statutes of Distribution of Intestates' Effects have become, and been then entitled thereto, in case I had died intestate." It was held that the word "then" (*i.e.*, the second "then": the first was accepted as referring to the event and not the time), even if treated as an adverb of time, referred only to the time when the persons entitled would

come into possession of what had been bequeathed to them, but that the persons entitled were to be ascertained at the death of the testator. Lord Campbell L.C. at p. 12 said:

“Generally speaking, where there is a bequest to one for life, and after his decease to the testator’s next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the first taker.”

Lord Cranworth said at p. 18:

“Where a testator, having by his will, made contingent dispositions of his estate or of any part of it to take effect after the termination of particular interests for life, has proceeded to direct that if the contingencies do not arise, on which those dispositions are to take effect, then the property shall go to his next of kin according to the statute, the courts have in modern times held that *prima facie* his language is to be taken to refer to those who are his next of kin at his death, not to those who may happen to answer that description at the determination of the preceding particular interests.”

Lord Kingsdown said at p. 28:

“There is no expression of the interest which any of the persons who may answer the description are to take, except by reference to their title under the statute. They are to take according to their title under the statute. The words seem to me, according to their natural import, to mean this: ‘My trustees shall transfer the funds according to the title created by the statute amongst my next of kin,’ and I think that this is the construction settled by the decided cases.”

In *In Re Winn* [1910] 1 Ch. 278 Parker J. said at p. 286:

“In every case of a gift ‘to my next of kin’ or ‘my nearest relations’ or any gift of that kind, *prima facie* the rule is, and I think it is not only a rule of construction, but the natural meaning of the words, that the class is to be ascertained at the death of the testator.”

Those words were quoted by Greene L.J. in *In Re Hooper* [1936] Ch. 442—though his was a dissenting judgment applying the general rule, while the majority of the court felt that there was sufficient manifestation of an intention to exclude the general rule (in that case relating to the meaning of the word “heir” which similarly *prima facie* means the person who would have been the heir at the date of the death of the propositus). In *Hutchinson v. National Refuges for Homeless and Destitute Children* [1920] A.C. 794 Viscount Finlay said at p. 802:

“It is for those who assert that the class is to be ascertained at a date other than that of the death of the testator to show that this is the fair result of the language of the will”.

In *Re Gansloser’s Will Trusts* [1952] Ch. 30 was a case where the general rule that the class (there, “relations”) was to be ascertained as at the death of the propositus was excluded by indications that another date was intended. But at p. 37 Evershed M.R. said:

“I agree . . . that in an ordinary case, and apart from something in the context which would lead to a different result, if a fund is given to ‘A’s relations’, by which, by the operation of the rule, is meant those relations who would take under the Statutes of Distribution, *prima facie*, the class is constituted at A’s death; since it is only then that the Statutes of Distribution properly provide an answer to the question notionally put. However, it is clear that a testator who uses this loose phrase may, by the context in which it is used, produce

the result that the class is to be ascertained albeit by reference to the Statutes of Distribution, yet at some date other than that at which in ordinary circumstances the Statutes of Distribution would come into operation.”

(“Next of kin” is a less loose, more legalistic, phrase than “relations.”) At p. 44 Jenkins L.J. said:

“The rule in *Gundry v. Pinniger* . . . comes to this: that, inasmuch as the proper time for the operation of the Statutes of Distribution in relation to the estate of any person is the death of that person, therefore, *prima facie*, the reference to next of kin according to the statutes involves by implication the ascertainment of those persons at the proper time, namely, the death of the person whose next of kin according to the statutes are referred to.”

Morris L.J. expressed himself in full agreement with the judgments of the Master of the Rolls and Jenkins L.J.

The *prima facie* rule of construction of the expression “next of kin” applies as much to settlements as to wills—indeed, in that settlements are more universally drawn formally than wills, the rule might be thought to be even more relevant. In *Ranking's Settlement Trusts* (1868) L.R. 6 Eq. 601 Giffard V.C. followed *Bullock v. Downes*, saying at p. 604:

“. . . where, either in a will or a settlement, there is a reference to the statute, the statute regulates the nature of the interest as well as the persons who are to take under it.”

This in turn was followed in New South Wales in another settlement case, *Deane v. Lombe* (1925) 25 S.R. (N.S.W.) 502. Norton on Deeds (2nd ed. 1928, p. 446) states:

“The ‘next-of-kin’ or ‘next-of-kin or persons entitled according to the Statute,’ are to be ascertained at the death of the propositus.”

Certainly in the present case the rule of legal presumption accords with the ordinary sense of the language of Clause 3(b)(v) of the settlements. The trusts are “for the next of kin of the Settlor as determined by the provisions now in force of the Wills Probate and Administration Act 1898–1954 of the State of New South Wales”. Section 63 of that Act refers to grants of administration to the husband or wife of the deceased or one or more of his next of kin. This refers back to s. 61A(2), which substituted a new s. 49(1) in 1954 for the original provisions in the 1898 Act. The relevant part reads as follows:

“49.(1) . . . the real and personal estate, . . . as to which any person (in this section referred to as ‘the intestate’) dies intestate shall—

(a) be held by the administrator on intestacy, or in the case of partial intestacy by the executor or administrator with the will annexed, as the case may be—

(i) as to the real and personal estate—

(a) where the intestate leaves issue, in statutory trust for the issue of the intestate;

(b) where the intestate leaves no issue but both parents, in trust for the father and the mother in equal shares;

(c) where the intestate leaves no issue but one parent, in trust for the surviving father or mother;

(d) where the intestate leaves no issue or parent, in trust for the following persons living at the death of the

intestate, and in the following order and manner, namely:—

First, in statutory trust for the brothers and sisters of the whole blood of the intestate; but if there is no member of this class; then

Secondly, in statutory trust for the brothers and sisters of the half blood of the intestate; but if there is no member of this class; then

Thirdly, for the grandparents of the intestate and, if more than one survive the intestate, in equal shares; but if there is no member of this class; then

Fourthly, for the uncles and aunts of the intestate (being brothers or sisters of the whole blood of a parent of the intestate) and, if more than one survive the intestate, in equal shares; but if there is no member of this class; then

Fifthly, for the uncles and aunts of the intestate (being brothers or sisters of the half blood of a parent of the intestate) and, if more than one survive the intestate, in equal shares; but if there is no member of this class; then

Sixthly, for the surviving husband or wife of the intestate;

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(2) (a) Where under this section real and personal estate of an intestate or any part thereof is directed to be held in statutory trust for the issue of the intestate, the same shall be held upon the following trusts, namely:—

- (i) In trust, in equal shares, if more than one, for all or any the children or child of the intestate, living at the death of the intestate, and for all or any of the issue living at the death of the intestate of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking.

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(b) Where under this section real and personal estate of an intestate or any part thereof is directed to be held in statutory trust for any class of relatives of the intestate, other than issue of the intestate, the same shall be held in trust corresponding to the statutory trust for the issue of the intestate (other than the provision for bringing any money or property into account) as if such trust (other than as aforesaid) were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate.

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The statute refers to the intestate *leaving* issue and parents; while the remaining classes of next of kin under s. 49 (1) (a) (i) (d) are specifically *persons living at the death of the intestate*. The same expression is used in relation to the description of the statutory trusts in sub-section (2).

The appellants have not sought to argue that the time of distribution could be any earlier than the time for ascertainment of the next of kin entitled under Clause 3 (b) (v). But they rely on three matters which, they claim, suffice to rebut the presumption that, when the settlor referred to his next of kin in Clause 3 (b) (v), he was referring to his statutory next of kin (*i.e.*, living at his death), and demonstrate that he was referring to those who would have been his next of kin if he had died at the time of failure of the preceding trusts:— (1) the word “now” in the phrase “determined by the provisions *now* in force of the Wills Probate and Administration Act”; (2) the word “then” at the end of Clause 3 (b) (iv), which they would read as an adverb of time to denote that the trust in Clause 3 (b) (v) ensued immediately upon a failure of the preceding trust, so that next of kin must be ascertained as at that time; (3) since the settlor might still be living on the failure of the trust under Clause 3 (b) (iv), he cannot have intended a hiatus until his death before the next beneficiaries under (v) are ascertained: there is a presumption in favour of early vesting.

With regard to the use of the word “now” in Clause 3 (b) (v), their Lordships agree with the Court of Appeal that it does not in any way indicate that the deceased, in specifying his next of kin as beneficiaries, meant anything other than those who would be his next of kin at the date of his death; but that it is merely identifying to which statutory provision he wished reference to be made for the purpose of ascertaining who were his next of kin, and guarding against a possible change in the law subsequent to the execution of the settlement. As such it is against, rather than for, the contention of the appellants; since the particular statutory provision to which he wished reference to be made specifies “persons living at the death of the intestate”.

As for the argument based on the use of the word “then” at the end of Clause 3 (b) (iv), Norton on Deeds (2nd ed.) p. 448 states:

“Where the interest of the next-of-kin does not take effect in possession at the death of the propositus the word ‘then’ is not alone sufficient to prevent the rule (that they are to be ascertained at the death of the propositus) applying, and to cause the next-of-kin to be ascertained at the time they take in possession.”

Moreover, this argument for the appellants was that rejected in *Gundry v. Pinniger*. See also *Bullock v. Downes*. The present case is stronger than those. The statute to which reference is to be made itself uses “then” in the sense of “in that event”, not in the sense of “at that time”. Their Lordships agree with the Court of Appeal that the word “then” at the end of Clause 3 (b) (iv) means “in that event” and not “at that time”, and are of opinion that neither in itself nor in conjunction with any other matter is the use of this word there any contra-indication to the application of the presumption that the settlor intended his next of kin entitled under the trust to be ascertained as at his death.

The third argument for the appellants on this part of the case was that unless “the next of kin of the Settlor” meant those who would have been his next of kin if he had died on the happening of the last event causing the failure of the preceding trusts there would, if the settlor had survived such event, be a hiatus between the failure of the preceding trusts and the ascertainment of the beneficiaries under the trust contained in Clause 3 (b) (v). Their Lordships accept that the law leans in favour of early vesting. But none of the discussions of these matters to which their Lordships’ attention has been drawn suggests that the fact that there might be a hiatus between the contingent failure of preceding trusts and the ascertainment of who are next of kin (heir, relations, etc.) of the

propositus is sufficient to demonstrate that the settlor meant the next of kin (etc.) to be ascertained as at the contingent failure of trust and not at the time of the death of the propositus.

Their Lordships do not consider that, because the settlor in the instant appeal might have survived the happening of the events which caused the failure of the trusts preceding that for the next of kin, that phrase should be read as meaning "those who would have been the next of kin of the settlor if he had died at the time of the failure of the preceding trusts", rather than in the ordinary sense of the words actually used, which is also the presumptive sense—namely, his next of kin living at the date of his death.

It follows that their Lordships agree with the Court of Appeal that the settlement contained a "trust in respect of . . . property to take effect after [the settlor's] death". The trust in Clause 3(b)(v) had to await the death of the settlor before it could take effect. The settlement postulated a trust which at the settlor's death was still capable of taking effect.

For the foregoing reasons, as well as the reasons which their Lordships have given for humbly advising Her Majesty in *Atwill's* case, their Lordships will humbly advise Her Majesty that the instant appeal should be dismissed with costs.



In the Privy Council

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