

CANADA / JUDGMENT

Dhanda v. Gill

2019 BCSC 1500

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Supreme Court of British Columbia

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2019 BCSC 1500 Dhanda v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dhanda v. Gill,

2019 BCSC 1500

Date: 20190906

Docket: M155100

Registry: Vancouver

Between:

Pritpaul Singh Dhanda

Plaintiff

And

Herman Singh Gill, Palvinder Singh Gill, Marta Svejkovsky,

Robert Svejkovsky and City of Surrey

Defendants

Before: Master Elwood

(In Chambers)

Reasons for Judgment

Counsel for the Defendant, City of Surrey:

B. Lee

Counsel for the proposed Third Parties, Lamar Developments Ltd., BBC Development Ltd. and Marco Development Corporation:

R.S. Deol

Place and Date of Hearing:

Vancouver, B.C.

July 19, 2019

Place and Date of Judgment:

Vancouver, B.C.

September 6, 2019

I. INTRODUCTION

- [1] This is an application by a defendant in a motor vehicle action for leave to issue a third party notice claiming contribution or indemnity after the limitation period for that claim has expired.
- [2] The applicant relies on Rule 3-5(4) of the Supreme Court Civil Rules and s. 22(1) of the Limitation Act, S.B.C. 2012, c. 13. Caselaw under Rule 3-5 and the statutory predecessor to s. 22(1) allows claims of contribution or indemnity to be added to an action after the expiry of a limitation period for a separate action when it is just and convenient for those claims to be decided in the existing action. Under this jurisprudence, the expiry of a limitation period is a relevant, but not determinative, factor in the exercise of the court's discretion whether to grant leave to issue a third party notice.
- [3] The proposed third parties rely on s. 22(2), which was added to the Limitation Act when it was amended in 2013. They argue that s. 22(2) removes claims of contribution or indemnity from the court's discretion under s. 22(1), such that a third party proceeding must not be issued joining a claim of contribution or indemnity to an existing action after the expiry of a limitation period applicable to that claim.
- [4] A clear answer has yet to emerge at the B.C. Supreme Court level as to whether the Limitation Act preserves or removes the discretion to allow claims of contribution or indemnity to be added to an existing action after the expiry of a limitation period. The only decisions that have squarely addressed the issue are decisions by Masters of the Court, who have come to conflicting conclusions.
- [5] With respect to my colleagues who hold the contrary view, I have concluded that s. 22(2) bars a third party notice claiming contribution or indemnity after the limitation period for that claim has expired.

II. BACKGROUND

- [6] This action arises out of a motor vehicle accident on April 6, 2015, at a stop sign-controlled intersection in Surrey, British Columbia. The plaintiff was a passenger in one of the vehicles involved in the collision.
- [7] The plaintiff issued the notice of civil claim on July 17, 2015. In addition to the drivers and owners of the vehicles, the plaintiff named the City of Surrey as a defendant. As against Surrey, the plaintiff alleged that the City failed to adequately inspect, maintain and trim trees that obscured the stop sign.
- [8] Surrey filed a response to civil claim on February 19, 2016.
- [9] There are two related actions arising out of the same motor vehicle accident: the "Svejkovsky action", commenced September 10, 2015, and the "Banwait action", commenced March 24, 2017. Surrey is a defendant in those two actions as well.
- [10] Surrey issued a third party notice in the Svejkovsky action on March 14, 2016, claiming contribution or indemnity from the owners of the property on which the trees that obscured the stop sign were growing. Surrey issued a similar third party notice in the Banwait action on June 13, 2019.
- [11] The plaintiffs and defendants in the three related actions have tentatively agreed on a liability-only trial in all three actions to begin on February 14, 2022. The notice of trial has not yet been filed.
- [12] Through inadvertence, Surrey did not issue a third party notice against the property owners in the present action. Surrey acknowledges that the basic limitation period for a claim of contribution or indemnity under the Limitation Act has expired.

III. APPLICABLE RULES AND LEGISLATION

- [13] Rule 3-5(4) provides that a party may file a third party notice within 42 days after being served with the notice of civil claim or "at any time with leave of the court". The courts have established a number of factors to guide the exercise of discretion under Rule 3-5(4): see, for example, *Canfor Pulp Limited Partnership v. Siemens Building Technologies*, 2016 BCSC 2089, at paragraph 36.
- [14] The procedural discretion in Rule 3-5(4) is subject to the substantive law in the Limitation Act: *Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192, at paragraphs 180-81.
- [15] Section 22(1) of the Limitation Act provides the court with a discretion to permit "related claims", including third party proceedings, to be brought in an existing action despite the expiry of a limitation period for the related claim:

22(1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:

- (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim;
- (b) third party proceedings may be brought;
- (c) claims by way of set off may be advanced;
- (d) new parties may be added or substituted as plaintiffs or defendants. (emphasis added)

[16] The courts have also developed a number of factors to guide the exercise of discretion under s. 22(1) and its predecessor provision: see, for example, *Amezcuca v. Taylor*, 2010 BCCA 128, at paragraph 36.

[17] Section 22(2) of the Limitation Act provides that:

- (2) Nothing in subsection (1) gives a person a right to commence a court proceeding under subsection (1) (a) or (b) in relation to a claim for contribution or indemnity after the expiry of a limitation period applicable to that claim.

[18] The question is whether s. 22(2) removes claims of contribution or indemnity from the discretion provided in 22(1)(b) for third party proceedings to be brought following the expiry of a limitation period, and thereby precludes the court from weighing the factors for and against granting leave to file a third party notice under Rule 3-5(4).

IV. PREVIOUS DECISIONS OF THIS COURT

[19] In *Herman v. Accent Homes Realty Ltd.*, 2017 BCSC 479, Master McDiarmid refused leave to amend a third party notice to bring a claim for contribution or indemnity. The main issue was whether the limitation period had expired. Master McDiarmid found that it had expired. He then went on to find that the delay was unexplained and prejudicial to the proposed third parties, apparently applying the factors that guide the court's discretion under Rule 3-5(4). Although Master McDiarmid set out s. 22 of the Limitation Act and emphasized subsection (2), his reasons for judgment do not include an analysis of the statutory interpretation issue raised in this case.

[20] In *Stephenson v. Bridges*, 2018 BCSC 1155, Madam Justice Forth weighed the factors for and against granting leave under Rule 3-5(4) without reference to s. 22(2) of the Limitation Act. However, in that case, counsel agreed that the court had residual discretion under s. 22 to allow the filing of a third party notice after the expiry of a limitation period, citing (oddly, in my view) *Herman*. In the result, Madam Justice Forth denied leave.

- [21] In *The Owners, Strata Plan BCS 3156 v. KBK No. 11 Ventures Ltd.*, 2019 BSCS 565, Master Muir referred to Master McDiarmid's emphasis in *Herman* on subsection (2) of s. 22 of the Limitation Act, and went on to say this:
- [27] I take that to mean that unless there is something that extends the date of discovery, in this case, after December 2016 to somewhere within two years from today, that the applicant would be barred from bringing a third party claim by the effluxion of the two-year limitation.
- [28] There is no evidence explaining the delay and there is no evidence that the architect did not know or should not reasonably have known of the potential third party claim against Intertek at the time of service of the notice of civil claim. As there is no such evidence, I am of the view that the expiry of the two-year period from the service of the notice of civil claim is determinative.
- [22] In *Ferencz-Elder v. Bridges*, 2019 BCSC 735, Master Cameron applied the factors for and against granting leave from Madam Justice Forth's reasons in *Stephenson*, and granted leave to file a third party notice claiming contribution or indemnity after the expiry of the limitation period. It appears that, like the parties in *Stephenson*, counsel in *Ferencz-Elder* conceded that the court had residual discretion under s. 22 to allow the filing of a third party notice after the limitation period had expired.
- [23] More recently, in *Klinge v. Lee*, 2019 BCSC 1407, Master Taylor expressed "reluctant disagreement" with Master Muir's finding in *Strata Plan BCS 3156* that section 22(2) of the Limitation Act was determinative. Master Taylor continued:
- [22] . . . In my view, the term "court proceeding" in subsection (2) means a new court proceeding and not one where an action has already been commenced. My interpretation comes from reading Division 2 of the Limitation Act which, while not defining the term "court proceeding", does provide for excepted court proceedings which are all first instance proceedings and not a proceeding already in existence.
- [23] Nor should Section 22(2) function to limit the rights expressly given in section 22(1). There would be a clear inconsistency in the Limitation Act if it were to be read as per the interpretation in *The Owners, Strata Plan BCS 3156*. A statute should, if possible, be construed so that there is no inconsistency between its different sections in order to avoid absurdities. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment. See: *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 27.
- [24] Master Taylor's interpretation of s. 22(2) of the Limitation Act supports Surrey's position on this application. Master Muir's interpretation does not.

V. ANALYSIS

[25] When interpreting 22(2) of the Limitation Act, I am bound to apply Elmer Driedger's "modern approach" to statutory interpretation, as adopted by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26.

A. The Words of s. 22(2) in Their Entire Context

[26] In my view, the plain language of s. 22(2) in its entire context removes the discretion of the court under s. 22(1) to allow a counterclaim or a third party proceeding that claims contribution or indemnity after the expiry of the limitation period for that claim.

[27] Subsection (2) bars the use of subsection (1) to commence a "court proceeding" under subsection 1(a) or (b). Subsection 1(a) provides that "proceedings by counterclaim may be brought". Subsection 1(b) provides that "third party proceedings may be brought". Thus, read in the context, s. 22(2) bars the use of counterclaims or third proceedings to advance claims for contribution or indemnity after the expiry of a limitation period.

[28] Reading "court proceeding" in s. 22(2) to mean a new action claiming contribution or indemnity is inconsistent, in my respectful view, with the context of subsection (1). Subsection (1) permits "related claims," specifically counterclaims, third party proceedings, set offs or the addition of new parties. A new action is not a "related claim" within the scope of subsection (1). Moreover, subsection (2) bars counterclaims or third notices. A litigant cannot commence a new action by counterclaim or third party notice. A new action can only be commenced by notice of civil claim.

[29] Nor does an interpretation of subsection (2) which limits the discretion in subsection 1(b) lead, in my respectful view, to an inconsistency or an absurdity. Rule 3-5(1) sets out the various circumstances in which a third party claim may be brought. These include claims of contribution or indemnity in which the issuing party alleges that, in the event they are found liable to another party in the action, the third party must contribute to the damages or indemnify the issuing party for those damages. However, Rule 3-5(1) also encompasses claims against third parties that could be brought as a separate action, but to avoid a multiplicity of proceedings, may be made in an existing action. In this way, a third party notice functions as a special kind of notice of civil claim. It may allege any cause of action, so long as the claim or the relief sought is related to the existing action: *McNaughton v. Baker*, (1998), 25 B.C.L.R. (2d) 17 (C.A.), at paragraph 14.

- [30] Accordingly, the "third party proceedings" that subsection 1(b) allows are broader than the "court proceedings" by third party notice that subsection (2) bars. In other words, while subsection (2) may limit the right given in subsection 1(b), it does not take away everything that 1(b) gives. The two subsections can be read harmoniously without creating inconsistent or absurd results.
- [31] Rule 21-9 provides further contextual support for this interpretation. Rule 21-9(1) requires that a defendant who claims contribution or indemnity under the Negligence Act must do so, if the person against whom the claim is made is the plaintiff, by counterclaim, or in any other case, by third party notice. Rule 21-9 applies to existing actions only: *Scott Management Ltd.*, at paragraphs 180-81.
- [32] Thus, a claim for contribution or indemnity under the Negligence Act in an existing action must be brought by counterclaim or third party notice. This mandatory procedure for claims of contribution or indemnity in an existing action explains why s. 22(2) refers specifically to subsection 1(a) (counterclaims) and 1(b) (third party proceedings).
- [33] In short, read in its context, "court proceedings" in s. 22(2) must mean counterclaims and third party proceedings, not originating actions.
- [34] It might be argued that, instead of adding subsection (2), the Legislature could have simply amended subsection (1)(b) to say "except third party proceedings for contribution or indemnity". In my view, the current language of the two subsections read together has the same effect, and it is not my role to criticize the drafting technique adopted by the Legislature.

B. The Scheme of the Act

- [35] The Limitation Act creates a basic limitation period of two years for most claims, which includes claims of contribution or indemnity by non-governmental parties:

6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

- [36] The Act creates a rule of discoverability specific to claims of contribution or indemnity:

16 A claim for contribution or indemnity is discovered on the later of the following:

- (a) the day on which the claimant for contribution or indemnity is served with a pleading in respect of a claim on which the claim for contribution or indemnity is based;
- (b) the first day on which the claimant knew or reasonably ought to have known that a claim for contribution or indemnity may be made.

- [37] The Act also creates an ultimate limitation period for claims of contribution or indemnity:

21 (1) Subject to Parts 4 and 5, even if the limitation period established by any other section of this Act in respect of a claim has not expired, a court proceeding must not be commenced with respect to the claim more than 15 years after the day on which the act or omission on which the claim is based took place.

(2) For the purposes of this section and subject to section 24 and subsection (3) of this section, for any of the following claims, the day an act or omission on which the claim is based takes place is as follows:

...

(c) in the case of a claim for contribution or indemnity, the day on which the claimant for contribution or indemnity is served with a pleading in respect of a claim on which the claim for contribution or indemnity is based;

[38] Sections 6 and 16 of the Limitation Act bar a separate action for contribution or indemnity on the later of two years after the day on which the claimant was served with pleadings or two years after the day on which the claimant knew or ought to have known that a claim might be made. Section 21 bars a claim 15 years after the claimant was served with pleadings, regardless of whether the claimant knew or ought to have known it might be made.

[39] As simply a bar against bringing an originating action after the expiry of the applicable limitation period, s. 22(2) would be unnecessary and superfluous. Sections 6 and 21 already provide that an action in respect of a claim for contribution or indemnity "must not be commenced" after the expiry of the applicable limitation period.

[40] In *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont: LexisNexis, 2008) Professor Ruth Sullivan says at p. 210:

It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.

[41] To give any role to s. 22(2) that is not simply duplicative of ss. 6 and 21, it must apply to counterclaims and third party proceedings, not new actions.

[42] It also emerges from the scheme of the Act that claims for contribution or indemnity are treated differently from other related claims that might be joined to an existing action under s. 22(1).

[43] Most causes of action (for example, a personal injury claim from a motor vehicle accident) are subject to the general rule of discoverability in s. 8 of the Act:

8 [] a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
 - (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
 - (c) that the act or omission was that of the person against whom the claim is or may be made;
 - (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.
- [44] The limitation clock for most causes of action is linked to the underlying event giving rise to liability. In many motor vehicle accidents, for example, the basic limitation period for all potential defendants will begin running at the same time.
- [45] In *Lui v. West Granville Manor* (1985), 61 B.C.L.R. 315 (C.A.), the Court of Appeal held that the purpose of the predecessor to s. 22(1) was to avoid the mischief that would result if plaintiffs could wait to the last minute to start an action and thereby clear the "battlefield" of any competing claims or counterclaims for which the limitation period will have expired by the time the plaintiff delivers pleadings. Section 22(1) avoids this mischief by allowing related claims and counterclaims to be joined to the plaintiff's action after the expiry of a limitation period.
- [46] The potential mischief that s. 22(1) guards against does not arise to the same extent in relation to claims of contribution or indemnity. This is because the limitation period for a claim of contribution or indemnity does not start running until the later of two years after the day on which the claimant was served with pleadings or two years after the day on which the claimant knew or ought to have known that a claim might be made.
- [47] In other words, a plaintiff cannot avoid a claim of contributory fault by waiting to the last minute to start an action. The defendants will always have two more years in which to file a counterclaim or third party notice claiming contribution or indemnity. The need for relief under s. 22(1) is much less evident in the case of a claim for contribution or indemnity than it is for other related claims. This, in my view, provides further contextual support for an interpretation of s.22(2) that bars using counterclaims or third party proceedings to advance claims of contribution or indemnity after the expiry of a limitation period.

C. The Object of the Act, and the Intention of the Legislature

- [48] The previous Limitation Act, R.S.B.C. 1996, c. 266, did not contain any discoverability rules specific to claims of contribution or indemnity. The limitation period for claims of contribution or indemnity did not begin to run under the previous Act until judgement in the action on which the claim was based was obtained. This was because, as the Court of Appeal explained in *Scott Management*, the cause of action of contribution or indemnity does not fully accrue until a plaintiff obtains judgment against a defendant, and the defendant becomes a judgment debtor and potential plaintiff with an independent cause of action. Accordingly:

- [23] The cause of action for contribution does not accrue, and the limitation period does not begin to run, until the defendant tortfeasor sued by the plaintiff has been found liable: *George Wimpey & Co. v. British Overseas Airways Corporation*, [1955] A.C. 169 at 177, [1954] 3 All E.R. 661 (H.L.); *British Columbia Hydro and Power Authority v. Van Westen*, [1974] 3 W.W.R. 20 at 22 (B.C.S.C); *Krusel No. 1* at paras. 47-50.
- [49] For this reason, it was possible under the previous Act for parties to wait to see the outcome of the litigation, and then have a further two or six years in which to file a claim for contribution or indemnity. It was possible, therefore, to commence an action claiming contribution or indemnity many years after the events giving rise to the claim. In *Scott Management*, for example, the defendants were able to commence an action for contribution or indemnity that would not come to trial until some 20 years after the events in issue. The Court of Appeal noted that this delay was undesirable, but lawful given the Limitation Act as it then was.
- [50] The current Limitation Act encourages litigants to commence claims for contribution or indemnity within the action in which the potential liability arises, and limits their ability to "wait and see" to two years. While the limitation period will still be suspended until a claimant knows or ought to know that a claim might be made, separate actions for contribution or indemnity following the conclusion of the main action will now be rare. Given that the ultimate limitation period now expires 15 years after pleadings are served even if the claimant has no knowledge of a potential claim, a delay in the magnitude of *Scott Management* is no longer possible.
- [51] An interpretation of s. 22(2) that removes the discretion of the court under s. 22(1) in respect of counterclaims and third party proceedings for contribution or indemnity is consistent with this object and the intention of the Legislature.
- [52] In my view, the intent of s. 22(2), in combination with the new discovery rules for claims of contribution or indemnity, is to strike a balance between fairness to potential claimants and greater certainty for potential third parties, and to avoid stale claims of contribution or indemnity from being raised late in a proceeding, more than two years after when they could have been brought.
- [53] Conversely, it is difficult to discern any legislative intent behind the competing interpretation of s. 22(2). There is no reason, in my view, for the Legislature to warn litigants they cannot commence a separate action for contribution or indemnity after the limitation period for such an action has expired. Generally, the Legislature does intend to simply state the obvious.

[54] The Ministry of Justice outlined its proposed reforms to the former Limitation Act in the "White Paper on Limitation Act Reform: Finding the Balance", (September 2010). When the current Act came into force, the Ministry published "The New Limitation Act Explained" (June 2013). The Court of Appeal has referred to these publications to explain changes in the Act: *Leatherman v. 0969708 B.C. Ltd.*, 2018 BCCA 33, at paragraph 28.

[55] The White Paper includes a draft provision in substantially the same language as s. 22 of the current Limitation Act. The comment below the draft provision reads, at p. 70:

This section provides that there is no limitation period for a secondary claim (i.e., a counterclaim, a third party proceeding, or a claim by way of set-off) so long as this secondary claim is related to the primary claim (or original lawsuit), and the primary claim was commenced in time. Judges will still have discretion to refuse relief on grounds unrelated to the expiry of a limitation period.

This section carries forward the principles from section 4 of the current Act but removes the application of this section to claims for contribution. Contribution claims will be governed by limitation periods in the new Act. (emphasis added)

[56] The New Act Explained provides the following explanation of s. 22, at p. 41:

Subsection (1)

This provision has been carried forward from the former Act. It has been revised to fit within the language of the new Act. Subsection (1) provides that there is no limitation period for a person to commence a related claim (i.e. a counterclaim, a third party proceeding, a claim by way of set off, or the addition or substitution of a new party as plaintiff or defendant), as long as this related claim is related to or connected with the original claim, and the original claim was commenced within the limitation period under the new Act. This means that a judge retains the discretion to allow or not allow a related claim to proceed.

Subsection (2)

Section 22 does not apply to claims for contribution or indemnity. Contribution or indemnity claims are governed by the basic and ultimate limitation periods in the new Act. Section 16 sets out that the basic limitation period runs from the later of: the date a person claiming contribution or indemnity is served with the paperwork starting the original claim (on which the contribution or indemnity claim is based), or the date that a person first knew or reasonably ought to have known that he or she could make a claim for contribution or indemnity against a third party. (emphasis added)

[57] While care must be taken relying on secondary materials to interpret legislation, in this case the explanatory materials published by the government are fully consistent with my interpretation of s. 22(2) based on the legislation itself. The competing interpretation of s. 22(2) finds no support in the legislative history.

- [58] It might be argued that it was illogical for the Legislature to single out claims of contribution or indemnity for a limitations bar, but leave alone applications to add new defendants. Under s. 22 as explained by the government, the same party against whom a claim of contribution or indemnity is barred may be added by the plaintiff as a defendant after a limitation period has expired.
- [59] As I have sought to explain above, claims of contribution and indemnity are treated differently in the scheme of the Act from other related claims. This different treatment provides a coherent explanation for why the Legislature singled out and removed claims of contribution and indemnity from the relief that would otherwise be available under s. 22(1).
- [60] It might also be argued that an interpretation of s. 22(2) which removes any discretion of the court may lead to unfair or unintended results. In this case, for example, there would be no prejudice to the proposed third parties if they were added to the current action. They face identical claims of contribution and indemnity from Surrey in the two related actions.
- [61] On the other hand, there has also been significant delay in this case. Surrey was served with the notice of civil claim on July 17, 2015, or not long thereafter. It knew by March 14, 2016, at the latest, that a claim for contribution or indemnity may be made against the property owners, as evidenced by its third party notice in the Svejkovsky action. Four and a half years have passed since the accident in issue.
- [62] Section 22(2) represents a legislative choice to time limit claims for contribution or indemnity. Whether it strikes the right balance between fairness to potential claimants and certainty for potential third parties is not for me to decide.

VI. CONCLUSION

- [63] Section 22(2) of the Limitation Act removes claims of contribution or indemnity from the discretion provided in s. 22(1)(b) for third party proceedings to be brought following the expiry of a limitation period.
- [64] The limitation period for a claim by Surrey of contribution or indemnity against the proposed third parties has expired.
- [65] Accordingly, the application under Rule 3-5(4) for leave to file a third party notice is dismissed with costs to the proposed third parties.

"Master Elwood"

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