

CANADA / JUDGMENT

Sarband v. Joubin

2020 BCSC 1668

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2020 BCSC 1668 Sarband v. Joubin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sarband v. Joubin,

2020 BCSC 1668

Date: 20201106

Docket: S172815

Registry: New Westminster

Between:

Sara Mohammadi Sarband

Plaintiff

And

Ramin Joubin

Defendant

Before: The Honourable Madam Justice Lyster

On appeal from: A decision of the Supreme Court of British Columbia, dated September 4, 2020 (Sarband v. Joubin, 2020 BCSC 1477,

New Westminster Docket No. S172815).

Reasons for Judgment

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Place and Date of Trial/Hearing:

New Westminster, B.C.

October 23, 2020

Place and Date of Judgment:

New Westminster, B.C.

November 6, 2020

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Introduction

- [1] Dr. Sara Sarband and Mr. Ramin Joubin are former spouses who entered into a separation agreement in 2008. The agreement addressed how they would apportion a line of credit debt of \$150,000.
- [2] Dr. Sarband asserted that, under the terms of the agreement, Mr. Joubin was to pay her one-half of the debt, \$75,000. Subsequent to the agreement, he paid her \$5,000.
- [3] On August 20, 2015, Dr. Sarband filed a notice of civil claim alleging that Mr. Joubin breached the agreement, and seeking damages of \$70,000.

- [4] That action came on for an eight-day trial before Mr. Justice Masuhara in 2018, and in a judgment issued January 31, 2019, he found that Mr. Joubin owed Dr. Sarband \$70,000: see *Sarband v. Joubin*, 2019 BCSC 116.
- [5] Mr. Joubin has filed an application to reopen the trial. In that application, he seeks leave to introduce the evidence of Dr. Sarband's parents, whom were not called by either party to testify at trial, and requests orders requiring them to produce bank records. The purported import of that evidence is that it would show that Mr. Joubin did not have access to the line of credit funds, and does not owe Dr. Sarband the \$70,000 claimed by her. That application is scheduled to be heard by Masuhara J. on November 27, 2020.
- [6] In response, Dr. Sarband filed an application seeking a declaration that, by filing the application to reopen the trial, Mr. Joubin has waived privilege in respect of communications between himself and his solicitors relating to the litigation strategy and decisions made in the trial. Master Cameron heard and dismissed that application on September 4, 2020, finding that there had been no waiver of privilege, and that fairness and consistency did not require that Mr. Joubin disclose his solicitor's brief: see *Sarband v. Joubin*, 2020 BCSC 1477.
- [7] Dr. Sarband now appeals the Master's dismissal of her application to this Court pursuant to Rule 23-6(8.1). She submits that Master Cameron's reasons were insufficient, and that he erred in law in relying on inadmissible evidence, in finding that the disclosure sought was irrelevant to the reopening application, and in finding that fairness and consistency do not require waiver of privilege.

Issues

- [8] I must address three issues:
1. What is the applicable standard of review of the Master's decision;
 2. Were the reasons sufficient; and
 3. Applying the applicable standard of review, ought the decision be overturned on appeal?

Decision under Appeal

- [9] After describing the nature of Dr. Sarband's application, Master Cameron quoted at length from Masuhara J.'s trial decision to provide the factual background to the dispute. I do not propose to repeat that background in full, as it can be found in both judgments.
- [10] The crucial elements are that the parties married and moved to the Cayman Islands in 2006 to attend professional school: Dr. Sarband to attend medical school and Mr. Joubin to attend law school. In advance of moving to the Caymans, Dr. Sarband obtained the \$150,000 line of credit. The parties' marriage broke down while they were living in the Cayman Islands, and they entered into the separation agreement, which contains provisions regarding apportioning that debt. Mr. Joubin paid Dr. Sarband \$5,000, but never paid her the further

\$70,000 she says he owed her under the agreement.

[11] On August 20, 2015, Dr. Sarband served the notice of claim that initiated this action.

[12] In his reasons for judgment, Masuhara J. noted:

[22] I start by noting my observation from trial that neither party was a strong witness. The passage of time has eroded not only memories but also the availability of documentation. No doubt the desire of both to move forward separately from their failed marriage played a role here.

[23] The limited production of documentation by either party and their failure to call other witnesses, such as their parents, who were referred to in each party's testimony on important aspects limited the strength of the key assertions of each side.

[24] A key exercise here is to discern the intention of the parties in the Agreement. This involves viewing the text of the document as a whole and in the context of the surrounding circumstances that gave rise to the agreement. Consideration of the surrounding circumstances, however, is not to overwhelm the words used (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57). As mentioned, the family law context in which the Agreement was drafted is a factor in the exercise.

[13] The action was allowed, and Mr. Joubin ordered to pay Dr. Sarband \$70,000 and interest.

[14] Master Cameron then briefly described the ongoing litigation between the parties since the trial judgment was delivered. He quoted from Mr. Joubin's reopening application, including the following:

The defendant seeks to reopen his case to adduce fresh evidence that is in the possession of the plaintiff's parents in the form of bank records or accounts jointly held with the plaintiff and testimony under oath regarding their use of the funds of the line of credit at issue.

[15] Master Cameron went on to set out Mr. Joubin's explanation of why he did not call Dr. Sarband's parents during the trial:

[8] the defendant did not call the plaintiff's parents as witnesses as it was expected the plaintiff would be able to explain what occurred with the funds from the line of credit sufficiently, and given her own evidence that she withdrew funds from the line of credit and that the defendant had no access. The defendant did not anticipate the plaintiff would make no attempts to provide bank statements to prove her claim.

[16] Master Cameron then set out the parties' positions on the waiver application, referring to case law relied upon by Dr. Sarband with respect to express and implied waiver and circumstances when fairness and consistency may require waiver to be found: see *Araya v. Nevsun Resources Ltd.*, 2019 BCCA 205 [Araya] and *Do Process LP v. Infokey Software Inc.*, 2015 BCCA 52 [Pro-Suite]. He also referred to *Zhu v. Li*, 2007 BCSC 1467 [Zhu], with respect to the principles that apply on an application to reopen.

- [17] As counsel described it, the "meat and potatoes" of Master Cameron's decision are found at paras. 17 and 18 of his judgment:
- [17] In my view, the circumstances of this case do not establish that there has been any waiver of privilege or that fairness and consistency require that the defendant provide disclosure of his solicitor's brief. The defendant has conceded that he was aware of the potential relevance of the evidence that the plaintiff's parents could give about the use and ownership of the funds in the line of credit even before the trial commenced. As such, there is no question about the defendant's state of mind. A decision was made not to call these two witnesses.
- [18] The pending application to reopen will be decided on the principles stated respecting preventing a miscarriage of justice, and the disclosure sought by the plaintiff will not be relevant to that inquiry.

Discussion

1. What is the applicable standard of review?

- [18] The parties disagree as to the applicable standard of review of the Master's decision, with Dr. Sarband submitting it is correctness, and Mr. Joubin saying it is the "clearly wrong" standard.
- [19] For the reasons that follow, I find that the applicable standard is "clearly wrong".
- [20] As stated by Justice Fenlon, as she then was, in *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holding Ltd.*, 2011 BCSC 999, the standard of review applicable on an appeal to a judge of this Court from a master's decision has been established since 1990. As set out in *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. 188 (S.C.), the review of an interlocutory decision of a master is a true appeal and the decision is not to be interfered with unless clearly wrong. Some questions, namely a question of law, a final order or a ruling that raises questions vital to the final issue in the case, are reviewed by way of a rehearing on the merits, in which case the judge can substitute their own view for that of the master: at para. 7.
- [21] The basis for Dr. Sarband's position that a correctness test applies is that Master Cameron erred in law with respect to the admissibility of certain evidence and the correct legal standard for waiver of privilege. In *Cliff v. Dahl*, 2010 BCSC 1998, at para. 21, Justice N. Smith held that if a master applied the wrong legal test to determine whether documents were producible, that would be a question of law to which he could and should apply the standard of correctness. In *Maedou Consulting Inc. v. 0887455 B.C. Ltd.*, 2016 BCSC 2246, at para. 22, Justice Pearlman held that the question of whether a master had misapplied the correct test for determining if there was an implied waiver of privilege is a question of mixed fact and law, reviewable on the standard of palpable and overriding error. In other words, the applicant bore the burden of establishing that the master's decision was clearly wrong.

- [22] This is an appeal from an interlocutory decision. The question in issue - whether privilege has been waived by Mr. Joubin by applying to reopen the case - is not central to the final issue in the action. As I explain below in considering whether the Master's decision should be overturned, what is in issue is not whether he applied the correct test for waiver of privilege or the admissibility of evidence, as he clearly did apply the correct tests. Rather, what is in issue is whether he applied the tests correctly to the facts before him. Those are questions of mixed fact and law to which the clearly wrong standard applies.
2. Were the reasons sufficient?
- [23] Dr. Sarband submits that the Master's reasons were insufficient. While she acknowledges that Master Cameron cited at length from the trial decision, and provided a helpful summary of the parties' positions, she submits that the analysis largely states the conclusion of the legal test without much more. Mr. Joubin responds that Master Cameron's reasons were responsive to the live issues and the parties' key arguments, and that the reasons are sufficient to permit meaningful appellate review.
- [24] For the reasons that follow, I find that the reasons are sufficient.
- [25] In *Chahal v. Chahal*, 2020 BCCA 147, the Court of Appeal wrote the following about what is necessary for reasons to be sufficient:
- [60] While the judge's reasons were not extensive, she clearly described the issue and the parties' positions. It must be remembered that reasons do not need to be extensive; they need not dot every "i" and cross every "t". Reasons are sufficient if they are responsive to the live issues and the parties' key arguments: *R. v. Walker*, 2008 SCC 34 at para. 20. Appellate intervention is not warranted if the record permits meaningful appellate review: *Shannon v. Shannon*, 2011 BCCA 397 at para. 9.
- [26] I have already summarized Master Cameron's reasons for judgment. He clearly understood the nature of the underlying dispute between the parties and the relationship of the reopening application and the present waiver application to that dispute. He accurately summarized the parties' positions with respect to the waiver application.
- [27] Importantly, Master Cameron referred to the key case law relied upon by both parties in support of their positions on waiver, and in doing so, he accurately stated the applicable legal principles, and the parties' arguments based upon those principles. In particular, he noted that privilege can be waived where a party puts their mind in issue, and in those circumstances, the scope of waiver can extend to the knowledge and investigations of counsel: at para. 10, referring to *Araya*. He also noted that, aside from express or implied waiver, waiver can be found where fairness and consistency require it, despite the absence of any intention to waive: at para. 11, referring to *Pro-Suite*.
- [28] Dr. Sarband points to the brevity of the two paragraph discussion found at paras. 17 and 18 of Master Cameron's decision. That discussion is brief, but it is informed by the relatively lengthy preceding discussion of the parties' arguments, which makes clear both what he was

deciding and the reasons for his conclusions. In para. 17, he found that there was no express or implied waiver, and that fairness and consistency do not require waiver. Given his earlier discussion of the parties' arguments, it is clear that in so finding, the Master understood that an intention to waive was not necessary if fairness and consistency require waiver.

[29] Similarly, Master Cameron's reasons show that he understood the parties' arguments with respect to the potential relevance of Mr. Joubin's state of mind, and in particular his awareness before and at trial of the potential relevance of Dr. Sarband's parents' evidence about the use of the line of credit. It is clear that he found that Mr. Joubin was aware of the potential relevance of that evidence at all material times and that Mr. Joubin made a conscious decision not to call Dr. Sarband's parents as witnesses.

[30] Finally on this point, at para. 18, Master Cameron's reasons reflect that he understood the legal principles that will guide the eventual reopening application, consistent with his earlier reference to Zhu, and found that the disclosure sought by Dr. Sarband would not be relevant to that application.

[31] Master Cameron's reasons are more than sufficient to permit meaningful appellate review. He did not simply state legal conclusions without providing the reviewing court with the basis upon which to understand why he arrived at those conclusions. He was both alive to and responsive to the parties' key arguments. This Court is left in no doubt about what he decided and his reasons for doing do.

[32] I would not accede to this ground of appeal.

3. Should the decision be overturned on appeal on the merits?

[33] Dr. Sarband raises two interrelated arguments in support of her position that the Master's decision should be overturned on the merits. First, she submits that Master Cameron relied upon inadmissible evidence, namely the submissions of counsel for Mr. Joubin, in reaching his conclusion that Mr. Joubin's state of mind is not in issue. Further, she submits that Master Cameron erred in his finding that Mr. Joubin's state of mind is not in issue. Mr. Joubin disagrees, arguing that it was appropriate for the Master to take into account his counsel's submissions in determining whether Mr. Joubin's state of mind is in issue.

[34] Second, Dr. Sarband submits that Master Cameron erred in his conclusions that the disclosure sought would not be relevant on the reopening application, and that fairness and consistency do not require waiver. In response, Mr. Joubin submits that Master Cameron was not clearly wrong in his conclusion that the disclosure sought would not be relevant to the reopening application, nor in his conclusion that fairness and consistency do not require waiver.

[35] I will deal with each of these grounds of appeal in turn.

Was the Master clearly wrong in concluding that Mr. Joubin's state of mind is not in issue?

- [36] Dr. Sarband argues that Master Cameron erred in relying on inadmissible evidence in coming to his conclusion that Mr. Joubin's state of mind will not be in issue on the reopening application. She says that the Master ought not to have relied upon Mr. Joubin's counsel's statements about his litigation strategy at trial, and in particular, the decision not to call Dr. Sarband's parents as witnesses at trial. She also says that those statements conflict with explanations provided in Mr. Joubin's written response to the application and statements made in his reopening application. She submits that Mr. Joubin's position is therefore based on "shifting sands". Further, she submits that Master Cameron erred in concluding that Mr. Joubin's mind is not in issue.
- [37] I have already determined that the correct standard of review is whether the Master was clearly wrong in this regard. It is therefore important to begin by an examination of what the Master decided on this point and his reasons for doing so.
- [38] At para. 2 of his reasons for judgment, Master Cameron quoted at some length from the trial decision, including Masuhara J.'s observation that:
- [23] The limited production of documentation by either party and their failure to call other witnesses, such as their parents, who were referred to in each party's testimony on important aspects limited the strength of the key assertions of each side.
- [39] Master Cameron then noted that Mr. Joubin had filed the reopening application. He quoted from Mr. Joubin's application that he was seeking to reopen to adduce fresh evidence in the possession of Dr. Sarband's parents in the form of bank records of accounts held jointly with Dr. Sarband and their testimony with respect to the use of the line of credit.
- [40] Master Cameron then commented that Mr. Joubin had not called Dr. Sarband's parents as witnesses because he expected Dr. Sarband would be able to explain sufficiently what happened to the money from the line of credit. He wrote that Mr. Joubin did not anticipate Dr. Sarband would make no attempts to provide bank statements to prove her claim. I would note that this passage in his reasons appears to be based upon the contents of Mr. Joubin's application to reopen. Master Cameron correctly described Dr. Sarband's argument that Mr. Joubin had thereby caused his state of mind to become relevant, with the result that fairness and consistency required his solicitor's brief to be opened up to review the litigation strategy that led to the decision not to call her parents as witnesses.
- [41] Master Cameron then quoted from Mr. Joubin's response to the waiver application in which he acknowledged that he could have called Dr. Sarband's parents as witnesses at trial. He then referred to Mr. Joubin's counsel's submissions that whatever investigations he undertook and instructions he received about whether to call witnesses at trial will not be relevant to the reopening application. His onus on that application will be to show that a miscarriage of justice would probably occur if the trial is not reopened, and that the new evidence would probably change the result.

[42] Finally, in his analysis, Master Cameron noted that Mr. Joubin had conceded that he was aware of the potential relevance of Dr. Sarband's parents' evidence even before the trial commenced. On that basis, the Master concluded that "there is no question about the defendant's state of mind".

[43] On this appeal, I was provided with a partial transcript of proceedings before Master Cameron. The transcript makes clear that there was a good deal of discussion of the fact Mr. Joubin knew he could have called Dr. Sarband's parents as witnesses at trial, and chose not to do so. The following passages from Mr. Cote's submissions on Mr. Joubin's behalf reflect that discussion:

I'll take this point in a following submission, and that is you heard at length all the reasons or all the opportunities and possibilities as to when and why the parents should have been called. All of that's true. Of course it was open to Mr. Joubin to call the parents during the trial. Of course he made a decision as to whether or not he was going to do that.

The applicant in the application to reopen is going to have to wear that. It's probably the most damning piece in his application, and the balance is going to be weighed against the value of the weight of the evidence and its impact on the trial .

[44] Later, in response to a question from Master Cameron about whether he would have to show on the reopening application why he did not call the parents' evidence when he knew they had relevant evidence to give, Mr. Cote responded "[o]f course, yes. Absolutely," and continued "I think my friend described it as a litigation decision - as a strategic decision, and he's correct ."

[45] Dr. Sarband argues that Master Cameron erred in relying on those and other submissions of a similar nature because they were inadmissible evidence.

[46] In my view, Dr. Sarband has misapprehended the nature of counsel's submissions and the use Master Cameron made of them. Counsel's submissions were not accepted by the Master unsworn evidence. Rather, counsel's submissions were treated as concessions of fact - namely, that Mr. Joubin knew he could have called the parents and chose not to do so at trial; and of law - that those facts were going to create a significant hurdle for him in seeking to adduce fresh evidence on the reopening application. Those concessions were repeated before me, as was that Mr. Joubin will have to overcome those facts to succeed in his reopening application before Masuhara J.

[47] It is essential to the just and efficient resolution of legal disputes, especially in Chambers, that counsel be able to make such concessions, that the Court be able to rely upon them, and that parties be held to them. Mr. Joubin will not be able to resile from the concessions made on his behalf about the fact he could knew he could have called Dr. Sarband's parents and made a litigation decision not to do so.

[48] Master Cameron was not clearly wrong in his reliance upon counsel's submissions.

- [49] I turn to the second aspect of Dr. Sarband's submission in this regard, which is that Master Cameron erred in his conclusion that Mr. Joubin's state of mind will not be relevant. He relies on *Moradkhan v. Mofidi*, 2013 BCCA 132 [Moradkhan], in support of this submission, in which the Court of Appeal stated that on an application to reopen a trial "the reasons that the evidence was not led or submissions not made in the first place may be relevant to the exercise of the judge's discretion, particularly where the failure to do so in the first place was a considered or pragmatic decision": at para. 31.
- [50] Clearly, the reasons why evidence was not led may be relevant in an application to reopen. Moradkhan presents a particularly extraordinary example of such a situation. However, in the circumstances of this case, where Mr. Joubin has already conceded that his conscious decision not to call Dr. Sarband's parents at trial is something that "he'll have to wear" and overcome, I do not think that Master Cameron was clearly wrong in concluding that Mr. Joubin's state of mind will not be at issue. As submitted by Mr. Joubin, there is nothing further that could be gleaned by opening his solicitor's brief to inquire into the tactical reasons he made that decision.

Was the Master clearly wrong in his assessment of the relevance of the disclosure sought or whether fairness and consistency require waiver?

- [51] As I have already indicated, the applicable standard of review for these grounds of appeal is whether Master Cameron was clearly wrong in his assessment of the relevance of the disclosure sought or whether fairness and consistency require waiver.
- [52] In my view, there is no real question that the Master applied the correct test in assessing the relevance of the disclosure sought. Rather, Dr. Sarband attacks the application of that test to the facts of this case.
- [53] Fundamentally, the ground of appeal relating to the relevance of the disclosure sought represents a rehashing of the ground just considered, and it can be dealt with relatively summarily. The reasons why evidence was not called may be relevant in some cases, but given the concessions made by Mr. Joubin, and the analysis in *Zhu* which will apply on the application to reopen, there is no relevant question that would be answered by opening his solicitor's brief in this case.
- [54] I conclude that Master Cameron was not clearly wrong in his assessment of the relevance of the disclosure sought.
- [55] I turn to a consideration of whether Master Cameron was clearly wrong in his conclusion that fairness and consistency do not require waiver in this case.
- [56] In this regard, it is important to keep in mind the high bar faced by any party who seeks disclosure of an opposing party's solicitor's brief. As stated by the Court of Appeal in *Araya*, solicitor-client privilege must be "as close to absolute as possible": at para. 20.

- [57] Solicitor-client privilege is not, however, absolute, and the authorities make it clear that waiver can be found in the absence of any intention to waive privilege if fairness and consistency demand it. The court will deem privilege to be waived where a party "voluntarily takes a position in litigation that is inconsistent with the maintenance of the privilege" or "makes legal assertions that 'make it unfair for the holder of the privilege to retain the benefit of the privilege'": *Pro-Suite* at para. 23, cited in *Araya* at para. 23. For waiver to be found on this basis, "a party must voluntarily inject into the litigation legal advice it received or its understanding of the law before waiver can be implied": see *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 at para. 49, cited in *Araya* at para. 24.
- [58] In the present case, Mr. Joubin has not voluntarily injected into this litigation the legal advice he received or his understanding of the law at the time he chose not to call Dr. Sarband's parents or seek disclosure from them of the banking records. He has conceded he knew he could do so, and chose not to. He has not suggested that he relied upon legal advice in making that tactical choice. This is not a case in which Mr. Joubin has pointed to his solicitor's advice as the basis upon which he chose not to call Dr. Sarband's parents - if he did so then the advice contained in his solicitor's brief would be relevant to the reasons why he did not call them at trial. In the absence of such an injection of legal advice into these proceedings, Dr. Sarband's application to waive privilege over Mr. Joubin's solicitor's brief amounts to nothing more than a fishing expedition that she might find something relevant there. That is not sufficient to establish that fairness and consistency demand waiver of privilege.
- [59] Dr. Sarband also emphasizes what she calls the "shifting sands" of the reasons put forward by Mr. Joubin as to why he chose not to call her parents to the stand at trial or seek production of documents from them. It is a fair observation that Mr. Joubin has not been entirely consistent in this regard. In particular, I would highlight the statement in the notice of application to reopen the trial that he did not call Dr. Sarband's parents because he expected she would be able to explain what happened with the funds from the line of credit sufficiently, and did not anticipate that she would make no efforts to provide bank statements. That can be contrasted with his statement in his response to the waiver application that those comments were an explanation for why the application was made after the trial was concluded.
- [60] In submissions before me, counsel for Mr. Joubin said a submission that he could not have called Dr. Sarband's parents at trial, or could not have sought to seek the banking records from them, would have "no air of reality", and that that was the heart of the concession he made before Master Cameron. I agree: on the record before the Court on this appeal that would be an impossible position to sustain. That does not explain why he has provided inconsistent explanations of that decision in various documents filed on these applications. But the fact that inconsistent explanations have been provided does not put Mr. Joubin's mind in issue, make his solicitor's brief relevant, or waiver necessary due to fairness and consistency.

- [61] I therefore conclude that Master Cameron was not clearly wrong, and indeed was correct, in finding that waiver has not been established.
- [62] Further, in the event that I am wrong in my finding that Master Cameron was not clearly wrong in his conclusion on relevance, or indeed if he was not correct on his finding on relevance, I would in any event not overturn his decision. Even if the legal advice received by Mr. Joubin is relevant to the reopening application, I find that he has not expressly or implicitly waived privilege; nor do consistency and fairness require that privilege be waived. The reopening application will stand to be decided on the basis of the principles set out in Zhu, and the burden will be on Mr. Joubin to show that a miscarriage of justice will probably occur if the trial is not reopened, in light of the fact that he undoubtedly could have introduced this evidence at trial. Nothing in his solicitor's brief will shed light upon that question.

Conclusion

- [63] I have concluded that Dr. Sarband's appeal from Master Cameron's decision dismissing her application for a declaration that Mr. Joubin has waived privilege cannot succeed. In coming to that conclusion, I have reviewed the Master's decision on the clearly wrong standard of review. I have found that his reasons for decision were sufficient for meaningful appellate review, and that he was not clearly wrong in any aspect of his decision. Even if he were clearly wrong, or incorrect, with respect to relevance, I would in any event find that privilege has not been waived.
- [64] The appeal is dismissed. Costs of this appeal will be to the defendant in the cause.

"Lyster J."

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