

JERSEY / JUDGMENT

Chartier v States of Jersey Post [2007] JCA 068 (19 March 2007)

[2007] JCA 068

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COURT OF APPEAL 19 March 2007 Before : Sir Philip Bailhache, Kt., Bailiff, President; P. D. Smith, Esq., Q. C., and M. S. Jones, Esq., Q. C. Between Jacques Chartier Respondent/Plaintiff And States of Jersey Post Appellant/First Defendant And HSBC Bank International Limited Second Defendant Appeal by the Appellant from the Order given by the Samedi Division of the Royal Court on the 8 th June, 2006. Leave to appeal granted by Commissioner Hamon on Friday 12 th January, 2007. Advocate D. J. Benest for the Appellant. Advocate O. A. Blakeley for the Plaintiff.

JUDGMENT

SMITH JA:

Introduction

1. This is an appeal against a finding by the Royal Court (Samedi Division) that the Appellant, Jersey Post, was liable in damages to the Respondent, Mr. Jacques Chartier, in respect of personal injuries sustained in an accident which was alleged to have occurred on 10 May 2001 in the course of Mr. Chartier's employment by Jersey Post as a postman. 2. Mr. Chartier's case at the trial was that at the date of the alleged accident he had been employed by Jersey Post for about eighteen months. He had started work at about 6.00am on the day in question. At about 9.20am he was asked by a manager to carry out a collection duty. He felt anxious because he had not carried out the collection before and "pressurised" because of time restraints. The collection was from the branch of HSBC Bank International Limited ("HSBC") at Hill Street, St. Helier. Mr. Chartier told the Royal Court that he walked into the reception area and rang a bell there but no one answered. He noticed a cardboard box on top of a metal trunk. He checked that the box was for collection and took it to the van with which he had been provided by Jersey Post. Mr. Chartier then returned for the trunk. This had handles on both ends. On previous occasions when he had handled trunks they had not been heavy. He bent over to pick up the trunk. He lifted it a few inches or a foot off the ground but it was very heavy. He felt a pain in his lower back and dropped the trunk and stood up. He then squatted down and picked up the trunk again and put it into the van. He took what he had collected to where it was supposed to go and reported the incident. The trunk was put on scales and found to weigh 34 kg or 75 lbs. 3. Mr. Chartier brought

proceedings claiming damages for negligence and/or breach of duty against both Jersey Post and HSBC. As against Jersey Post those causes of action are particularised as follows: "(i) Negligently employing the Plaintiff to lift, carry or move a load so heavy as to be likely to cause him injury. (ii) Instructing the Plaintiff to perform the said task alone. (iii) Failing to provide the Plaintiff with assistance. (iv) Failing to provide the Plaintiff with any or any sufficient manual handling training. (v) Failing to ensure that collection trunks (sic) were not overfilled by customers. (vi) Providing collection trunks that when filled by customers could or would be likely to exceed safe handling loads. (vii) In the premises [Jersey Post] failed to provide the Plaintiff with a safe place or safe system of work, safe plant or equipment and exposed him to an unnecessary risk of injury." It is not necessary for us to set out the particulars in respect of HSBC as they are not relevant to this appeal, the Royal Court having dismissed Mr. Chartier's claim against that company. Procedural Issues 4. The trial of the action, Mr. F. C. Hamon, OBE, Commissioner, presiding, commenced on 24 April 2006 and lasted five days. The court heard evidence from witnesses as to liability, expert witnesses as to safety at work and medical expert witnesses for all three parties. Advocate D J Benest appeared for Jersey Post and Advocate O Blakely appeared for Mr. Chartier both in the Royal Court and before us. 5. After the evidence had been heard Mr. Blakely proposed that "... we close today on the issues of liability and we discuss medical evidence as well. The Court will then be in a position to come back at some point with a finding on what injuries it believes, if any, Mr. Chartier suffered. Then, as a result of that, we will continue on another occasion, or maybe even possibly agree, to general damages and move on to consider special damages." The Commissioner indicated that he thought this very sensible and Mr. Benest and counsel for HSBC said that they had no objection. 6. On 8 June 2006 the Commissioner delivered a judgment on behalf of the court. Jersey Post was held liable to Mr. Chartier subject to a deduction of 30% for contributory negligence. On 6 July 2006 Jersey Post gave notice of appeal. At that stage, and this remains the position, the quantum of Mr. Chartier's damages had not been determined. After the hearing of this matter was listed before this Court it was drawn to Mr. Benest's attention, at the behest of the Court, that as the appeal he sought to prosecute was interlocutory (see *Planning and Environment Committee v. Lesquende Ltd.*

[2003] JLR 15) leave to appeal ought, in the first instance, to have been sought from the Royal Court (see *Glazebrook v. Housing Committee* [

[2002] JLR Note 43). Leave to appeal was then sought and obtained from the Royal Court. We take this opportunity to remind practitioners that when leave to appeal to this Court is required and can be granted by the court below as well as this Court it should be first sought from that court. 7. There is a further procedural matter on which we think we should comment. After the judgment of 8 June 2006 had been delivered the Royal Court issued a further judgment entitled " Addendum to Judgment of the 6 th June 2006 " (sic). Mr. Benest suggested that it was probably drafted after the Commissioner had seen Jersey Post's Notice of Appeal which is dated 6 July 2006. 8. The first sentence of the addendum describes it as the Royal Court's decision on the medical evidence. Mr. Benest contended

that the Royal Court was uneasy with its original judgment. The production of the addendum supported the appeal because in producing it the Royal Court was acknowledging that it had been wrong in thinking that it could decide the liability issue without a decision on the medical evidence. However, at the point in time when, according to Mr. Benest, the addendum was created the Royal Court, he argued, was *functus officio* as far as liability was concerned and "could not purport to take up its office again on the subject of liability." 9. We reject this argument. It is clear from the course of action proposed to the Commissioner by Mr Blakely and accepted by Mr Benest that it was open to the Royal Court to state its findings on Mr Chartier's injuries at a later stage. It chose to do so when it issued the addendum. Even assuming that Mr Benest is correct in his suggestion as to when the addendum was drafted he, having consented in advance to what happened, cannot now be heard to complain. The Royal Court was not *functus* when the addendum was produced. The Appellant's Substantive Contentions 10. Jersey Post's Notice of Appeal, which was amended after the addendum to the Royal Court's judgment became available, is an elaborate document which was supplemented by detailed written contentions. We have read these documents very carefully, together with all the other documents in the case, and we have listened attentively to Mr. Benest's oral submissions as well as those of Mr. Blakely. We do not consider it necessary to address every single point raised. In particular, we have not accepted Mr. Benest's invitation to revisit issues on which the Jurats reached conclusions that were open to them on the evidence that they had heard. In a case of this sort the resolution of evidential conflicts is essentially a matter for the tribunal which has had the advantage of seeing and hearing witnesses being examined and cross-examined before them. The only circumstance in which an appellate court can interfere is when it is satisfied that the court of trial was plainly wrong. We can find no basis for so concluding in this case. However there are a number of issues with which we should deal and to these we now turn. Causation: The Negligent Conduct 11. Mr. Benest argued that, although the Royal Court had identified what he described as supposedly negligent conduct, it had never asked itself whether that negligence had actually caused any event which would not otherwise have occurred if there had been no such negligence. Mr. Benest's submission was predicated on a paragraph in the judgment of the Royal Court in which reference was made to Jersey Post not carrying out an adequate risk assessment that would have revealed the risk of injury from over-laden trunks; to the Jurats' finding that Mr. Chartier had not attended the manual handling course provided by a Mr. Grimes; which implied that Jersey Post had not followed their usual procedures in relation to the round in question; and which concluded as follows "... had [Jersey Post] not put Mr. Chartier under pressure then our decision might not have been the same." 12. We do not consider this argument to be well founded. Prior to the paragraph in the judgment to which Mr. Benest referred the Commissioner set out the components of the test for negligence. The third of these was "injury or damage caused by ... negligence to the complainant." In the circumstances, we do not accept that in subsequently referring to negligent conduct the Royal Court did not have well in mind the need for a causal link. We interpret the reference to not carrying out an adequate risk

assessment as a finding of a culpable failure not only to ascertain that an employee collecting from HSBC might be faced with a very heavy trunk (and the Royal Court held that the trunk in question was very heavy) but also of a culpable failure to take reasonable steps to ensure that if this eventuality arose the trunk could be handled safely. Later in the judgment the Royal Court said that "it does not seem to us to be reasonable ... for Mr. Chartier to have been sent alone on a round of collection that he had never done before and which went beyond the usual collection round of a postman." We interpret this to mean that the Royal Court considered that in the circumstances someone should have been sent with Mr. Chartier in case he needed help (a view that the Jurats were entitled to take) and that had this been done the plaintiff would not have been injured. 13. Much time was spent at the trial on a dispute as to whether or not Mr. Chartier had attended Mr. Grimes' manual handling course. In the event the Royal Court concluded that he had not or, if it was wrong in reaching that conclusion, that in the period between the training and the accident it had been established with Mr. Chartier's manager that he did not feel adequately trained in that area and that that should have been addressed at that time. Clearly the Royal Court thought that either way Jersey Post was at fault. However, the only aspect of Mr. Grimes' training on which the Royal Court focused was the testing of the weight of boxes, including trunks, by tilting them so that a lower edge remained resting on the ground or floor. Although it is not actually spelt out in the judgment, it seems to us that the reference to Mr. Grimes' manual handling course in the paragraph in question can only be construed as relating to the plaintiff not having been trained to test the weight of the trunk by tilting it and that but for this the accident would not have happened. In other words that had he been so trained, or adequately trained, he would have tested the box by tilting it, would have discovered that it was too heavy for him to attempt to lift on his own and, therefore, would not have sustained injury. 14. Mr. Benest sought to persuade us that in the course of his evidence at the trial Mr. Chartier conceded that at the time of the accident he both knew how to test a box by tilting it and had tested the weight of the trunk before attempting to lift it. We do not accept either of these propositions. We cannot find anything in the transcript to support the contention that the plaintiff acknowledged that at the material time he knew how to conduct the test in question. Moreover, as we have indicated, it is apparent that the Jurats took the same view otherwise their conclusion that the plaintiff had either not received Mr. Grimes' training or, if he had, did not feel adequately trained would have been meaningless and redundant. 15. As to the proposition that the plaintiff conceded at the trial that he had tested the weight of the trunk, it is quite clear that what Mr. Chartier was referring to was an attempt on his part to open the trunk and look inside it at the contents, an attempt which failed because the trunk was locked. But there is nothing in his evidence to the effect that at any material time he conducted or attempted the requisite tilting test. 16. It is true that the Jurats' conclusion as to Mr Grimes' training does not sit entirely comfortably with the finding that Mr. Chartier was guilty of contributory negligence because he did not test the weight of the trunk by lifting it by one of the handles. However, we are not dealing with an appeal by Mr. Chartier against any aspect of the Royal Court's finding of contributory negligence against him. 17. It is

convenient when referring to this finding of contributory negligence to point out that it tends to confirm that the Jurats must have considered the failure to tilt as causally connected with the plaintiff's injury. Had this not been the case it could not have provided a basis for the deduction. 18. As to the implication that Jersey Post had not followed their usual procedures, we read this as a reference to Mr. Chartier's evidence that when a worker was put on a new duty, whether involving deliveries or collections, he or she would receive three days' training from another worker, something that had not happened in this case. This conclusion was open to the Jurats and we deduce from it that their view was that had the plaintiff received that training in relation to the collection in question he would have learned how to deal with the very heavy trunk safely and the accident would not have occurred. 19. As to Mr. Chartier having been put under pressure we interpret this, from other parts of the Royal Court's judgment, to mean that had this not been the case he would have been more circumspect. He would have either rung the bell again seeking assistance from HSBC staff or contacted his manager for assistance using his mobile telephone or he might even have spontaneously thought of tilting the trunk. Whichever course he may have adopted, the accident would not have happened. 20. We would add that, as Mr. Blakely reminded us, the paragraph on which Mr. Benest relied is not the only one in the judgment of the Royal Court in which Jersey Post is criticised. Another paragraph refers to the trunk not having been labelled "Heavy", the possibility of Jersey Post stipulating to HSBC "the maximum weight in each box without the "Heavy" label being applied" and the possibility of several smaller trunks being provided. It also refers to the possibility of the manager who instructed Mr. Chartier to do the job in question reminding him to test the weight "of the sealed box" (the trunk in question was locked). 21. Given the finding that Mr. Chartier had not been trained to test the weight of boxes or, if he had, that he did not feel adequately trained, the last point has to be read as envisaging Mr. Chartier responding to the manager to this effect and the manager coming up with an alternative precaution. However, it seems to us to be clear that in this paragraph also the Royal Court was saying that there were precautions that could have been taken that were not taken and that, in its view, if any one of them had been taken the plaintiff would not have been injured. Causation: The Medical Evidence 22. Mr. Benest argued that the Royal Court had failed to consider the question of medical causation properly or at all. The Notice of Appeal summarises this argument as follows: "If the Court had done so and done so properly it would have concluded that any default by [Jersey Post] had a) not been proved to have had any measurable effect on the Plaintiff at all; or b) had no more than a trivial effect on the Plaintiff in any event." 23. In the light of the fact that the Royal Court was invited without objection from the defendants to reach an initial decision on liability it would have sufficed for the purpose of determining that issue for it simply to have concluded that Mr. Chartier had sustained more than minimal injuries as a result of the accident. And, in our view, having accurately articulated the test for actionable negligence, it is implicit in the judgment that this is what the Royal Court did. It is true that it explained its view of the medical evidence in the addendum (and we will come to this) but, strictly speaking, it is not in our view necessary to have resort to it in

considering Mr. Benest's arguments on liability as such. 24. Having said all this, however, we would point out that when one looks at the medical evidence Mr. Benest's argument is plainly wrong. Although the medical experts dealing with Mr. Chartier's back injury differed in the nature and significance of it, as will be seen from the summaries set out below all of them conceded that the plaintiff had sustained a degree of injury which, in our opinion as well as that of the Royal Court, was sufficiently significant to attract compensation. 25. Mr. R. R. H. Coombs FRCS, a consultant orthopaedic surgeon, gave evidence for Mr. Chartier. Mr. R. S. Maurice-Williams FRCS, a consultant neurosurgeon, gave evidence for Jersey Post and Professor J. R. Shearer FRCSE, an emeritus professor of orthopaedic surgery, gave evidence for HSBC. All three are highly qualified. Each had prepared reports which were before the Royal Court and formed part of the evidence. 26. Mr. Coombs thought that the cause of the problem with Mr. Chartier's back was an annular tear. Intervertebral discs comprise a ring of fibrous tissue with a soft centre. When these fibres - the annular fibres - are torn this causes intense pain. Furthermore, the tearing may permit the acidic material in the centre of the disc to leak out and irritate the adjacent nerve roots. In addition the disc loses its integrity and the disc space may collapse causing instability. It was Mr. Coombs' view that this had happened in Mr. Chartier's case as a result of the lifting accident involving the trunk and explained his ongoing pain and sciatica. 27. Mr. Maurice-Williams thought that it was unlikely that Mr. Chartier had sustained more than a soft tissue injury to his lumbar spine, possibly superimposed on pre-existing degenerative changes. In the course of his oral evidence he said the following: "I would've expected [Mr. Chartier] to have had quite a good deal of initial back pain and stiffness and muscle spasm, and often with the soft tissue injuries, there is some vague radiation of discomfort in one, or both legs - sometimes with some vague tingling. But, I would expect symptoms to begin to clear within a few weeks, and by three months or so I would've expected possibly some residual symptoms which would have relapsed from time to time, but not sufficient to cause any functional disability." 28. Professor Shearer's opinion was that the accident was most likely to have caused a musculo-ligamentous low back problem although it was unlikely that there would have been any significant ongoing functional disability at eight weeks or so from the time of the injury. Contributory Negligence 29. Jersey Post complained that no reasons were given by the Royal Court for the finding of contributory negligence at 30%, implying that the scale of the deduction should have been greater. In one sense this criticism is not accurate: the court did outline the factors it took into account in the following terms: "We feel that the problem lies in the fact that Mr. Chartier just did not think. He rang the bell - presumably having looked inside the cardboard box to see that it contained statements

- in order to find out what the locked trunk contained. It does not surpass belief that he might have assumed that the cardboard box was an overflow from the metal trunk and perhaps tested the weight by lifting it by one of the handles (even if he had not been trained to do so) or rang the bell again, to ensure that the trunk did contain statements and that he was to take the trunk away. If someone had come, he might have inquired into the weight of the

box." But what the Royal Court did not do was to attempt to explain how it assessed the deduction at 30% rather than at some other percentage. 30. The approach of a court making a deduction for contributory negligence is laid down by statute: Article 4(1) of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 requires that where a person suffers damage as a result partly of the person's own fault and partly of the fault of any other person or persons "the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." It is obviously logically impossible for the court making the deduction to do so with mathematical precision. In truth, it is really a matter of impression, the court looking at the conduct of the claimant and of the other person or persons and doing the best it can to be fair. The phrase "just and equitable" is suggestive of a discretion and, as in the case of the exercise of a discretion vested in a lower court, an appellate court should be slow to interfere. 31. In our opinion there is sufficient in the judgment of the Royal Court to indicate the factors it took into account in deciding what percentage to deduct. We cannot say that the percentage it chose was wrong in the sense that it should have been greater. Accordingly, we decline to interfere with it. In saying this we reiterate what we have already said in para. 16 above, that we are not dealing with an appeal by Mr. Chartier against any aspect of the Royal Court's finding of contributory negligence. The Royal Court's Reasoning 32. This brings us to an unsatisfactory aspect of the judgment and that is its failure to set out the findings of the Royal Court in a clear manner. The result has been that both the parties and this Court have had to parse it very closely in order to ascertain what factual conclusions had been reached and how the Royal Court reached them. In the end it has proved just about possible to deduce the Royal Court's reasoning on the various issues with which we have dealt but this has not been achieved without difficulty. 33. In *English -v- Emery Reimbold & Strick Limited*

[2002] 1 WLR 2409 the Court of Appeal of England and Wales reviewed both the Strasbourg and English Common Law jurisprudence on the requirement that courts give reasons for their judgments. The judgment in that case, delivered by the Master of the Rolls, deserves careful scrutiny by everyone who performs an adjudicative function in a legal setting. 34. Lord Phillips MR makes it clear that the adequacy of reasons depends on the nature of the case (at page 2417 para. 17). He recognises that it is not possible to provide a template to be used in every case (at page 2418 para. 19). However, we would suggest that in a case like the present one, the judge might be assisted by asking the following questions and ensuring that, insofar as they are applicable, they have been answered in the judgment: (i) What are the issues of fact? (ii) What are the issues of law? (iii) How has the court resolved the issues of fact and law? (iv) Why has the court resolved these issues of fact and law in the way it has? (v) What results follow and why? Answering these questions would inevitably involve recording the main points of the parties' contentions, and how the court resolved them, so that they will know why they have won and lost. 35. The judgment in *English -v- Emery Reimbold & Strick Limited* also includes important guidance on another point. This relates to the situation in which permission to appeal (the equivalent of leave

to appeal here) is sought from the court of first instance on the ground of lack of

reasons.

In this situation the judge should consider whether his or her judgment is defective for lack of reasons and, if he or she concludes that it is, the judge should set out to remedy the defect by the provision of additional reasons (at page 2419 para. 25). 36. In the instant case the Commissioner did not furnish additional reasons when the application for leave to appeal was made to him either because he thought that the reasons given were adequate or because his attention was not drawn to *English -v- Emery Reimbold & Strick Limited*. Whatever the explanation we consider that the guidance of the English Court of Appeal to which we have referred should, where appropriate, be followed in this jurisdiction. The Addendum 37. As we have said, after the judgment of the Royal Court on liability and contributory negligence had been delivered an addendum was issued which was described as the Royal Court's decision on the medical evidence. The medical evidence was of two types: the evidence of the surgeons to which we have already referred and the evidence of a consultant psychologist called on the plaintiff's behalf and a consultant psychiatrist called on behalf of Jersey Post. 38. The passage in the addendum dealing with the medical evidence on the plaintiff's physical injuries reads as follows: "The medical experts called on behalf of the plaintiff and the two defendants were not of the same mind. There are clearly no reliable tests accurately to ascertain whether a patient is in continuous back pain or the level of the pain. As stated in ... the main judgment the Court was impressed by all three experts. They all acknowledged that the incident in question had caused some trauma to Mr. Chartier's back but it is in the extent and effect of that injury that the experts differ. The Jurats accept that Mr. Chartier continues to suffer some degree of pain. They therefore prefer the evidence of Mr. Coombs who explained that the pain still suffered was likely to be caused by a slight annular tear and the subsequent acidic leakage which can cause irritation of nerve roots." 39. Mr. Benest argued that to prefer the evidence of Mr. Coombs on the basis of the continuation of some degree of pain was illogical as the other two experts had also given explanations for any continuing pain suffered by the plaintiff. 40. Although the reasoning of the Jurats in this important aspect of the case is not expressed as clearly as it might have been, we are prepared to assume that what is meant by the passage quoted is that the Jurats concluded that Mr. Chartier's pain was continuous and that this supported Mr. Coombs annular tear diagnosis rather than the diagnoses of the other two medical experts, which would have resulted in intermittent pain at the most. We are also prepared to assume that the pattern of the plaintiff's pain was sufficiently significant to have entitled the Jurats to have adopted it as the basis for choosing between the respective opinions. Where we found difficulty, however, was in identifying the evidence on which the Jurats could have come to a reliable conclusion as to the pattern of the plaintiff's pain. In the course of the hearing we drew this to the attention of the advocates and they subsequently furnished detailed written submissions on this point for which we are grateful. 41. Mr. Blakely pointed to various parts of Mr. Chartier's evidence at the trial and contended that the plaintiff had thereby provided a sufficient basis for the Jurats' conclusion. We do not accept this contention. All of the relevant answers given by Mr. Chartier were at best ambiguous, not tending clearly to

establish whether his back pain was continuous or intermittent. Mr. Blakely also submitted that the Jurats would have been entitled to rely on the opinion evidence of Mr. Coombs, who appears to have accepted Mr. Chartier's assertion to him that he suffered persistent pain. We do not accept this submission either. Although no doubt entitled to take into account the opinion of an experienced orthopaedic surgeon, it was vital for the Jurats to have formed their own view of this issue on the basis of their assessment of the plaintiff. Moreover, it cannot be inferred, as Mr. Blakely suggested, that the Jurats viewed Mr. Chartier as a person who could generally be believed and that, on this basis, they must be taken to have believed what the plaintiff had told Mr. Coombs. As Mr. Blakely conceded in his original contentions, the Royal Court did not accept all of Mr. Chartier's evidence. If it had heard the plaintiff's evidence as to the pattern of his pain it would have been constrained to decide whether it accepted his evidence on this issue or not. It did not hear the plaintiff's evidence and, therefore, we do not consider that it was in a position to reach a reliable conclusion as to the pattern of his pain. 42. It seems to us that what must have happened is that the Jurats relied on the medical reports and the evidence of the experts dealing with the plaintiff's physical injuries in order to choose between the competing theories. In our view this was insufficient and, accordingly, their conclusion as to the aetiology of those injuries as set out in the addendum cannot stand. Disposal 43. Turning to the consequences of our conclusion on this point it is obvious that this Court is no better placed than the Royal Court was and, therefore, we cannot cure the lacuna. In the course of his supplemental submissions, although not in this context, Mr. Blakely argued that if this aspect of the case were to be sent back to the Royal Court as constituted for the trial it is most unlikely that it would perform a U-turn. We do not believe that this is as certain as Mr. Blakely suggested, but we think that the interests of justice would be better served by a freshly constituted court dealing with the outstanding issues. 44. Although our conclusion in respect of the addendum extends only to the plaintiff's physical injuries the psychological issues are heavily intertwined with the physical and there would appear to be no alternative to the whole of the injuries aspect of the case being revisited. 45. Accordingly, while dismissing Jersey Post's appeal on liability, we allow the appeal insofar as it relates to the injuries suffered by Mr. Chartier and remit this issue to a freshly constituted Royal Court which should deal with it, and the outstanding issues on the quantum of the plaintiff's damages, as quickly as possible. *Authorities Planning and Environment Committee v. Lesquende Ltd*

[2003] JLR 15 . *Glazebrook v. Housing Committee*

[2002] JLR Note 43 . Addendum to Judgment of the 6th June 2006. Law Reform (Miscellaneous Provisions) (Jersey) Law 1960. English -v- Emery Reimbold & Strick Limited

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