

JERSEY / JUDGMENT

Warren -v- AG [2014]

JCA 080 (27 March 2014)

[2014] JCA 080

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Court of Appeal 27 March 2014 Before : The Hon. Michael Beloff, Q. C., President; Sir Hugh Bennett, and; Sir David Calvert-Smith. Curtis Francis Warren -v- The Attorney General
Application for leave to appeal against the confiscation order imposed by the Royal Court on 5 th November, 2013. H. Sharp, Q. C., Solicitor General for the Crown. Advocate S. M. Baker for the Applicant.

JUDGMENT

THE PRESIDENT:

introduction

This is the judgment of the court. 1. This is an application made pursuant to Article 3(2)(c) of the Court of Appeal Jersey Law 1961 ("the 1961 Law") for leave to appeal a decision of the Royal Court (Sir Christopher Pitchers, Q. C., Commissioner and Jurats Clapham, Morgan, Fisher, Crill, Olsen and Liston on 5 th November, 2013) that there would be a confiscation order against the Appellant in the sum of £198 million, that he would have 28 days to pay that sum, and that in default of payment he would serve 10 years in prison ("the Confiscation Order"). Advocate Baker's submission on the Appellant's behalf is that the Court of Appeal should exercise its powers under Article 26(3) of 1961 Law to quash the confiscation order and either impose a nominal order in its place or else make a confiscation order in a lesser sum. 2. On 7 th October, 2009, the Appellant was convicted by a jury of conspiracy to import cannabis into Jersey. He was sentenced to 13 years' imprisonment. The Attorney General's application for a confiscation order was adjourned. The Appellant appealed unsuccessfully to the Court of Appeal and to the Privy Council (

[2011] JLR 424). The application for confiscation was finally heard by the Royal Court between 21 st October and 5 th November, 2013. The Law 3. The application was brought under the provisions of the Drug Trafficking Offences (Jersey) Law 1988 ("the Drug Trafficking Law"). Article 1 (Interpretation) defines drug trafficking as follows:- "drug trafficking" means doing or being concerned in any of the following, whether in Jersey or elsewhere -

- (a) producing or supplying a controlled drug where the production or supply contravenes Article 5 of the Misuse of Drugs (Jersey) Law 1978 or a corresponding law;

- (b) transporting or storing a controlled drug where possession of the drug contravenes Article 8(1) of that Law or a corresponding law;
- (c) importing or exporting a controlled drug where the importation or exportation is prohibited by Article 4(1) of that Law or a corresponding law;
- (d) manufacturing or supplying a scheduled substance within the meaning of Article 6 of the Misuse of Drugs (Jersey) Law 1978 where the manufacture or supply is an offence under that Article or would be such an offence if it took place in Jersey;
- (e) acquiring, having in possession or using property in circumstances which amount to the commission of an offence under Article 38 or which would be such an offence if it took place in Jersey;
- (f) conduct which is an offence under Article 30 or which would be such an offence if it took place in Jersey;
- (g) using a ship for illicit traffic in controlled drugs in circumstances which amount to the commission of an offence under Article 46, and includes a person doing the following, whether in Jersey or elsewhere, that is entering into or being otherwise concerned in an arrangement whereby -
 - (i) the retention or control by or on behalf of another person of the other person's proceeds of drug trafficking is facilitated, or (ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person's disposal or are used for the other person's benefit to acquire property by way of investment;" Article 3 (Confiscation orders) provides, so far as material:- "(1) Where a person appears before the Court to be sentenced in respect of one or more drug trafficking offences (and has not previously been sentenced or otherwise dealt with in respect of the conviction for the offence or, as the case may be, any of the offences concerned), then - (a) if the Attorney General asks the Court to proceed under this Article; or (b) if the Court considers that, even though the Attorney General has not asked it to do so, it is appropriate for it to proceed under this Article it may act as follows. (2) The Court may first determine whether the person has benefited from drug trafficking. (3) For the purposes of this Law, a person who has at any time (whether before or after the commencement of this Article) received any payment or other reward in connection with drug trafficking carried on by the person or another has benefited from drug trafficking. (4) If the Court determines that the person has so benefited, the Court may, before sentencing or otherwise dealing with the Appellant in respect of the offence or, as the case may be, any of the offences concerned, determine in accordance with Article 8 the amount to be recovered in the person's case by virtue of this Article. (5) The Court may then, in respect of the offence or offences concerned - (a) order the person to pay that amount; (b) (6) (7) The standard of proof required to determine any question arising under this Law as to - (a) whether a person has benefited from drug trafficking; or (b) the amount to be recovered in the person's case by virtue of this Article, shall be that applicable in civil proceedings." Article 8 (amount to be recovered under confiscation orders):- Amount to be

recovered under confiscation order (1) Subject to paragraph (3), the amount to be recovered in the defendant's case under the confiscation order shall be the amount the Court assesses to be the value of the defendant's proceeds of drug trafficking. ... (3) If the Court is satisfied that the amount that might be realised at the time the confiscation order is made is less than the amount the Court assesses to be the value of the defendant's proceeds of drug trafficking, the amount to be recovered in the defendant's case under the confiscation order shall be - (a) the amount appearing to the Court to be the amount that might be so realised; or (b) a nominal amount, where it appears to the Court (on the information available at the time) that the amount that might be so realised is nil." 4. It is common ground that there are three questions which the Court must ask itself in deciding applications under this Article. R-v-May

- [2008] UKHL 28 ; 2 WLR 1131 para 48. 5. Firstly, has the Appellant benefited from drug trafficking? ("the first question") It is common ground that (i) it is still the Appellant's benefit, even if he has obtained the money jointly with others. R-v-Ahmad
- [2012] 1 WLR 2335 . (ii) The scheme in the Drug Trafficking Law allowed for confiscation in respect of benefit derived from drug trafficking other than that for which the Appellant had been convicted. R v Briggs-Price
- [2009] UKHL 19 . The burden of proving that he has so benefitted is on the prosecution. It does not have to prove it beyond reasonable doubt; it must establish it on the balance of probabilities [Article 3(7)]. 6. Secondly, what is the amount of his benefit? ("the second question") Again the burden of proving the amount is on the prosecution and again it must establish it on the balance of probabilities. [Article 3(7)]. In R-v-Whittington
- [2009] EWCA Crim 164 the English Court of Appeal rejected a submission advanced by Andrew Mitchell QC that the standard of proof should be the criminal standard see paras 26-33. Advocate Baker tentatively reprised the submission on the basis that there was no decision of a Court actually binding upon us that compelled its rejection. We are content to accept the orthodox view as elaborated in Whittington . 7. Thirdly, what sum is recoverable from the Appellant? ("the third question") Once the prosecution has established the amount of his benefit in a particular sum, the Court then considers what sum is recoverable from him. The starting point is the amount of his benefit. The burden then passes to the Appellant to prove, again on the balance of probabilities, that his realisable assets are less than this amount by "clear and cogent evidence" R-v-Summers
- [2008] EWCA Crim 872 at para 11. 8. At each stage of this triple exercise the Court "may" carry out one or other of the relevant steps of the confiscation process. It thus has, as is again common ground, a discretion whether or not to make a confiscation order. 9. As to the first question, it was not in issue that the Appellant had benefitted from drug trafficking. So much was indeed conceded on the Appellant's behalf at the conspiracy trial. 10. As to the second question, the Crown relied on two major items of evidence. The first item on quantum of benefit was a covert recording of a conversation between the Appellant and

an associate, Zulfu Vatandas, in Zoetemeer prison on 25 th April, 2004. The conversation starts at 01:34:01. The key passage is at 01:34:45:- "CW: You know that those people used to do with me 1% -they transferred but they never let me see anybody where they are. They'd do us in Spain they'd just say "there's a car there, there's the registration, go and pick the car up 7pm open the bag just take the money out" You know. everywhere. Fucking South America everywhere! Just pick it up and carry on! You know what I mean for 1, 1.5%! But Fuckin'ell mate sometimes we'd do about £10 to £15 million pounds in a week/3 or 4 days for me . Do you know what I mean at that time? (emphasis added) 11. Advocate Baker made three submissions:- (i) The tape was inaudible, and the transcript accordingly flawed. (ii) Even if the transcript was accurate, the words did not in their fair construction means what The Crown asserted. (iii) Even if the words meant what The Crown asserted, they should be treated as boasts rather than the truth. 12. As to (i) it is well established that where a Court of first instance has the benefit of sight and sound of a witness, the Appellate Court must be extremely slow to override a decision based on that factor, Pell Frischmann-v-Bow Valley

[2008] JCA 146 at para 121. Although in this instance, the Royal Court had only the sound of the recording (aided by the transcript) nonetheless a modified version of the same approach would seem appropriate. (We listened ourselves to the tape de bene esse but heard nothing which caused us to question the Royal Court's conclusion as to what it heard). Moreover the Appellant did not seek before the Royal Court to adduce expert evidence which might undermine the accuracy of the transcript, although apprised of how the Crown put its case. Advocate Baker invited us to say that the Royal Court's conclusion was perverse. For those reasons we decline to do so. As to (ii) it seems to us that the words spoken on their face indicated that the Appellant was laundering £10-15 million per week, or even in a shorter period. The fact that in the immediately preceding passage the Appellant said:- "Remember last time? It cost me 1% - everything. Yeah, but I know that, I know if I go out today and I go to the same place he'll only charge me 1% - sure" The four mentions of "I" and two mentions of "me" confirm that in the material extract he was speaking about his own profits, not those of his own and others. 13. The only remaining issue for the purposes of determining the value of benefit was how many times was 'sometimes'. The Royal Court concluded:- " all of the evidence established that the prosecution case, that the defendant had laundered £10 million on ten occasions or the equivalent thereof, was fully justified and a considerable underestimate of his benefit within the meaning of that term in the law" [para 22] (our emphasis) 14. The Royal Court therefore - and properly

- reinforced its view of the plain meaning of the words spoken by setting them in the context of other evidence of which they said:- "This demonstrates absolutely clearly that the defendant was involved in drug dealing on an enormous scale yielding huge profits, that that continued over the years and was not brought to an end by his incarceration. The Court accepted the evidence of Mr Saggars as to the coded references in the intercepts and as to the price of different drugs at different times. The Court did not accept the assertion of

Advocate Baker that the defendant is given to wild boasting. While it may be plausible that he would boast of his wealth to a helicopter pilot, his disclosures in the intercept material are in the course of business conversations with trusted associates." [para 20] (We interpolate that Mr Saggars was an NCA expert in international; drug trafficking called by The Crown on the issue of street values of drugs and associated matters.) 15. In para 21 the Royal Court referred to yet further evidence not only consistent with but positively supportive of the natural interpretation of the Appellant's recorded words:- "In Summary:-

- (i) His close involvement in two huge shipments of cocaine in 1991 and 1996 was not only clearly demonstrated on the evidence but, in respect of one, on his own admission through his counsel in the 2004 asset recovery proceedings, that he was a major participant. The profit on a 500 kilo importation sold wholesale would be at least £10 million. (ii) References in the intercepts to other importations of cocaine. For example his dealings with 'the father and son'. (iii) The defendant remained in contact with Mario Halley who was a major player in the 1991 importation and who visited him in prison in Holland in 2003. (iv) References in the intercepts to 10 million ecstasy tablets and other ecstasy deals. The profit per tablet would depend on when and where it was sold, but would be in excess of £1 wholesale. If they were being sold on the street, the profit would be much greater. In the 1990s, the street price of one tablet was £5-£10 in the UK and three times that in Australia.
- (v) The defendant speaks of deals involving 'smack' and 'horrible', meaning heroin, of tens of kilos. A 54 kilo importation organised by the defendant was intercepted at Dover in October 1996. The profit would be at least £10,000 a kilo. (vi) The defendant speaks of multi-tonne importations of cannabis probably from Morocco. A tonne of cannabis was recovered from 'The Shed' in Holland. At wholesale prices, the profit would be £1000 a kilo or more. (vii) Regular references to the export of household goods clearly relate to large drugs deals. To take one example, it is absurd to suppose that the defendant had decided to branch out into installing bathrooms when he refers to '3000 bathroom interiors to Russia'. (viii) The defendant was capable of continuing his drug-trafficking activities quite unperturbed, despite sustaining massive losses by way of seizures of importations by British and Dutch Customs. (ix) The Dutch investigation concluded that his turnover from drug dealing over a few months would be £17 million and his net profit £12 million.
- (x) Although the matters set out in this and the following sub-paragraph post-date the relevant conversation, they demonstrate that the defendant was continuing to deal while in custody. He made thousands of calls from HMP La Moye in 2008 and 2009 to known criminal associates and all over the world. (xi) The pattern of calls to Christopher Burgan in June 2008 very strongly suggests that the defendant was arranging the importation of heroin seized from Burgan at Dover on 11th June, 2008. (xii) The defendant's defence at trial in Jersey was that he was 'a sophisticated and successful career criminal' who would hardly trouble himself with importing 180 kgs of cannabis into Jersey." Advocate Baker did not mount any serious challenge to the facts set out in that paragraph. 16. The second item on quantum of benefit was the Tony Liverpool account. Between October 1994 and September 1996,

£11,748,310 were converted into foreign currencies including Deutschmark and Dutch guilders through an account at the TEB Bureau de Change in King's Cross in the name of Tony Liverpool. The account had been opened in 1992 but no other records survive. (Royal Court Judgment para 23) In asset recovery proceedings on 12 July, 2004, the Appellant's then counsel asserted in clear terms that this was the Appellant's account, referring inter alia to "An account called Tony Liverpool" and the explaining "Tony was one of the many names of (the Appellant) because of Tony Curtis." In a document produced by the same Counsel for the purpose of the same proceedings entitled "Further clarification of the Request for Disclosure" the same point was made in different language but to like effect on no less than three occasions. 17. The link between the Appellant and the account was further confirmed by covert surveillance of known associates of his visiting the TEB sometimes having travelled from Liverpool and intercept evidence concerning money laundering. These visits and intercepts as the Royal Court noted can in part be married up to transactions on the account. (Judgment para 23) 18. Advocate Baker submitted that nonetheless it was unclear whether the Appellant was the sole beneficiary of the account and pointed out that the name "Tony" (which it was accepted was used by the Appellant) was not unique to him. (as is accepted by us) 19. In our view the Royal Court was entitled to conclude, at least, that the fact that the name "Tony" was used to designate the account, indicated whose account it was, i.e. of someone called Tony and that in all the circumstances the Appellant was the obvious candidate

- a matter put beyond doubt by the admissions made in the asset recovery proceedings by his counsel (Royal Court judgment para 24). 20. The Royal Court concluded: "the Court had no doubt that this account was the Appellant's. Indeed it was not really challenged by the defence." [para 25] Although we recognise that Advocate Baker did indeed challenge the proposition in his closing address, we interpret the emphasis of the Royal Court's observations as being on the word "really" i.e. it regarded the challenge as devoid of real substance. 21. Adjusting the sums proved to be the Appellant's benefit from drug trafficking to take account of the change in value of money, the Royal Court found that the Appellant's benefit to be at least £198 million (para 26). 22. As to the third question, the Appellant did not give evidence. He was not obliged to do so, but, we repeat, the burden of proving on the balance of probabilities that his assets were less than his benefit rested on him In short. the Crown did not have to prove that the Appellant still had £198 million, he had to prove that he did not. A Defendant, such as the Appellant, who does not give evidence will find it difficult [although not impossible] to discharge the burden that the law imposes on him. (See R-v-Mackintosh and Marsden

[2011] 1 Cr. App. R. (S) 60 at para 15 and R-v-Mahmood

[2013] EWCA Crim 325 at para 31). 23. The obvious reason why the legislation at the third stage of inquiry shifts the burden to a defendant is that he is privy to the relevant information even if not uniquely so: at any rate he has presumptively special knowledge of the material matters. Advocate Baker made the submission that it was unrealistic to suppose that the

profit made by the Appellant from drug trafficking in which others were participants, was not shared with those participants. Whether it was or was not so is a matter of fact. The Appellant could have given evidence on this issue. He might or might not have been believed. However, having himself given and adduced no evidence on the point, he could not prove such sharing.. 24. Equally as the Solicitor General observed, even if such sharing with criminal associates had taken place, it would not diminish the prima facie realisable sum of £198 million unless that sum embraced the entirety of the cake to be shared. But any cake, if shared, may have been larger than the £198 million. Again the Appellant called no evidence as to the size of any cake said to be shared - if it was - with such associates. 25. Advocate Baker made several supplementary points. 26. Firstly he submitted that on an earlier occasion a Dutch Court, seized of similar evidence to that before the Royal Court, reached a far more modest assessment of the amount appropriate for a confiscation order i.e. €6.2 million. Even if we accepted the premise - and the unshaken evidence of Van Heynigen of the Dutch police was that the Appellant had even then more assets and interests than those seized on behalf of the Dutch government - it seems to us that there is no basis in law for the proposition that the Jersey Court should abdicate its own evaluation of the appropriate amount to the Court of another jurisdiction, however august. 27. Second he submitted that the indications on the part of the Crown at an earlier stage that it was not disposed to seek a confiscation order, a matter to which we return later, betrayed a realistic appreciation that the Appellant was someone without substantial realisable assets. We cannot accept if even this would be a legitimate inference (which we doubt) it could stand in the way of the Jersey Court's own assessment of the evidence before it. 28. Thirdly he made submissions about the inherent likelihood of the realisable assets being at the level assessed by the Royal Court. He suggested that the Appellant was vulnerable to the "fluidity of loyalties within the criminal world" who might mulct him of his ill-gotten gains. He suggested that no allowance had been made for the expenses involved in the drug trafficking trade. He referred to the setbacks the Appellant had sustained over the course of his criminal career. He noted that the Crown had not located any hidden assets of the Appellant. None of these submissions had any force. Either they lacked any foundation in evidence or were in reality an attempt to reverse the burden of proof. 29. As to discretion the Royal Court correctly directed itself that in its exercise it must consider the question of whether there is a real risk of serious injustice if a confiscation order were made. (para 15) The order must be axiomatically be proportionate. The purpose of the discretion is to protect a defendant from unjust confiscation and not to punish the authorities for any perceived or proved bad behaviour. (See the judgment of Lord Woolf CJ in the Court of Appeal in *Benjafield*

[2001] 3 WLR 75 and the speech of Lord Steyn in the House of Lords in *R-v-Rezvi*

[2002] 2 Cr App R 2). However, that discretion must elementarily be exercised on rational grounds and against the background of the purpose of the drug trafficking law which creates an intentionally severe regime designed to remove from convicted criminals the proceeds of their crime. 30. Before us there were two matters relied upon by Advocate

Baker to support the submission that ,even if the answers to all three questions were decided adversely to the Appellant, nonetheless in the exercise of its undoubted discretion the Royal Court ought not to have made a confiscation order at all. 31. The first was the refusal of the Attorney General of England and Wales to give an undertaking that any admissions of criminal conduct made by the Appellant during the confiscation proceedings would not be used in any criminal proceedings in England and Wales, with the consequence (it was asserted) that the Appellant was inhibited from giving evidence in the confiscation proceedings. He remained, however, free to do so, albeit the choice confronted him with a dilemma, if he defended the confiscation claim he might expose himself to criminal proceedings in England and if he did not he might expose himself to a confiscation order in Jersey. There is, however, nothing so inherently unfair in that as to oblige a Court to exercise its discretion not to make an otherwise impeccable confiscation order. As the Royal Court additionally noted, were anything, (if anything),he said in his defence against a confiscation claim in Jersey used as a basis for prosecution in England (if any), he could in England argue that it would be unfair to rely on such statement. Non sequitur that it was unfair in Jersey to require him to exercise a choice as to whether or not to defend himself against a confiscation order. Moreover the Appellant's request for such an undertaking was made very late and the Royal Court .with its intimate knowledge of the course of the proceedings were entitled to regard it as a purely tactical manoeuvre (since there was no realistic prospect of the Appellant ever giving evidence), and was rightly not prepared in any event to find an abuse of process based on a series of mere hypotheses as to possible future events. 32. The second was the statement made by Crown Advocate Gollop "As matters stand, The Crown would not be seeking a confiscation order" [letter of 30 th January, 2009] and another made by the Solicitor General ("it is likely that the usual practice will be followed and I will seek a nominal confiscation order") [letter of 7 th August, 2009]. It was submitted that as a matter of principle a Law Officer, given his particular status, should not be permitted to resile from the position taken in the latter letter. Furthermore it was asserted that the Appellant had relied on both statements to his detriment. 33. As to that there are several countervailing considerations which deprive Advocate Baker's submissions of any weight:- (i) It was for the Court, not the prosecution to decide if there is to be proceedings for a confiscation order. (R v Lazarus 2004 EWCA Crim 2297 [para 20]) (as Advocate Baker himself acknowledged in a letter to the Prosecution of 2 nd August, 2009). (ii) In any event the statements were both on their face qualified. There was no unequivocal promise made by the Crown under no circumstances to seek a confiscation order as would be required to enable.the Appellant validly to complain of a change of position by the Crown see [Abu Hamza

[2007] QB 659 para 54. Notably the Solicitor General's letter itself referred to the possibility of a future financial investigation. (iii) There was a perceived change of circumstances which prompted the change of attitude by The Crown i.e. a recognition (even if belated) of the significance of what the Appellant had said via his counsel in the asset recovery proceedings. (iv) The Appellant could not have relied on such statements other than as

providing an incentive to tell the truth in the Jersey prosecution that he was a major drug trafficker who would not have been involved in the (relatively minor) conspiracy that ultimately led to his conviction. This cannot qualify as a detriment recognisable by the law: [Abu Hamza

[2007] QB 659 para 54). No other detriment was identified. 34. We must note that the Royal Court itself had digested these or similar arguments (Judgment paras 32/33) and had determined nonetheless to make the order sought. We could only overrule it on the limited grounds set out in UCC v Bender

[2006] JCA 102 , at paras 24-26 and declined to do so. 35. Advocate Baker ,who said everything that could conceivably be said on the Appellant's behalf, made some general observations about what he termed the unusual features of the case:- (i) the benefit that the Appellant enjoyed from drug trafficking related not to the offence of which he had been convicted in Jersey but from previous drug trafficking; (ii) that such drug trafficking arose out of events many years previously; (iii) for a period of time between 30 th January, 2009 and the 3 rd December, 2009 (when the Crown invited the Court to commence confiscation proceedings) the Appellant had entertained a reasonable belief that no compensation order would be sought; (iv) the unprecedented amount of the confiscation order; in England the highest recorded amount was £18 million and that was by way of settlement; (v) the consequences of the confiscation order i.e. that unless the Appellant were to disgorge such enormous sum, the period of his imprisonment for his actual offence, would be very substantially increased. 36. As to these observations, (i), (ii) (iv) and (v) seem to us to do no more than reflect the legislative intent. Further in relation to (i) and (ii) the Court would have a residual discretion to rule out evidence whose admission would amount to an abuse of process (see R v Briggs-Price

[2009] UKHL 19 per Lord Mance, para 106).and it would, as always, be for the Court to assess what weight would be given to evidence adduced by the person on whom the burden of proof lay and whether it satisfied what was the relevant standard of such proof. In relation to (iii) we repeat what we said at paras 32-33 above. Advocate Baker on several occasions reminded us that even a person with the Appellant's record was entitled to justice. With that proposition we do not disagree, but he is entitled to justice according to law - no less but no more. 37. This is an application for leave to appeal. No specific test is provided in the 1961 Law or rules derived from it, for grant of such leave. In the context of an appeal against a confiscation order we would propose that the test is whether the proposed grounds are "seriously arguable" (Warren v AG

[2009] JCA 135 para 5). 38. In our view that test is not satisfied in this case. The Royal Court correctly directed itself in law: its findings of fact were soundly based: and the inferences drawn were entirely reasonable. 39. We dismiss the application. Authorities Court of Appeal Jersey Law 1961. AG-v-Warren and Others

[2011] JLR 424 . Drug Trafficking Offences (Jersey) Law 1988. R-v-May

[2008] UKHL 28 ;
[2008] 2 WLR 1131 . R-v-Ahmad
[2012] 1 WLR 2335 . R v Briggs-Price
[2009] UKHL 19 . R-v-Whittington [2009] EWCA Crim 164. R-v-Summers
[2008] EWCA (Crim) 872 . Pell Frischmann-v-Bow Valley
[2008] JLR 311 . R-v-Mackintosh and Marsden [2011] 1 Cr. App. R. (S) 60. R-v-Mahmood
[2013] EWCA Crim 325 . Benjafield [2001] 3 WLR 75. R-v-Rezvi
[2002] 2 Cr App R 2 . R v Lazarus 2004 EWCA Crim 2297 . Abu Hamza
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