

SCOTLAND / JUDGMENT

Warner v Scapa Flow Charters [2017]

ScotCS CSIH_13 (16 February 2017)

[2017] ScotCS CSIH_13

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[2017] ScotCS CSIH_13, 2017 GWD 7-106, 2017 SLT 239 [New search] [Help] EXTRA DIVISION,
INNER HOUSE, COURT OF SESSION

[2017] CSIH 13 PD1159/15 Lord Menzies Lady Clark of Calton Lord Glennie OPINION OF THE
COURT delivered by LORD GLENNIE in the cause by DEBBIE WARNER Pursuer and
Reclaimer against SCAPA FLOW CHARTERS Defenders and Respondent Appellant:
Milligan QC; Thompsons Respondent: Howie QC, Charteris; BTO Solicitors LLP 16
February 2017

Introduction

- [1] This Reclaiming Motion (appeal) raises a question as to the proper application of the two year time bar in Article 16 of the Convention relating to the Carriage of Passengers and their Luggage by Sea (“the Athens Convention”) set out in Schedule 6 to the Merchant Shipping Act 1995 (“the 1995 Act”). In particular it raises the question as to whether certain provisions of the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”) are to be regarded as providing “grounds of suspension and interruption of limitation periods” for the purposes of Article 16.3 thereof. Background Facts
- [2] On 14 August 2012 Lex Warner was killed in a diving accident off Cape Wrath while on board the m/v JEAN ELAINE, a motor vessel owned and operated by the defenders. He had chartered her from the defenders for a diving trip for the week 11-18 August 2012.
- [3] The pursuer is his widow, suing both as an individual and as guardian to their young son who was born in November 2011. It is alleged in the Summons that her husband’s death was due to the fault and negligence of the defenders.

- [4] The Summons in this action was signetted on 14 May 2015. It was met with a defence that the action was time barred under the Athens Convention which prescribes a two year time bar, in the case of death occurring during carriage, from the date when the passenger should have disembarked.
- [5] It is a matter of agreement that had the accident not occurred the deceased would have disembarked no later than 18 August 2012.
- [6] The time bar question was discussed before the Lord Ordinary on the Procedure Roll. After hearing argument from both parties, he sustained the time bar defence and dismissed the action.
- [7] This appeal is from that decision. We should make it clear that, as the matter was dealt with on the Procedure Roll, no evidence has been adduced. The Athens Convention
- [8] The Athens Convention has the force of law in the United Kingdom: see section 183(1) of the 1995 Act. The application of the Convention has been extended to domestic carriage of passengers by sea by the Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987. It is not in dispute that the Convention applies in this case. The deceased was a passenger within the meaning of Article 1(4) of the Convention; the contract pursuant to which he was on board the vessel was a contract of carriage within the meaning of Article 1(2); the defenders, who concluded the contract with him, were the carrier within the meaning of Article 1(1)(a); and, in terms of Article 1(8), the carriage covered the period during which he was on board the ship or in the course of embarkation or disembarkation.
- [9] The two year time bar is contained within Article 16 of the Convention. This provides as follows: “ ARTICLE 16 Time-bar for actions
1. Any action for damages arising out of the death of or personal injury to a passenger or for the loss of or damage to luggage shall be time-barred after a period of two years.
 2. The limitation period shall be calculated as follows:
 - (a) in the case of personal injury, from the date of disembarkation of the passenger;
 - (b) in the case of death occurring during carriage, from the date when the passenger should have disembarked, and in the case of personal injury occurring during carriage and resulting in the death of the passenger after disembarkation, from the date of death, provided that this period shall not exceed three years from the date of disembarkation;
 - (c) in the case of loss of or damage to luggage, from the date of disembarkation or from the date when disembarkation should have taken place, whichever is later.

3. The law of the court seized of the case shall govern the grounds of suspension and interruption of limitation periods, but in no case shall an action under this Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later.
4. Notwithstanding paragraphs 1, 2 and 3 of this Article, the period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing.”

[10] For the pursuer, it was contended that section 18 of the 1973 Act provided grounds for suspension and interruption of limitation periods and could be relied on here, Scots law being the law of the court seized of the case (the *lex fori*). Section 18 of the Prescription and Limitation (Scotland) Act 1973

[11] Section 18 of the 1973 Act provides, so far as material, as follows: “ Actions where death has resulted from personal injuries.

- (1) This section applies to any action in which, following the death of any person from personal injuries, damages are claimed in respect of the injuries or the death.
- (2) Subject to subsections (3) and (4) below and section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of 3 years after –
 - (a) the date of death of the deceased; or
 - (b) the date (if later than the date of death) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of both of the following facts –
 - (i) that the injuries of the deceased were attributable in whole or in part to an act or omission; and (ii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.
- (3) Where the pursuer is a relative of the deceased, there shall be disregarded in the computation of the period specified in subsection (2) above any time during which the relative was under legal disability by reason of nonage or unsoundness of mind. ...” We need not set out the remainder of the section.

Submissions

- [12] For the pursuer, Mr Milligan QC argued that section 18 of the 1973 Act contained provisions of Scots law pertaining to the suspension and interruption of limitation periods in particular circumstances. Article 16.3 required the court to give effect to them. In the circumstances set out in section 18(2)(b) and (3) of the 1973 Act, the two year time bar was suspended or interrupted. In terms of section 18(2)(b), the pursuer had averred on record, that she “was not and could not have become aware that the death of the deceased was due to an act or

omission attributable to the defender until the publication of the MAIB Accident Report number 25/2013 in December 2013". On that basis, it was arguable that the running of the two year limitation period was "suspended" until that date; and that period did not expire until December 2015. So far as concerned section 18(3), in so far as the pursuer sued as guardian of her young son, he had at all times been under a legal disability by reason of nonage and, accordingly, the whole of the period after the incident fell to be disregarded in the computation of the limitation period. He accepted that, in terms of Article 16.3, the long stop of three years from the date of disembarkation would apply to claims by the pursuer, both as an individual and as guardian of her son, but the action was commenced in May 2015, well within this time. The Lord Ordinary was wrong to dismiss the action. He should have allowed a Proof Before Answer with all pleas standing.

- [13] Mr Howie QC, for the defenders, submitted that section 18(2)(b) and (3) did not provide for "suspension" or "interruption" of the limitation period as those words were used in the Convention. On a proper construction of Article 16.3, the word "suspension" was virtually synonymous with "interruption". It contemplated something happening after time had started to run. It could not refer to something which deferred the start of the limitation period - that would be inconsistent with the fact that Article 16.2 specifically stipulated when time was to start running. In any event, the terms of section 18(2)(b) and (3) of the 1973 Act did not, on their proper construction, have the effect of suspending or interrupting limitation. Rather they provided a start date for the running of the three year time limit in Scots law. They had no application to claims under the Convention since the Convention had fixed its own date for when time was to start running. Even if he was wrong about that, the pursuer's case on section 18(2)(b) was bound to fail. The pursuer's agents wrote to the defenders on 17 April 2013 making a claim for damages and asserting that the claim arose out of the failures of the skipper of the vessel. That showed the requisite knowledge to start time running under section 18(2)(b). The action was not commenced until more than two years after that letter was sent. The Lord Ordinary was right to dismiss the action.

Discussion

- [14] The Athens Convention provides a comprehensive code for the allocation of liability for death, injury, loss and damage occurring during the course of the carriage. In terms of Article 3(1) the carrier is liable for the damage suffered as a result of the death or personal injury to a passenger (and the loss of or damage to luggage) if the incident which caused the death, injury, loss or damage occurred in the course of the carriage and was due to the fault or neglect of the carrier or of his servants or agents acting within the scope of their employment. Article 3(2) and (3) make specific provision for the burden of proof in certain circumstances. Article 6 deals with the question of "contributory fault"; and Articles 7 and 8 set out limits of liability respectively for death or personal injury and for loss or damage to goods. Those limits of liability are subject to the terms of Article 13 which provides that the carrier shall not be entitled to limit his liability if it is proved that the damage resulted from an act or omission done with intent to cause such damage or recklessly and with knowledge that such damage would probably result. Article 14 provides that no action for damages for

the death of or personal injury to a passenger, or for the loss of or damage to luggage, shall be brought otherwise than in accordance with the Convention - any claim has to be made under the Convention.

- [15] It is against this background that the Convention, in Article 16, provides its own time limit for bringing an action for damages arising out of death or personal injury to a passenger or loss or damage to luggage. We have set out the text of Article 16 in paragraph [9] above. We need not repeat it here. Four points in particular should be noted:
- (1) First, any action for damages, including one arising out of the death of a passenger, is time barred after a period of two years: Article 16(1). In other words, any such action is subject to a two year limitation period.
 - (2) Second, Article 16.2 stipulates the commencement date for that two year limitation period. In the case of death occurring during carriage, that two year period is calculated as from the date when the passenger should have disembarked. In the present case that date is 18 August 2012 at latest.
 - (3) Third, Article 16.3 allows the *lex fori*, the law of the court seized of the case, to govern the grounds of suspension and interruption of that limitation period, ie to prescribe the circumstances (if any) in which that limitation period may be suspended or interrupted.
 - (4) Fourth, Article 16.3 provides a long stop date of three years after disembarkation for the commencement of proceedings. Even in a case where the *lex fori* permits the two year limitation period to be suspended or interrupted, the action must nevertheless be commenced no later than three years after disembarkation (unless there has been a declaration or agreement in terms of Article 16.4), otherwise it will be time barred. We did not understand parties to be in dispute about these points, though they were not in agreement as to the meaning to be attributed to the words “suspension and interruption of limitation periods” in Article 16.3 or as to what, if any, provisions of Scots law fell within that wording.
- [16] It seems to us that the question should be approached in two stages. The first question relates to the meaning of the Convention and, in particular, Article 16.3. What does the Convention mean when it permits the *lex fori* to govern the grounds of suspension and interruption of limitation periods? We accept, by analogy with the judgment of Hirst LJ in *Higham v Stena Sealink Ltd*
- [1996] 1 WLR 1107 at 1111C-D, that Article 16.3 can be read as though it said “The Prescription and Limitation (Scotland) Act 1973 shall govern the grounds of suspension and interruption of limitation periods ...”; but in order to ascertain the extent to which provisions of the 1973 Act are relevant it is still necessary to understand what the Convention is referring to when it uses in Article 16.3 the expression “suspension and interruption of limitation periods”. Next, however, having identified what aspect of the *lex fori* is being referred to in Article 16.3, the second question is whether Scots law, being the

lex fori in this case, has any relevant provisions for “suspension and interruption” of limitation periods. If it does, then, so far as may be relevant, those provisions govern.

- [17] Approaching the matter in this way, we ask first what is meant by “suspension and interruption” in Article 16.3. We do not accept Mr Howie’s submission that those words are virtually synonymous and simply mean, in effect, “interruption”. It is well established that the words used in the Convention must be given their ordinary meaning without regard to domestic rules of statutory construction: see eg per Lord Hobhouse *King v Bristow Helicopters* in
- [2002] 2 AC 628 Ltd at paragraph 147. There is no uncertainty about the word “interruption”. Nor, in our view, is there any difficulty about the word “suspension”. The word “interruption” may well be particularly apposite to describe a situation where something has already started and is then interrupted. The word “suspension” may, like “interruption”, include the suspension of something which has already started; but it is also apt to include the deferment or suspension of something which has not yet started. We were shown a number of dictionary definitions which makes this clear: see, for example, the *Shorter Oxford English Dictionary*, cited by Hirst LJ in *Higham v Stena Sealink Ltd* at 1112A-B, which includes, within the definition of “suspension”, the meaning “deferring, postponement”. We do not consider that Hirst LJ was correct in that case to say that the dictionary definitions all contemplated a break in a period or course of events “which are presently in train” - both “deferring” and “postponement” suggest an interruption to the course of events before they get under way - but the distinction being drawn there was between a provision interrupting a course of events which was still live and one excluding altogether a period which had already run its course. The point about interruption before the period began did not arise for consideration.
- [18] In fairness to his argument, we did not understand Mr Howie to suggest that the word “suspension” could not include those meanings as a matter of ordinary usage. His point was that Article 16.2 of the Convention provided a specific starting date for the running of the two year limitation period. In the case of death, that starting date was the date on which the passenger would have disembarked. Any domestic rule of law which had the effect of deferring or postponing the commencement of that two year period would, in effect, be replacing that starting date. That was not what the framers of the Convention can have intended. Had they intended this result they would not have fixed the starting date but would have provided that the two year period began to run from a date fixed by reference to the lex fori. For that reason, he argued, “suspension” and “interruption” could only operate once time was already running. In other words, “suspension” could not mean “deferment”. The Lord Ordinary appears to have accepted Mr Howie’s submission on this point (see paragraph [27] of his Opinion).
- [19] We cannot accept this argument. We can agree with Mr Howie that Article 16.2 of the Convention fixes the starting date for the commencement of the two year limitation period. We also agree with him that the framers of the Convention cannot have intended that the lex

fori should be able to replace this with some other starting date. But it does not follow from this that the word “suspension” in Article 16.3 has to be read in the restrictive manner for which Mr Howie contends. The commencement date for the running of a period of limitation can be suspended, in the sense of being deferred, in a particular set of circumstances without this meaning that one commencement date is replaced by another. The word “suspension”, in this sense, means the suspension or deferment of something which would otherwise be about to happen. It is not, in our view, apt to describe a situation where the starting date stipulated in Article 16.2 is replaced by a different starting date fixed by some provision of the *lex fori*. What the word describes is some rule of domestic law which has the effect of suspending or deferring what would otherwise be the date upon which the limitation period started to run. In other words, the word “suspension” presupposes that there is already a date from which time would begin to run but for the particular circumstances in which the running of time is suspended or deferred. It is in this sense that it can be regarded as equivalent to “deferment”. That is, we think, its natural meaning. It is a meaning which makes sense of its incorporation into a limitation regime (in Article 16) which fixes the limitation period and start date. The same is true *mutatis mutandis* of “interruption”.

- [20] We then turn to the second question, namely whether Scots law, the *lex fori*, has any provisions capable of applying to the instant case in terms of which limitation periods are suspended or interrupted. Some countries do have such provisions as part of their law, others do not. In *Higham v Stena Sealink Ltd* at page 1110 Hirst LJ referred to research carried out for the Comité Maritime International by Professor Francesco Berlingieri which showed that there was a very wide variety of different codes of limitation throughout the world. Some countries had no provisions which might potentially fall within Article 16.3 as providing for “suspension and interruption”. Of those that did have provisions providing for suspension and interruption of limitation periods, the regimes differed widely from country to country.
- [21] In the present case we are only concerned with section 18 of the 1973 Act. That deals with the question of limitation for actions of damages following the death of a person from personal injuries. Similar but not identical provisions in respect of actions for damages for personal injuries not resulting in death are contained within section 17 of the Act, but we are not concerned with that section for present purposes. Nor are we concerned with the power given to the court by section 19A of the Act to override time limits. Section 18(2)(b)
- [22] The relevant parts of section 18 are those in subsections (2) and (3). We have set out the relevant text at paragraph [11] above.
- [23] So far as concerns section 18(2), reliance is placed on the terms of subsection (2)(b) which defines the commencement date for limitation purposes as the date (if later than the date of death) on which the pursuer became aware or could reasonably have become aware of certain material facts. Mr Milligan QC submitted that this is a provision suspending the running of time for limitation purposes in the event that at the date of death the pursuer did

not have the requisite knowledge. We are unable to agree. It is clear, in our view, that section 18(2), read as a whole, specifies both the length of the limitation period in an action of damages arising out of death from personal injuries and the date when that time starts to run. The period is a period of three years. Time starts to run either (a) on the date of death of the deceased or (b), if later, the date on which the pursuer became aware or could reasonably have become aware of certain material facts. These are alternate commencement dates for limitation purposes, the date of death or (if later) the date of knowledge. The running of time is not “suspended” or “interrupted” in a case where the pursuer did not have the requisite knowledge at the date of death. Rather, the date of knowledge is the stipulated commencement date for limitation purposes. To hold that these provisions “govern” (to use the language of Article 16.3) would be to allow domestic law as to the commencement of the limitation period to supersede that laid down in Article 16.2 of the Convention. That is not permissible. On this point, therefore, we agree with the Lord Ordinary. The Letter of 17 April 2013

- [24] On 17 April 2013 agents for the pursuer wrote to the defenders setting out the circumstances of the accident, as they then understood them to be and putting forward a claim for damages on the basis that the death of the deceased was caused by “the failures of your skipper”. In the course of these proceedings the defenders served a Notice to Admit on the pursuer. The pursuer answered that notice by admitting the first three calls, viz that the document lodged in process was a true and accurate copy of that letter, that the letter was sent to the defenders on or about the date that it bore and that the letter intimated a claim for damages in respect of the death of the deceased on behalf of the pursuer and their child. The fourth call in the Notice to Admit was that the letter attributed the deceased’s death “to actionable omissions on the part of the defenders’ skipper”. That was not admitted. Mr Howie submitted that that non-admission did not matter. The letter itself was admitted and it said what it said. It could not been written if the pursuer or her agents did not have sufficient awareness of the relevant facts to start time running under section 18(2)(b). Accordingly, even if that section was a provision of Scots law providing for the suspension or interruption of limitation periods, it did not help the pursuer since in terms of that section time started running at latest at the date of that letter and the action was not brought until more than two years afterwards. The Lord Ordinary accepted this submission: see paragraph [28] of his Opinion.
- [25] There is considerable forensic force in this argument. However, the matter arises for consideration on the Procedure Roll. The pursuer’s averments in her pleadings must be taken pro veritate and at their highest. In her Summons she does not respond in terms to the defenders’ reliance on the letter of 17 April 2013. It is simply averred on her behalf that she did not become aware, and could not have become aware, until December 2013 that the death of the deceased was due to an act or omission attributable to the defender. It is said that it was only upon receipt of information published in the MAIB Accident Report that the pursuer received the relevant information. If section 18(2)(b) had otherwise been relevant, we would have appointed a proof before answer on this point. The pursuer’s pleading is

somewhat lacking in candour in not addressing the point made against her, but she would have been entitled to give evidence that she did not have the relevant state of awareness until that time and she could have expected to be cross-examined by reference to the terms of the letter. Standing our decision as to the relevancy of section 18(2)(b), however, this point does not arise. Section 18(3)

- [26] Section 18(3) is also relied on by the pursuer, though, unlike in the case of section 18(2)(b), this provision would only assist the pursuer in her capacity as guardian of her son. It provides that any time during which the relative (ie, in this case, the child) is under a legal disability by reason of nonage or unsoundness of mind “shall be disregarded in the computation of the period specified in subsection (2) above”. The “period specified in subsection (2)” is not the commencement date for limitation purposes but the limitation period of three years. The meaning to be attached to section 18(3), therefore, is that, while the relative of the deceased is under a legal disability, time which would otherwise run in terms of section 18(2) does not run. It is, in our view, legitimate in such circumstances to regard the limitation period as “suspended” or “interrupted” during that period of legal disability. In the case of unsoundness of mind, the limitation period may be suspended before it starts running or it may be interrupted after it has started. That depends upon when the unsoundness of mind manifests itself. In the case of nonage, however, the commencement of the limitation period will be suspended before it starts. The important point to note, however, is that suspension or interruption in all these circumstances is suspension or interruption of time which would otherwise be running. It does not matter whether time has already begun to run or has not yet started. That is consistent with the interpretation which we consider should be given to the words “suspension and interruption of limitation periods” as they appear in Article 16.3 of the Convention itself.
- [27] We note in passing that the case of suspension or interruption through unsoundness of mind under section 18(3) illustrates the difficulty of Mr Howie’s contention that, to qualify under Article 16.3, the suspension or interruption has to suspend or interrupt time which has already started to run. Mr Howie accepted that if the relative on whose behalf the pursuer brought the action had developed an unsoundness of mind after commencement of the limitation period specified in the Convention, then, subject to other arguments, that could properly be regarded as suspending or interrupting the running of time for the purpose of Article 16.3 of the Convention. By contrast, however, if the relative was already of unsound mind when the accident happened, and remained of unsound mind throughout the two year limitation period, then the running of time would not be suspended or interrupted. We can see no sense in such a distinction and, to his credit, Mr Howie did not proffer any suggestion in this regard. His point was simply that any suspension of the period before time had started to run amounted to the substitution of a new commencement date in place of that fixed by the Convention. We have already given our reasons for rejecting that argument, but the problem mentioned here seems to us to highlight why his submission about this could not on any view be correct.

- [28] In coming to this conclusion we are conscious that we are differing from the conclusion reached by the Lord Ordinary. He had two reasons for rejecting the argument that section 18(3) was a provision for suspension and interruption of limitation periods. One reason was that he regarded nonage as, at best, a deferment of the start of the time period, whereas in his view the words “suspension and interruption” as used in Article 16.3 referred only to the suspension or interruption of the running of the time period “already in train”. We have already given our reasons for disagreeing with this interpretation.
- [29] The Lord Ordinary’s second reason for rejecting the pursuer’s reliance on section 18(3) was that he considered that it only related to the computation of the time period in section 18(2) and “does and cannot apply to other stand-alone provisions in other enactments”. In other words, the terms of subsection (3) specifically require the period of disability to be disregarded in the computation of the domestic three year limitation period specified in subsection (2), and cannot be used to require that period to be disregarded in the computation of the two year period fixed by Article 16 of the Convention. We think this is too narrow a view. Once Article 16.3 is read as though it said “The Prescription and Limitation (Scotland) Act 1973 shall govern the grounds of suspension and interruption of limitation periods ...”, then it follows, as Hirst LJ said in *Higham v Stena Sealink Ltd* at page 1111E-F, that the whole of the 1973 Act is potentially applicable to the time limit in Article 16. Hirst LJ went on at F-G to refer to sections which might well appear at first sight to be eligible candidates, but noted that the fact that in each case the section referred to periods of limitation “prescribed by this Act” might disqualify them. The court thought it better not to decide that point until it arose specifically in relation to one of those sections. It is such a point in the context of the Scottish legislation which comes before us for decision in this case. We think it would be unduly restrictive to hold that a provision such as that in section 18(3) cannot be regarded as one which is capable of suspending or interrupting the running of time under the two year limit in Article 16. As we have said, one way of reading the 1973 Act as applying to the Convention is to read Article 16.3 as though it said: the 1973 Act shall govern the grounds of suspension and interruption of limitation periods. But another equally legitimate way of looking at the interaction between the 1973 Act and the Convention is to read the limitation period and commencement dates set out in Article 16 as though they were written into the relevant section of the 1973 Act. On that basis, section 18(2) would read as though it provided for actions for death caused by personal injury (during carriage by sea) to be time barred unless commenced within a period of two years after the date when the passenger should have disembarked. Section 18(3) would then provide for suspension or interruption of that two-year period during periods of nonage or unsoundness of mind. We should simply add that the obiter remarks at the end of Hirst LJ’s judgment at page 1112D-E of *Higham v Stena Sealink Ltd* clearly do not decide this point - it had been expressly left open in the passage at page 1111F-G. The subsequent discussion at page 1112D-E is about a very different type of provision from that with which we are dealing in the present case.

- [30] We conclude, therefore, that section 18(3) applies to this case. The age of the child is not in dispute. Accordingly, while the claim by the pursuer as an individual in her own right is time barred, her claim as guardian of her child is not. Disposal
- [31] This being a personal damages action under Rule of Court 43, there are no pleas in law to sustain or repel. In those circumstances we shall (a) adhere to the interlocutor of the Lord Ordinary insofar as it dismissed the action by the pursuer as an individual in her own right but (b) recall that interlocutor to the extent that it dismissed the pursuer's action as guardian of her son, Vincent Warner, and replace it by a finding that the claim by the pursuer as guardian of Vincent Warner is not time barred.
- [32] We shall reserve all questions of expenses. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: [https://www.bailii.org/scot/cases/ScotCS/2017/\[2017\]CSIH13.html](https://www.bailii.org/scot/cases/ScotCS/2017/[2017]CSIH13.html)
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