

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 8 No 3 March 2002

This month has seen two important cases on the principles governing liquidation expenses. In *Kahn v Commissioners of the Inland Revenue* the House of Lords held that in relation to expenses incurred after the commencement of a liquidation rule 4.218(1) of the Insolvency Rules 1986 represented a comprehensive code of what is to be paid as an expense and that there is no room for the operation of any other principle. Mark Phillips QC and Felicity Toubé appeared for the liquidators. Meanwhile in *Re Leyland Daf Ltd* the Court of Appeal upheld the judgment of Rimer J that where liquidation follows administrative receivership the expenses of the liquidation are to be paid out of all the assets comprised in the floating charge in priority to the claims of the charge-holder.

This edition of the Digest was compiled by Richard Fisher.

Tom Smith

GENERAL NEWS

Insurance Companies Rules

The Insurers (Winding up) Rules 2001, SI 2001 No 3635 came into force on 1 December 2001. These rules supplement the Insolvency Rules 1986 in relation to the winding up of insurers in England and Wales. They revoke and re-state with modifications the Insurance Companies (Winding Up) Rules 1985. Amongst other matters, the rules provide for valuation rules in relation to a company's general business policies and provide for valuation rules in relation to a company's long-term business policies. The new rules implement the EU Directive on the Reorganisation and Winding-up of Insurance Undertakings which came into force on 20 April 2001 and which is discussed by Gabriel Moss QC in *Cross-Border Insolvency of Insurance Companies* (Sweet & Maxwell, 2001).

Review into Role of

Non-Executive Directors

The Department of Trade and Industry has commissioned a review into the role and functions of non-executive directors. The

review is to be chaired by Sir Peter Davis, the Chief Executive of J Sainsbury plc, and is expected to focus in particular on the role of non-executive directors in recent corporate collapses.

ARBITRATION

Dardana Ltd v Yukes Oil Company

**QBD (Comm Ct) (Judge Chambers QC).
The Times, 4 February 2002.**

Where a party challenging the enforcement of a foreign arbitration award made against it applied to the court for security of costs against the holder of the award, the Court had jurisdiction to grant such an order.

Mousaka Inc v Golden Seagull Maritime Inc

**QBD (David Steel J). [2002] 1 WLR 395;
[2002] 1 All ER 726.**

An application for permission to appeal to the High Court from a decision of an arbitrator was refused on paper. The prospective appellant applied to the judge for full reasons for the decision on the basis that he was under a duty to do so in order to comply with Article 6 of the European

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Convention on Human Rights. It was held that an application for permission to appeal of this type required the court to determine a threshold question as to whether the case was suitable for appeal and any detailed consideration of issues of law would be misplaced. In order to comply with Article 6, it was sufficient for the court to refer to the legitimate restraints on a right of appeal such as the need for the case to involve a matter of general public importance. Moreover, since there was no effective right of appeal from the decision of the High Court on such an application, the provision of reasons touching on the merits would be worthless. Accordingly, the decision was not challengeable as being devoid of relevant reasoning.

BANKING

Aroso v Coutts & Co

Ch Div (Lawrence Collins J). [2002] 1 All ER (Comm) 241.

The fact that one of the holders of a joint bank account did not contribute to or draw upon the joint account did not prevent that person from having a beneficial interest in the account. It would not matter if such a person did not even know of the existence of the joint account. Moreover, the fact that a joint account holder was never intended to use the account while the other account holder was still alive would not prevent the former from succeeding to the whole account by survivorship. In the instant case, the bank had adduced sufficient evidence to establish that the first account holder had intended to give the other account holder a beneficial interest in the assets in the account.

COMPANY

Braymist Ltd v Wise Finance Co Ltd

CA (Judge, Latham and Arden LJ). New Law Online, 20 February 2002.

Where solicitors acting as agents and solicitors for a company that is in the process of being incorporated sign a contract, the solicitors as agents are entitled to enforce the agreement by virtue of Section 36C(1) of the Companies Act 1985. For the purpose of Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, the agent is a party to the contract and is properly to be treated as having signed the contract on its own behalf. Section 36C(1) would otherwise be rendered useless.

Re Equitable Life Assurance Society

Ch Div (Lloyd J). New Law Online, 8 February 2002.

The Court considered whether it should sanction a scheme of arrangement pursuant to Section 425 of the Companies Act 1985 between the Equitable Life Assurance Society and its creditors, such scheme having been approved by the requisite majorities in meetings of creditors. The Court was satisfied that the requirements of the Companies Act 1985 had been fulfilled in relation to the meetings and in particular that the classes of creditors had been properly identified. The scheme was not contrary to Article 1 of the First Protocol to the European Convention of Human Rights and was such as an intelligent and honest man, a member of the class concerned acting in respect of his interest, might reasonably approve. In this regard the fact that such large majorities

of each class had voted in favour of the scheme was a major factor to be taken into account.

[Gabriel Moss QC, Barry Isaacs]

Mallone v BPB Industries plc CA (Waller and Rix LJ, Wilson J). New Law Online, 19 February 2002.

A share option scheme provided that if an executive left the company through no fault of his own, he was permitted to exercise an "appropriate number" of his share options, such number to be determined at the absolute discretion of the directors. The claimant left the company through no fault of his own having participated in the scheme for 2 years. However, the directors of the company determined that the claimant was not entitled to exercise any share options. In these circumstances the directors had acted irrationally since although they had an absolute discretion, their discretion remained one to find the "appropriate number". The appropriate number was to be found by taking the length of the participant's service following the grant of an option and multiplying it by a multiplier which took into account the services and loyalty provided. It was irrational, without any explanation, to award the claimant the same amount of options as if he had been dismissed in a fault situation.

A J Boyle "The Company Law Review and 'group reform'" [2002] 23(2) The Company Lawyer 35.

CONFLICT OF LAWS

Re Cover Europe Ltd; Kvaerner Masa-Yards Inc v Barrett

Ch Div (Leslie Kosmin QC (sitting as a Deputy High

Court Judge)). New Law Online, 26 February 2002.

The applicant sought to prove in a members voluntary liquidation in respect of a liability due under a guarantee. The liquidator failed either to admit or reject the proof and informed the applicant that he had brought proceedings in Rome to determine the validity of the guarantee ("the Rome Proceedings"). The Rome Proceedings had not in fact been issued at that time. The applicant issued an application under Section 112 of the Insolvency Act 1986 for an order seeking directions that the liquidator should admit the applicant's proof ("the English Proceedings"). The English Proceedings were served on the liquidator before the Rome Proceedings were either issued or served.

On a trial of preliminary issues as to jurisdiction under Articles 21 and 22 Brussels Convention (relating to the question whether the court which is second seised of proceedings should stay them), the Court held that:

(1) The English Proceedings and the Rome Proceedings involved the same cause of action and were between the same parties within the meaning of Article 21.

(2) The English court was the court first seised. The fact that the court had a discretion whether to exercise its powers under Section 112 IA 1986 did not make its jurisdiction provisional. The proceedings were definitively pending for the purposes of Articles 21 and 22 when the Section 112 application was served.

(3) If the Judge was wrong to conclude that the proceedings fell within Article 21, in any event the proceedings were related actions within Article 22.

(4) The application of Articles

21 and 22 was not to be overridden on forum non conveniens grounds (*Re Harrods (Buenos Aires) Ltd* [1992] Ch 72). However, in any event the English Proceedings were an appropriate means of establishing the applicant's debt.

[Felicity Toube]

Donohue v Armco Inc HL (Lords Bingham, Mackay, Nicholls, Hobhouse and Scott). [2002] 1 All ER (Comm) 97

Where parties bind themselves by an exclusive jurisdiction agreement, effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party could show strong reasons sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain would depend on all the facts and circumstances of the particular case. Where the dispute was between two contracting parties, one of which sued the other in a non-contractual forum, and the claims fell within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties were not involved, effect would in all probability be given to the clause. However, the court might well decline to grant an injunction or a stay where the interests of parties other than parties bound by the exclusive jurisdiction clause were involved or grounds of claim not the subject of the clause were part of the relevant dispute so that there was a risk of parallel proceedings and inconsistent decisions.

Henderson v Jaouen CA (Peter Gibson and Mantell LJ, Wall J). New Law Online, 1 February 2002.

An individual obtained an award for damages from a French Court

after he had been injured in a road traffic accident. He was also granted liberty to apply for a further award should his condition subsequently deteriorate. An application for a further award was made to the French court in 1995 but not pursued. In 2000, an application was made to the English Court for further damages on the basis that the English Court had jurisdiction under Article 5 (3) of the Convention because the "harmful event" (the deterioration) had occurred in England. The Court, dismissing the action, held that the term "harmful event" was an autonomous Convention concept, not to be determined by reference to national law. Although the "aggravation" of the condition gave rise to a new cause of action in French law, the harmful event in this case was the original road accident. The fact that French law considered it as a new cause of action was procedural and did not require the court to equate the aggravation with a new and different harmful event.

Union Discount Co Ltd v Zoller CA (Lord Phillips MR, Schiemann and May LJ). [2002] 1 All ER 693.

A party was entitled to bring a claim in England seeking damages for the costs of proceedings commenced by another party in another jurisdiction in contravention of an exclusive jurisdiction clause. There is no rule that costs incurred in foreign proceedings could never be recovered in an English action between the same parties. Moreover, the public interest does not require a claimant to be deprived of his reasonable expenses of litigating

in a foreign forum where (a) the costs which the claimant sought to recover in the English proceedings had been incurred by him as a defendant in the foreign proceedings; (b) the claimant in the foreign proceedings had brought them in breach of an express term which had the effect of entitling the English claimant to damages for breach; (c) the rules of the foreign forum only permitted recovery of costs in exceptional circumstances; and (d) the foreign court had made no adjudication as to costs.

DAMAGES

Colbeck v Diamanta Ltd

QBD (Field J). New Law Online, 25 February 2002.

Where the bailee of goods is unable to return the goods which are the subject of the bailment to the bailor upon request and it is therefore impossible to value the goods lost, the Court should assume that the goods were of the highest quality. However, such a presumption must be consistent with the rest of the evidence.

EQUITY

Jennings v Rice

CA (Aldous, Mantell and Robert Walker LJ). New Law Online, 22 February 2002.

Where the elements of proprietary estoppel are established, an equity will necessarily arise. However, the value of the equity will depend on all the circumstances including the expectation and the detriment, the most essential requirement being that there should be proportionality between the expectation and the detriment. It should not be a rigid rule that once the doctrine was established, the equity should be satisfied by making good the expectation. That approach could lead to

injustice and would not form the basis of an equitable result.

Longstaff v Birtles

CA (Mummery and Laws LJ, Sir Anthony Evans). [2002] 1 WLR 470.

A solicitor has a paramount duty to observe fiduciary obligations in his personal dealings with a client or former client and where he proposed to buy property from or sell property to a client he had a duty to cause the client to obtain independent legal advice and that duty might endure beyond the termination of that retainer which initially formed their professional relationship. Accordingly in the present case since the relationship of trust and confidence between the claimant's and the defendant's solicitors had not ceased on the termination of the initial retainer, the solicitors had, in a situation where there was a conflict of interest and duty, acted in breach of their fiduciary duty in dealing with the claimants without first insisting on their obtaining independent legal advice.

National Westminster Bank plc v Somer International (UK) Ltd CA (Peter Gibson, Potter and Clarke LJ). [2002] 1 All ER 198.

A company was paid \$76,000 by a bank by mistake and in reliance on the payment the company subsequently released goods to a total value of £13,180 to a third party. In proceedings brought by the bank for the recovery of the money, the company argued that it was entitled to rely on an estoppel by representation and moreover that this defeated the entirety of the bank's claim since it could not operate pro tanto and was a rule of evidence which prevented the bank from adducing

facts contrary to the representation. Held that although estoppel by representation was a general rule of evidence there remained scope for the operation of equity to alleviate the position on grounds of unfairness or unconscionability. In the present case the payment made by the bank bore no relation to the detriment actually suffered by the company and it would be unconscionable for the company to be able to retain the balance over and above the value of the goods shipped.

GUARANTEES

Actionstrength Ltd v International Glass Engineering SpA CA (Simon Brown, Peter Gibson and Tuckey LJ). [2002] 1 WLR 566.

Where a promisor agreed to pay a creditor an amount owed to the creditor by a debtor, out of funds which the promisor owed to the debtor, the question whether that agreement was a promise to answer for the debt of the debtor depended upon whether payment under the agreement would or would not extinguish the promisor's debt to the debtor. If payment under the agreement would not extinguish that debt it was not properly described as an agreement to make a payment out of funds otherwise due to the debtor, but was an agreement to make a payment out of the promisor's own funds and therefore a promise to answer for the debtor's debt. There was no requirement that to come within the Statute of Frauds an agreement had to impose a liability on the promisor's assets generally rather than on a particular asset. In this case, the debtor had not consented to the agreement and therefore the promisor would not have extinguished his debt to the debtor

by paying the creditor the amount under the agreement. Accordingly, the agreement was a promise to answer for the debt of another falling within Section 4 of the Statute and was unenforceable for lack of writing.

HUMAN RIGHTS

Ebert v The Official Receiver CA (Chadwick and Buxton LJ). [2002] 1 WLR 320

On an application by a vexatious litigant under Section 42(3) of the Supreme Court Act 1981 for permission to commence proceedings, the Court held, refusing the application, that the general system relating to vexatious litigants in England and Wales complies with the requirement of Article 6 of the Convention. Courts in considering an application for leave under Section 42(3) should therefore continue to apply the criteria of domestic law and moreover where permission to appeal was refused the court should consider on its merits any application for leave to apply to the higher court for permission. It is not necessarily incompatible with Article 6 for such leave to be refused.

INSOLVENCY – BANKRUPTCY

Bleach v Stanway & Ors Ch D (Kim Lewison QC sitting as a deputy High Court Judge) Unreported, 22 February 2002.

On an appeal in bankruptcy from the District Judge the appellant sought to rely on two additional statements not before the judge. As regards the first there was no doubt that the information contained in it could have been obtained at the time of the hearing before the District Judge. As regards the second there was no evidence to suggest that it

could not have been obtained at that time. The principles set out in *Ledd v Marshall* remain relevant to the question of new evidence although they are not rules following the Court of Appeal in *Hertfordshire Investments Ltd v Bubb*. However, the additional evidence failed to satisfy the first principle in *Ladd v Marshall* and was rejected. The appeal proceeded on the basis of material before the District Judge.

[Samantha Knights]

INSOLVENCY – CORPORATE

Re a Company No 7219 and 7220 of 2001

Ch Div (Etherton J). Unreported, 18 December 2001.

The making of an order for the appointment of a provisional liquidator on a without notice application by the Secretary of State, acting in a law enforcement capacity, is an extreme exercise of the court's powers. Good practice requires those acting for the Secretary of State, on a without notice application for the appointment of a provisional liquidator, to draw expressly to the judge's attention that a cross undertaking in damages is not being offered and that it has been the practice of some judges in appropriate cases to make injunctions or impose undertakings rather than appoint a provisional liquidator. It should be explained why it is not considered appropriate to give any notice to the company prior to making the order and why it is not considered appropriate to grant the company an opportunity to be heard however short the period of notice may be or protecting the public's position in the meantime by ex parte interim injunctive relief restraining, for example,

dealings with the assets of the company or with its books and records or particular activities of the company.

[Stuart Isaacs QC, Lexa Hilliard]

Kahn v Commissioners of the Inland Revenue

HL (Lords Hoffmann, Woolf CJ, Hutton, Hobhouse and Rodger). New Law Online, 20 February 2002.

Rule 4.218(1) of the Insolvency Rules 1986 represents a definitive statement of what constitutes an expense of a liquidation. The heads of expenses listed in that rule are not subject to any implied qualification that the expense incurred must have been beneficial for the liquidation. The liquidation expenses principle as set out in cases such as *Re Atlantic Computers Plc* [1992] Ch 505 is not a general test for deciding what counted as an expense of the liquidation. The liquidation expenses principle is only to be applied in determining whether an expense incurred before the liquidation should be paid as an expense of the liquidation. In relation to expenses incurred after the commencement of a liquidation, if they are liabilities which should properly be paid by the company in liquidation and they fall within rule 4.218(1) then they should be paid as expenses of the liquidation and no further test is required to be passed. *Re Kentish Homes* [1993] BCLC 1375 overruled.

[Mark Phillips QC, Felicity Toubé]

Re Leyland Daf Ltd

CA (Peter Gibson, Chadwick and Longmore LJ). New Law Online, 22 February 2002.

The true interpretation of Sections 115 and 175(2)(a) of the Insolvency Act 1986 is to require liquidation

expenses to be paid out of assets subject to a floating charge in priority to the claims of the chargee. In particular, following *Re Barleycorn Enterprises Ltd* [1970] Ch 465, the reference to “assets” in Sections 115 and 175(2)(a) included assets comprised in a floating charge. If prior to the winding up receivership assets had been applied in paying the receivership preferential debts or in satisfaction of the claims of the debenture holders then they would no longer be assets comprised in or subject to the floating charge. But assets which remained in the receivers’ hands when a winding up commenced fell within Section 175(2)(b) and were available to meet the liquidation preferential debts and accordingly were available also for the payment of the liquidation expenses.

**Re Television Trade Rentals Ltd
Ch Div (Lawrence Collins J). New
Law Online, 19 February 2002.**

Joint provisional liquidators appointed in respect of two Isle of Man companies requested the proposal of company voluntary arrangements in respect of the companies. CVAs are not known under the law of the Isle of Man and accordingly the Isle of Man Court issued a request to the English court pursuant to Section 426 of the Insolvency Act 1986 for a declaration that Part I of the 1986 Act and the relevant rules applied in relation to the companies. In considering this request, there was no doubt that the English Court was a court which had jurisdiction in relation to insolvency law and that the Isle of Man fell with subsection 11 of Section 426. In determining which law to apply, the court should take into account the

connections of the parties with England and with the foreign country. In the present case the fact that the companies had very strong connections to England made a very strong case for application of the Act.

[David Marks]

A Berg, “Cosslett – Section 395 and set-off in the House of Lords – Part 1”, [2002] *Insolvency Intelligence* 9.

N Briggs and H Sims, “Escaping bankruptcy – applications to annul”, [2002] *Issue 1 Insolvency Lawyer* 2.

G McCormack, “Personal Property Security Law Reform in England and Canada”, [2002] *JBL* 113.

G McCormack, “Security Interests in Deposit Accounts: An Anglo-American Perspective”, [2002] *Issue 1 Insolvency Lawyer* 7.

R Parry, “The destination of proceeds of insolvency litigation”, [2002] *23(2) The Company Lawyer* 49.

INSURANCE

**Caledonian North Sea Ltd v
London Bridge Engineering
HL (Lords Bingham, MacKay,
Nicholls, Hoffmann and Scott).
The Times, 13 February 2002**

A contractual indemnity would usually be the primary indemnity in situations where another indemnity was provided by the insurer of a party to a contract where there was no obligation to make any insurance arrangements. One party’s voluntary decision to insure itself should not operate to the advantage of the other party against whom a contractual claim for indemnity was made.

PRACTICE

**Capital One Developments Ltd
v Commissioners of Customs
and Excise**

Ch Div (Neuberger J).

The Times, 19 February 2002.

There would have to be very special facts before a court would grant an interim injunction to order payment of a disputed sum from the defendant to the claimant on the basis that the claimant would repay the sum if it lost its substantive appeal. However, the jurisdiction did exist.

**Naser v United Bank of Kuwait
CA (Simon Brown and Mance
LJJ). [2002] 1 All ER 401.**

The discretion to award security for costs against an individual claimant or appellant not resident in a contracting state of the enforcement conventions was to be exercised only on objectively justified grounds relating to obstacles to, or the burden of, enforcement in the context of the particular individual or country concerned. It would be both discriminatory and unjustifiable if the mere fact of residence outside a contracting state of the enforcement conventions could justify the exercise of the discretion to make orders for security for costs with the purpose or effect of protecting defendants or respondents to appeals against risks to which they would equally be subject, and in relation to which they would have no protection if the claim or appeal had been brought by a resident of a contracting state of the enforcement conventions. Potential difficulties or burdens of enforcement in states not party to those conventions were the rationale for the existence of the discretion, and it should be exercised in a manner reflecting its rationale.

**Skjevesland v Geveran
Trading Company**

Ch Div (Lightman J).

Unreported, 22 February 2002.

While the guidelines governing judicial bias as outlined in *Re Medicaments (No 2)* [2001] 1 WLR 700 also applied to counsel there was a difference in their application. Mere social acquaintance or background knowledge of a party stopping short of misuse of confidential information or abuse of confidentiality would not be a bar to counsel appearing for another opposing party.

[Simon Mortimore QC, David Marks]

**Sumitomo Corporation v
Credit Lyonnais Rouse Ltd**

CA (Lord Phillips MR, Jonathan Parker LJ and Lord Mustill).

[2002] 1 WLR 479.

In the context of legal professional privilege there is no relevant distinction between a translation of an unprivileged document in the control of the party claiming privilege and a copy of such a document. Neither the process of copying nor translating adds to or subtracts from the sense of the original document or the information contained in it. In particular, neither process introduces any element of confidentiality not in the original document. As a consequence in principle the rules governing legal professional privilege should apply equally to all reproductions of original documents, whether reproduced by copying or translation.

Taylor v Lawrence

CA (Lord Woolf CJ, Lord Phillips MR, Ward, Brooke and Chadwick LJ).

The Times, 8 February 2002.

The Court of Appeal could re-open an appeal after it had given a final

judgment and that judgment had been drawn up, if it was clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy. Where the alternative remedy would be an appeal to the House of Lords, the Court of Appeal would give permission to re-open the appeal only if it was satisfied that leave to appeal would not be given by the House of Lords. The Court of Appeal should exercise strong control over any such application so as to protect those who were entitled reasonably to believe that the litigation was already at an end.

Practice Note (Court of Appeal: Handed Down Judgments)

[2002] 1 WLR 344.

Practice Direction (Judgments: Neutral Citations)

[2002] 1 WLR 346.

PROPERTY

**BHP Petroleum Great Britain Ltd
v Chesterfield Properties Ltd**

**CA (Judge and Chadwick LJ,
Bodey J). The Times,**

21 February 2001.

A covenant in an agreement for a lease, expressed to be a personal obligation of the landlord, was not a "landlord" covenant within the definition of that term in Section 28(1) of the Landlord and Tenant (Covenants) Act 1995 so that the original landlord remained liable under the covenant after it had transferred the reversion to a third party.

**Malory Enterprises Ltd v
Cheshire Homes (UK) Ltd**

CA (Schiemann, Clarke and Arden LJ). New Law Online,

22 February 2002.

The right to seek rectification of the register can constitute an

overriding interest within the meaning of Section 70(1)(g) of the Land Registration Act 1925, an interpretation not precluded by Section 82(3) of the 1925 Act. However, the right to claim rectification had to be coupled with actual occupation for the saving in Section 82(3) to apply.

S Frieze, "Requirements for enforcing lender's security", [2002] *Insolvency Intelligence* 13.

SECURITIES

A McGee and G Scanlan, "Dealings in securities: the Ricardo case and the nature of share interests", [2002] 23(2) *The Company Lawyer* 37.

P Wong Chi Yeun, "Proprietary interests in fungible shares; the Hong Kong Experience", [2002] 17(1) *JIBL* 24.

BOOKWATCH

Robin Dicker QC and Jeremy Goldring have contributed a chapter on "Insolvency Practitioners" to *Professional Negligence and Liability* (ed. Simpson).

[Robin Dicker QC, Jeremy Goldring]

SEMINARS / TALKS

Professor Ian Fletcher delivered his Inaugural lecture in the Herbert Smith Chair of International Commercial Law at University College London, on "The Quest for Global Insolvency Law: A Challenge for Our Time", on 24 January 2002.

[Ian Fletcher]

Marion Simmons QC delivered a paper on "Tribunal Decisions" at the Disciplinary Conference 2002 on Friday 1st February 2002

[Marion Simmons QC]

The digest is a collation of references to reported and unreported cases and other items of relevance to the professional practices of the Barristers at 3/4 South Square, Gray's Inn, London WC1R 5HP. It is not intended to constitute legal advice, and the contents should not be relied upon without checking the original text of any authority or periodical cited. No duty of care is hereby assumed to any person, and no liability is accepted for the content.
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