IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S313 of 2010

BETWEEN:

DASREEF PTY LIMITED

Appellant

and

NAWAF HAWCHAR

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication on the internet

1 The respondent certifies that this submission is in a form suitable for publication on the internet.

Part II: Concise statement of the issue or issues that the respondent contends that the appeal presents

2 The respondent accepts the appellant's statement: '*The only issue for the purposes of this appeal is whether the breach of duty on [the appellant's] part was established by admissible evidence*': appellant's submissions ('AS') [8], as relating only to whether the opinion evidence of Dr Basden tendered by the respondent was admissible pursuant to s.79 of the *Evidence Act* 1995 (NSW). The weight to be given to that opinion, or whether it was capable of sustaining the finding by the Court, does not arise for consideration because that controversy is excluded by the restricted nature of the statutory appeal from the Dust Diseases Tribunal to the New South Wales Court of Appeal under s.32 of the *Dust Diseases Tribunal Act* 1989 (NSW). The appeal is limited to '*point of law*' or '*a question as to the admission or rejection of evidence*' and the appellant does not contend that if the opinion evidence was admissible, there was nonetheless no evidence to sustain the finding of breach of duty of care and causation.

3 The respondent says that the secondary issue identified by the appellant: AS [3], concerning the extent to which the Dust Diseases Tribunal was entitled to rely upon its expertise as a specialised tribunal, is a separate substantive point. If it is permissible for a specialised tribunal to have resort to its expertise as such, no question of admissibility of evidence arises.

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Part III: Requirement for s.78B notice

4 The respondent certifies that it considers that no notice is required under s.78B of the *Judiciary Act* 1983 (Cth).

Part IV: Statement of material facts

5 The respondent accepts the appellant's statement of facts in AS [7], [8], [12] and [13].

6 The respondent identifies an error in the appellant's statement of facts, AS [15], that the Trial Judge determined that the respondent spent, on average, 30 to 40 minutes per week cutting stone with an angle grinder: AS [15]. The time spent was 30 to 40 minutes per day: Trial Judge's reasons ('TJ') [56], [82] and [83].

7 The respondent below adds additional relevant material to the respondent's statement of facts (AS [9], [10], [11] and [15]) concerning the respondent's exposure to silica; and supplements the appellant's statement of facts as to the course of proceedings and the evidence of Dr Basden (AS [16], [17], [18], [19], [20] and [21]).

8 The respondent does not accept the appellant's statement as to the nature of the appellant's case against the respondent (AS [14] and [15]).

Exposure to silica

9 The respondent worked as a labourer and stone cutter for the appellant in the period 21 October 1999 to May 2005, and in that work was exposed to silica dust generated by the application of hand held angle grinders, hammers, chisels and abrasives, used to cut and shape sandstone: TJ [1]. He usually worked five or six days per week, commencing at 7:00am and finishing at 3:30pm: TJ [29]. He would start work at the appellant's premises, where large slabs of sandstone were brought to the yard by truck. His task was to take a hand held grinder to where the slabs were stored and cut them into smaller pieces: TJ [29]. Those pieces were then taken to the water saw where they were cut into still smaller pieces, or their edges trimmed: TJ [29]. The stones were cut initially by the angle grinder, which incised a 3mm to 5mm deep groove on the surface of the stone and a bolster was applied with a hammer to cleave the stone along the line of the groove: TJ [30].

10 This work in the yard would take about one hour each morning, although sometimes it continued throughout the day with usually two men, but on occasions three men, performing similar cutting work in close proximity to the respondent: TJ [31]. The respondent estimated that he did cutting work on sandstone in the yard for at least eight hours each week: TJ [32].

11 Most of the respondent's work was away from the appellant's premises and on site where stoneworks were being performed: TJ [33]. Although the stones used on site were generally pre-cut, about 30% of them needed further grinding; on some sites, the percentage was much less, on some sites much more: TJ [33]. If work was being done, for example, on a '*crazy wall*' or floor, where each piece was deliberately of a different size, he would use the grinder throughout the day: TJ [33]. Whilst there

were three to four men working on each site, the respondent did most of the cutting: TJ [34].

12 Although the respondent was supplied with a mask, the mask did not form a proper fit over his mouth and the dust would get through the sides and into his mouth and nose; he wore the mask, as instructed, only when he was operating the angle grinder and he was not instructed to wear it at other times: TJ [35].

13 Mr Yousef, a co-worker of the respondent in the period 2002 to 2005, testified that the respondent's main job was cutting and preparing the stone both on site and in the yard and that this work occupied him for between four and six hours each day: TJ [39].

14 Mr Buono, an owner of factory premises which adjoined the appellant's premises, said that from the time in about the year 2000 when he first occupied the factory, on three of four occasions each week, for about four hours each time, visible clouds of dust were generated by stone cutting in the appellant's yard and that the dust coated cars parked at his premises, affected his staff and his machinery and that he saw that the dust was generated by the use of angle grinders and other saws: TJ [40]. Mr Buono complained to the local council and eventually the cutting was reduced to once or twice a week. The cutting work done in the yard of the appellant's premises reduced after 2003 or 2004, and ceased in 2005: TJ [41].

15 The appellant used about 85% new stone purchased from Gosford Quarries and about 15% second hand stone purchased from demolition contractors or available on site: TJ [45]. During the period of the respondent's employment, the appellant owned two hand-operated wet saws and five or six hand held angle grinders used for cutting: TJ [49]. Because the wet saw was big and heavy, it could not perform accurate cuts, '*with nice sharp edges*' – this required the use of the angle grinder: TJ [49].

16 On some sites, very little cutting was required and on other sites the worker might be engaged in continuous cutting for five or six days: TJ [50]. On those occasions the angle grinder would actually be cutting for approximately 30 to 40 minutes, the balance of the day being occupied with resting, measuring, marking and work with the bolster and hammer: TJ [50].

17 Before coming to Australia and working with the appellant, the respondent had done some part-time work with a relative who conducted a stonemason's business in Lebanon: TJ [28], [32], [43] and [54], and while employed by the appellant, he had done stone work at his home, his sister's house and for a number of private customers on weekends: TJ [37].

18 The Trial Judge found the relative contribution of the different work to the respondent's total silica burden was one part the pre-employment Lebanon exposure, two parts the exposure in the course of his private work and 20 parts the exposure in the employment of the appellant: TJ [58] – that is, 87% of his exposure was attributable to the appellant.

19 The Trial Judge's specific findings (TJ [56]) on the sources of exposure were that the respondent had spent most of the day cutting and dressing sandstone with either hammer and bolster or an angle grinder. He frequently worked on five consecutive

days cutting with an angle grinder. On each of those days, the cumulative time operating the angle grinder exceeded 30 minutes; on many occasions he worked in close proximity to other men operating angle grinders and he wore a mask supplied by his employer when he was operating an angle grinder, but not otherwise.

20 Although all of those work duties exposed the respondent to silica dust, the Trial Judge limited his specific findings on exposure only to that work which was performed using a hand held angle grinder (*'the cumulative time operating the angle grinder exceeded 30 minutes'* per day: TJ [56]). No specific allowance was made for the contribution from the other aspects of his work, but it is clear, from TJ [84] to [86], that the Trial Judge was aware of that contribution, particularly from his reproducing, in TJ [85], the question to Dr Helen Englert, the appellant's medical expert, as to *'whether persons working with hammers and chisels on sandstone without respirators were at risk?[scil. from silicosis]'*, Dr Englert answered: *'Absolutely'*.

Dr Basden and exposure

21 Dr Basden graduated as a Bachelor of Science in applied chemistry from the University of New South Wales in 1954 and was awarded his PhD in 1960: TJ [60]. He was a founding member, fellow and associate member of a number of industrial and occupational hygienist professional bodies: TJ [60]. Between 1954 and 1987, the doctor lectured in mining engineering and related topics at the University of New South Wales; established a dust laboratory; taught subjects relating to dust control and measurement of air pollution; and published numerous learned papers on the subject generally: TJ [61]. From 1987 to date, as an engineering and environmental consultant, the doctor had conducted many field and laboratory investigations into air pollution and workplace atmospheric contamination. He was experienced in the measurement of respirable dust concentrations, and familiar with the Australian/New Zealand Standard 1715 entitled, *'Selection, Use and Maintenance of Respiratory Protective Devices'*: TJ [63].

22 WorkSafe Australia in 1996 adopted 0.2mg/m^3 as the maximum time weighted average to which a person may be exposed in industry to airborne dust containing silica: TJ [65]. The doctor's opinion was that the actual dust concentrations generated in the respondent's breathing zone generated by the cutting wheel of the hand held angle grinder exceeded the specified concentration standard of 0.2mg/m^3 of respirable particles, and were more realistically of an order of 1,000 or more times those values: TJ [72]. As a consequence, the doctor expressed the opinion that the minimum protection factor required by ANZ Standard 1715 in order to protect the respondent was well in excess of the 100 plus, could realistically approach 1,000 plus and the only suitable type of respirator would be a powered air purifying respirator fitted with a PAPR-P3 filter, and there were many such respirators available in Australia: TJ [73].

23 Dr Basden's cross-examination on the voir dire *'revealed that his opinion was not based on a precise measurement or a view expressed with precision, but rather an estimate drawn from his experience'*: Court of Appeal (Allsop P, Basten JA and Campbell JA agreeing) reasons ("CA") [41]. The Court of Appeal noted that the transcript extract of Dr Basden's evidence relied on by the Trial Judge, TJ [77],

explained that his opinion '*was that it was obvious from his experience that the dust concentrations were very high based on his knowledge of [the appellant's] practices and from applying his experience to that knowledge*': CA [41].

24 The Court of Appeal observed that his experience came from matters including: that dust that would not exceed the standard prescribed by the level would be barely visible in a normally illuminated room: Transcript, 211.P-T (CA [41] '*that nuisance dust (by which he meant the limit that should not be exceeded) would be barely visible in a room*'); that the clouds of dust produced in the performance of the work described in the evidence was a foundation for the estimate given by him: CA [41]; and that the fractions of respirable dust in all dusts are the same (Transcript, 201.U-V; 203.L-N; 221.H-K; 230.H-232.N). The Court of Appeal concluded, CA [42]: '... *his experience and specialised knowledge allowed him to say that given that dusts have a consistent fraction of respirable content and given that the [respondent] was working in clouds of silica as the evidence revealed, an inexact estimate of the concentration of respirable silica dust was what he said it was – a thousand times the acceptable level of the standard*'.

25 In addition to the matters specifically referred to by the Court of Appeal: CA [41] and [42], the Trial Judge noted that Dr Basden had measured respirable concentrations of silica dust in the vicinity of the wet cutting of sandstone and on construction sites, had observed dust generated by application of a grinding wheel to sandstone and had viewed video of this process tendered into evidence by the appellant: TJ [74]. The Trial Judge stated: '*He said that from his experience in observation and measurement he was able to form an opinion on those observations alone, within general parameters*': TJ [74]. While the doctor did not actually take measurements with equipment to identify the concentration, the Trial Judge recorded that *'when asked upon what basis did he express the opinion that the dust in [the respondent's] breathing zone was in the order of a thousand times that permitted by the standard as a time weighted average*': TJ [77], the doctor explained: *"Well, general knowledge of being in this area of dust required some time, You Honour, being used to the amount of dust when seen on a microscope slide when dispersed in the area, what the clouds look like, the 0.10mg of dust is not a very big amount. I have written some reports which actually have a photograph of 10mg on a microscope slide sitting on the balance showing it is 10mg that's there. It's a very, very small amount and that dispersing one cubic metre of air would be virtually invisible but would show up in a very large room, but therefore when there are clouds of visible dust within an area of a metre or so of the saws, the concentrations are going to be very high"*: TJ [77].

26 A crucial part of Dr Basden's evidence is: '*I have undertaken work in the past to determine the amount of dust and [sic – in?] clouds in the air over lots of situations and it's just the sort of opinions that I have come up with. I've measured dust clouds from time to time and weighed the filters afterwards*', TJ [80]. It is submitted that that was precisely the experience which would qualify Dr Basden to express the opinion he did in this case.

27 The Trial Judge calculated, TJ [82] and [83], from the evidence that the respondent's exposure from the hand held grinding work for 30 to 40 minutes per day for 5 days per week – which was only one confined aspect of the respondent's exposure – with the protective effect of the P2 mask meant the respondent's time weighted exposure

for that confined aspect of the respondent's exposure alone was above the permitted level of 0.2mg/m^3, and was, alternatively, 0.25mg/m^3 or 0.33mg/m^3 (depending on whether there was 30 or 40 minutes exposure). His Honour noted that those calculations assumed that the atmospheric concentrations of the respirable silica completely disappeared on the instant that the grinder was turned off and that no other grinders were being used by men working in the site: TJ [84], and that those calculations did not account for cutting, splitting and dressing sandstone with a hammer and bolster: TJ [85].

28 In making his calculations the Trial judge made several assumptions and adjustments which were more favourable to the appellant than the evidence in fact justified. For instance, '*The mask provided to Mr Hawchar fitted perfectly and provided a protection factor of 50*': TJ [82], but see: '*the mask did not form a proper fit ... and the dust would get through the sides and into his mouth and nose*': TJ [35] and also TJ [91]. Also, his weekly exposure was calculated on five working days: TJ [83], but see: '*usually worked five to six days per week*': TJ [29].

29 Dr Basden gave evidence that dispersion of respirable silica particles was such that finer particles (below 10μm – the respirable fraction) would remain permanently suspended in the air until removed by contact with a solid surface or by rain: TJ [84]. The Trial Judge noted on windless days those respirable particles remained in and about the respondent's breathing zone to be inhaled by him without the protection of the P2 mask which he only wore when cutting, in the context where Mr Buono described the clouds of dust which surrounded the men cutting the sandstone in the appellant's yard: TJ [84].

30 Mr Rogers – an occupational hygienist in the same field of expertise as Dr Basden – was qualified by the appellant for the purpose of giving evidence in the case and he was not called. The Trial Judge drew the conventional inference '*that his evidence would not advance the [appellant's] case that, in the absence of measurement, no conclusion may be made as to the probable concentration of respirable silica dust in the breathing zone of a person cutting sandstone with an angle grinder*': TJ [88].

31 The Trial Judge found that the P2 mask provided by the appellant to the respondent was inadequate to protect a worker from silica inhalation when working with a hand held angle grinder and found that a suitable mask (a powered air purifying respirator fitted with a PAPR-P3 filter) was reasonably available for purchase: TJ [91], also see [68] and [73].

32 It was recorded that the appellant admitted that the respondent suffered from silicosis and that there was '*no suggestion that [the respondent] was exposed to silica particles other than in Lebanon, in the employment of [the appellant] and in his private building work*': TJ [92].

33 His Honour said, uncontroversially, that '*silicosis is a diffuse pulmonary fibrosis caused by the inhalation of excessive quantities of silica-containing dust*': TJ [92], and that '*the sole cause of silicosis is the inhalation of excessive quantities of silica particles*': TJ [92]. He recorded that Professor Henderson gave evidence that '*short latency intervals are unusual, but not unknown, and that latency intervals of five to*

ten years characterise accelerated silicosis, suggesting that [the respondent's] silica exposure was intense': TJ [93].

The video

34 The Trial Judge found that the appellant's video that had been watched by Dr Basden demonstrated '*that the visible cloud of dust generated by the angle grinder enveloped the head of the worker*': TJ [79], demonstrated '*that visible dust was liberated by the application of a hammer and bolster to sandstone placed within 50cm of the worker's nose and mouth*': TJ [86], and '*confirmed that masks were worn when cutting stone with an angle grinder, but not when using a hammer and bolster*': TJ [86]. The video had been filmed by and was tendered by the appellant.

Specialist tribunal

35 The Trial Judge – corroboratively – saw as '*of greatest significance... the fact that [the respondent] suffered from silicosis*': TJ [87]. The Trial Judge stated: '*The Dust Diseases Tribunal is a specialist jurisdiction and I am permitted to take into account my experience that this disease is usually caused by very high levels of silica exposure*": TJ [87].

36 Professor Henderson's report states: '*By definition, silicosis refers to diffuse pulmonary fibrosis related to inhalation of excessive quantities of silica-containing dust...*': CA Supplementary Appeal Book, 375.W-X. Part of Exhibit PX5, Appendix 2 to the report of Dr Basden, contains a definition from an article, '*History of the knowledge of effects of silica dust inhalation*', from a 1923 work of authority: '*Silicosis, a form of fibrosis of the lungs, primarily the result of the inhalation of fine particles of silica, in the form of fractured crystalline quartz, and showing a definite relationship between its causation and the duration of employment in industries associated with exposure to excessive silica dust inhalation...[t]his is the form of fibrosis met with in the grinders of sandstone, in the industries under review*': CA Blue Appeal Book, 145.S-Y.

Part V: Constitutional provisions, statutes and regulations

37 The respondent accepts that the contents of Annexure 1 of the appellants' submissions are correct, but would add references to ss.11(1), 13(5), 13(6), 25, 25A of the *Dust Diseases Tribunal Act* 1989 (NSW).

Part VI: Argument

Admissibility of Dr Basden's opinion

38 The purpose of s.79 of the *Evidence Act* 1995 (NSW) is to ensure that Courts do not have to '*deal*' with '*expert*' evidence which is not based on the criteria set out in the section. There are technical aspects of the provision, but it could not be doubted that the general intent is that in matters requiring expertise those who have special knowledge acquired through any one of '*training, study or experience*' will be heard and those without it will not.

39 However it is submitted that after the demonstration of '*special knowledge*' the fact of '*substantial basis*' must be susceptible of proof by a simple evidentiary statement. The section refers to '*evidence of an opinion ... wholly or substantially based on that knowledge*'. Proof that the requirement has been met can be given in the document required by rules in all the Australian Courts, or it can be given in evidence in chief or it can be given in cross examination or it can be decided, as it was in this case, by a *voire dire*.

40 In *HG v The Queen* (1999) 197 CLR 414, 433 [63], Gaudron J said that '*criticisms ... concerned with [the expert witness's] failure to expose his reasoning process [and] his failure to identify the precise factual matter upon which his conclusions ... were based*' were 'not matters bearing on its admissibility as opinion evidence'. Gummow J, 449 [124], agreed with her Honour generally on her reasons concerning the '*opinion rule*'.

41 It is possible to reconcile the opinions of Gaudron and Gummow JJ in *HG* with those of Gleeson CJ in the same case as expounded by the appellant in its submissions and those of Heydon JA (as he then was) in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [83] to [86]. The respondent submits that the difficulty is overcome by recognition that the general conduct of cases (see paragraph 39 above) will rarely if ever leave a case in a state where the Judge or Jury is in doubt as to either of the crucial questions raised by the section – whether a witness has '*specialized knowledge*' and whether the expert opinion is '*wholly or substantially based on that knowledge*'. If a case were in that state, the tribunal could use the discretionary provisions in the *Evidence Act* (in this case, s.135) to ensure that the case was fairly tried: see, generally, the discussion by S Odgers, *Uniform Evidence Law*, 8th Ed, pages 329-331.

42 The reasons of the Full Federal Court in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty* Ltd (2002) 55 IPR 354 (Branson, Weinberg and Dowsett JJ) are not in principle different to the reasons of Heydon JA in *Makita*. Contrary to the differences suggested by the appellant between the Federal and New South Wales Courts (AS [24]), *Sydneywide* principally addresses misconceptions about *Makita* put to the Federal Court by the appellant in those proceedings, particularly arising from a setting where in *Sydneywide* the challenge to the admissibility of the opinion evidence was first made on appeal, following its tender without objection at trial: *Sydneywide*, [6].

43 Branson J's reference to Heydon JA's approach as a '*counsel of perfection*': *Sydneywide*, [7], is not a rejection of that approach, but the recognition that Heydon JA's approach represents the steps best made to achieve the principled arrangement of expert opinion, but in a setting where Heydon JA always recognised that the context of a trial does not always make such a desirable outcome possible: *Sydneywide*, [7]. These matters conventionally follow the observation by Gleeson CJ in *HG* that the statutory formulation in s.79 directs '*practical*' attention to the arrangement of expert opinion in a manner that conveniently sets out as a matter of form the required statutory connection: *HG*, [39].

44 Similarly, the reasons of Weinberg and Dowsett JJ in *Sydneywide* observe that Heydon JA's reasons formulated matters of general principle: *Sydneywide*, [86], and that the statement had embedded within it considerations of practicality by his Honour's proviso ('*strictly speaking*'). Their Honours noted that many of the elements of the statement of general principle '*involve questions of degree, requiring the exercise of judgment*': *Sydneywide*, [87]. Further, their Honours discuss the

undesirability of experts offering '*chapter and verse in support of every opinion against the mere possibility that it may be challenged*': *Sydneywide*, [89] – a matter of legitimate concern because an incorrect understanding of s.79 and the statement of general principle in *Makita* can readily convert to oppression and waste.

45 Whatever the correct position, the result in this case must have been the same. The opinion was not admitted without evidence of what had to be proved; evidence was taken on the voire dire and admitted so that the opinion before the Court was complete. The only point which the appellant can press in this context is the point of law set out in its Notice of Appeal – that '*the finding that the appellant had breached its duty of care to the respondent was not reasonably open on the admissible evidence*'. The respondent says that having regard to the factual material before the Trial Judge set out above and the fact that the evidence given by Dr Basden himself was uncontradicted expert evidence, the appellant must fail.

Specialised tribunal

46 The appellant's criticism of the judgment below extends to the trial judge drawing upon the '*supposed expertise of the Dust Diseases Tribunal as a "specialist jurisdiction"*': TJ [87].

47 The respondent's first answer is to direct the Court to the evidence of Professsor Henderson, reproduced at paragraphs 33 and 36 supra, and the other evidence in paragraph 36. The Trial Judge was expressing a view which, whether he already knew it from his specialised judicial experience or not, had been proved before him by unchallenged expert evidence.

48 Further, the appellant's treatment of *Tame v Commonwealth Collieries Pty Ltd* (1947) 47 SR(NSW) 269, 272, does not do the case justice. The question before the Court was whether it was open to the Court below to find that Mr Tame's short employment with Commonwealth '*was one to which pulmonary fibrosis is due*' in the sense that such employment generally could cause such a disease. There was evidence from Mr Tame that wet weather and other factors meant that '*there was no dust at all*' during his employment. Jordan CJ said, 272.7: '*But the Commission was entitled to take into account its general knowledge of silicosis ... and to form the opinion that the facts so deposed to did not satisfy it that the conditions of employment did not expose the worker to the ordinary risks of such employment but that the general evidence showed that they left him exposed to some risk of inhaling silica dust.*'

49 The Tribunal's governing statute provides support for the view taken by his Honour. Section 11 of the *Dust Diseases Act* 1989 (NSW) provides that action for damages by sufferers from dust-related disease '*may be brought before the Tribunal and may not be brought or entertained before any other Court or Tribunal*'. The Tribunal has jurisdiction to hear matters relating to only 14 prescribed dust diseases, which are set out in Schedule 1 to the Act, although the Parliament may add new diseases to the schedule: s.35 of Act. Special evidentiary provisions in ss.25, 25A and 25B of the Act are aimed at allowing the use of historical evidence, and the reuse of evidence on general matters, including medical causation.

50 It is submitted that the context of the Act and the highly restricted nature of its jurisdiction provide a basis for the acceptance of the special judicial expertise here argued for. The factual basis of such acceptance is much stronger here than in the case of workers compensation Courts generally, with their almost unlimited range of claims in respect of diseases and traumatic injuries. Further, the cases before the

Tribunal are often marked by the imminence of the death of the claimant, and the need to deal with the cases with great urgency.

51 It is submitted that the appellant's claimed distinction between this case and others (AS [47]) is unfounded. The question dealt with by his Honour was not '*a specific question of what had caused the particular worker's disease*'; rather, it was a question as to the silica load which had been proved to cause silicosis generally. If the exception in respect of specialised tribunals exists, and the appellant does not suggest it does not, then his Honour was entitled to do what he did. The claim (AS [49]) that the Tribunal's knowledge was used '*to determine a specific common law issue of breach of duty*' cannot be supported. The use made was as to a fact commonly proved before the Tribunal in like cases.

52 Any cutting down of the special evidentiary shortcuts available to the Tribunal would increase the cost and time taken with cases which of their nature should be run at the lowest efficient cost and with urgency.

Part VII: Respondent's notice of contention or notice of cross appeal

53 Not applicable.

Dated: 21 February 2011

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