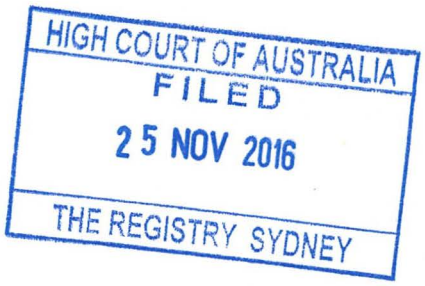
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S247 of 2016

BETWEEN



BONDELMONTE
Appellant

And

BONDELMONTE
First Respondent

INDEPENDENT CHILDREN'S LAWYER
Second Respondent

SECOND RESPONDENT'S SUBMISSIONS

Part I: Internet Publication

1. This submission is certified to be in a form suitable for publication on the internet.

Part II: Issues

2. The issue is whether the making of an interim parenting order which allowed, as one option, an election by the two oldest children to reside temporarily with a person/persons not party to the proceedings and the extent to which the Judge's failure to adjourn to enable the views of the children to be sought on that specific option, involved error.

3. In particular:

   (a) Whether the Court has a positive obligation to obtain the wishes of children on each individual aspect of the proposed orders before making an interim parenting order, and if not, whether it ought to have done so in the circumstances of this case;

   (b) whether in assessing the best interests of the children, the Court impermissibly diminished the weight to be given to the children's wishes because of the appellant's conduct.

Part III: *Judiciary Act 1903*, s. 78B

Filed on behalf of the Second Respondent
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4. The second respondent considers that notice in compliance with s. 78B of the *Judiciary Act* is not required.

Part IV: Facts

5. On 25 June 2014, by consent in the Family Court at Sydney, final orders were made in respect of the three children of the marriage (AB 1 61), namely R, J and N, aged respectively 16, 14 and 12 at the time of the hearing before Watts J. the subject of these proceedings.

6. Those orders provided relevantly:

> "1. That the parties have equal shared parental responsibility for the children, R ..., J ...and N... ("the children");
>
> 2. That the children live with the husband and wife as agreed between the parties or at the children's own election.
>
> 3. That pursuant to section 65Y(2)(b) of the Family Law Act 1975 the parties shall be permitted to take the children out of the Commonwealth of Australia for the purpose of a holiday provided that the parent travelling overseas with the children provides to the other parent not less than 14 days prior to their departure the following documents and information:
>
> 3.1 a copy of the children's travel itinerary including addresses for all places where the children will be staying overseas;
>
> 3.2 telephone numbers on which the children can be contacted whilst overseas; and
>
> 3.3 copies of the children's return air tickets (including e tickets)
>
> ...
>
> 7. That for the purpose of implementing order 2 above the Court notes that the children currently live between the parties as follows:
>
> 7.1 R lives with the husband and spends time with the wife at his election;
>
> 7.2 J lives with the husband for 9 nights a fortnight and with the wife for 5 nights a fortnight;
>
> 7.3 N lives with the wife and spends time with the husband as agreed between the parties."

7. At the time of hearing before the primary Judge R and J lived with the appellant and N lived with the first respondent. R was estranged from the first respondent and had not spent time with her since about August 2013. The extent of time being spent by J with the first respondent and N with the appellant was a matter of controversy. (2 AB 544, FC [20]-[22].)

8. On 11 December 2014 the first respondent made an Application for Final Orders in the Federal Circuit Court of Australia (2 AB 545 [25]). That application and the

appellant's Response filed 9 March 2015 (S AB 606), were transferred to the Family Court of Australia. In those proceedings each parent sought final parenting orders.

9. On 26 June 2015 an order was made pursuant to s. 68L of the *Family Law Act 1975* for a legal aid body to arrange the appointment of the second respondent as an independent children's lawyer to represent R, J and N (1 AB 242).

10. On 2 November 2015 an order was made pursuant to s. 11F of the Act for the parties and children to participate in the Child Responsive Program and the parents were ordered to attend the interview with the family consultant on 13 January 2016. (S AB 617.)

11. In November 2015 the second respondent had caused a number of subpoenae to issue, including the subpoena to Mr Gary Suntup, the children's therapist and psychologist (SAB 642) (2 AB 514, J[47]). The family consultant was granted leave to inspect the Court file and all documents produced pursuant to subpoena (for which leave had been granted) (SAB 617).

12. On 1 January 2016 the appellant informed the first respondent that he was considering taking R and J on holiday in the second half of January 2016. On 10 January 2016 he further advised the first respondent that he had decided to take the children to New York, and provided her with copies of airline tickets for R and J to travel to the United States of America ("USA") leaving on 14 January 2016 and returning on 30 January 2016. It was not proposed by the father that N would travel. See 2 AB 546, FC [29], 547 [33].

13. Notwithstanding the appellant's failure to comply fully with the orders of 25 June 2014 in relation to international travel, the first respondent on 13 January 2016 consented to R and J travelling to the USA (2 AB 546, FC [31]).

14. On 13 January 2016 the family consultant met with the first respondent and conducted a telephone interview with the appellant (then in the United States) (2 AB 546, FC [32]). On the same day the second respondent met with N and informed her that her brothers would be traveling to the United States for a holiday with the appellant (1 AB 226).

15. On 29 January 2016 the appellant, in the letter at 1 AB 234, informed the first respondent that he now intended to remain in the United States indefinitely, and that R and J had elected to remain there with him. Shortly afterwards, on 1 February 2016, in the letter at 1 AB 239, the first respondent informed the appellant that she

did not consent to the boys remaining in the United States, and sought their immediate return.

16. On 10 February 2016 the first respondent filed an application seeking, as a matter of urgency, interim orders, including a recovery order pursuant to s. 67U, for the return of R and J to the jurisdiction (the orders sought are at 1 AB 31). That application was returnable on 29 February 2016.

17. On 29 February 2016 the appellant filed a response to the first respondent's application for urgent relief. The response – 1 AB 36 – merely sought an order that "the wife's application in a case filed in these proceedings on 10 February 2016 be dismissed".

18. On 29 February 2016 the matter came on for hearing before Watts J. The first respondent proposed orders to facilitate the return of R and J to her care, and in the event they did not wish to reside with her she proposed they reside with their paternal grandmother. The appellant did not attend the hearing in person or by telephone, nor was he available to provide instructions on the mother's proposal by telephone 2 AB 302 [2], (SAB 629). For this reason the matter was adjourned until 3 March 2016. (SAB 632.)

19. At the hearing on 29 February 2016 the second respondent raised concerns and made submissions about the impact of the father's actions on N and the practical difficulties posed by a return. The second respondent also referred to the circumstances of the removal, contrary to court orders, and to "flagrant disregard of the current court orders" and drew the Court's attention to the views of J as expressed in the evidence.(SAB 625, 630).

20. On 2 March 2016 the first respondent filed a further application seeking orders *inter alia* restraining the parents from removing the children from the Commonwealth of Australia, that the children's names be placed on the airport watch list and that the children live with the mother and the father in such arrangement as agreed after consultation with and consideration of any recommendation by a Family Consultant (1 AB 14). She also sought interim orders for the return of R and J to the jurisdiction, for the children to live with her, an injunction preventing the father from removing the children from the State of New York pending their return to Australia, a recovery order and that the children's names be placed on the airport watch list (1 AB 16).

21. Prior to the interim hearing the second respondent had made inquiries about the availability of a report in New York (SAB 668). At the hearing on 29 February 2016

the second respondent stated: "I am not sure how much further a wishes report would take the Court" (SAB 625. 7-.14), but identified as an advantage of a proposed return to Australia, the preparation of a more fulsome Family Report, in the children's place of residence. (SAB 629. 44.46).

22. On 8 March 2016 Watts J. ordered the children be returned to Australia (2 AB 520-522). The relevant interim orders provided:

> "9 In the event the father returns to Australia with R and J, R and J can continue to live with him. In the event that he does not, R and J are to live with their mother provided that in the event that R and/or J choose not to do so they may live either:
>
> 9.1 in accommodation provided by the father with paid supervised services to which the mother consents in writing; or
>
> 9.2 J may live with L M and/or R may live with B A.
>
> 10 Either party have liberty on 7 days' notice to seek [re-listing regarding] to implementation of these orders.

23. The appellant appealed to the Full Court of the Family Court of Australia. The appeal was dismissed (Le Poer Trench J dissenting) on 8 April 2016 (2 AB 538-597).

Part V: Applicable statutory provisions

24. *Family Law Act 1975* ss. 11E, 11F, 60CA, 60CC, 60CD, 61B, 62G, 64B, 65D, 68L.

Part VI: Argument

25. Watts J. was engaged in an interim hearing in circumstances where the parties had existing final orders which provided that each parent had parental responsibility for the children. Parental responsibility has the meaning attached to it by s. 61B.

26. Both parties were seeking parenting orders. The source of power to make a parenting order is found in s. 65D, the definition of "parenting orders" being in s. 64B. In making a parenting order the Court must regard the best interests of the children as the paramount consideration: s. 60CA. To determine what order will be in the best interests of the children the Court is obliged to have regard to the matters in s. 60CC.

27. The Act sets out in s. 60CD the manner in which a child's views may be expressed.

28. The Court pursuant to s. 68L had appointed an independent children's lawyer. The role of that lawyer is set out in s. 68LA.

29. The Court had also made an order for the parties to participate in appointments with a family consultant pursuant to s. 11F, with a view to the family consultant providing advice to the Court pursuant to s. 11E ("the Child Responsive Memo)" and/or s. 62G ("a Family Report").

30. The primary Judge made an order that potentially provided for one or both of the children to live with persons who were non-parties to the proceedings. The Appellant's Submissions ("AS") contend that those persons do not meet the threshold in s. 65C. The second respondent contends that the operative provision was s. 64C.

31. The nature of the proceeding before Watts J. is central to theappeal. He was not hearing and determining a final application by the father to change the final (consent) orders of June 2014 so as to permit him to make the children's place of residence outside the Commonwealth of Australia. Rather he was determining the mother's interim application for return of R and J to the jurisdiction.[1]

10 32. The Full Court recognised the nature of the exercise undertaken by the trial Judge at 2 AB 565 [108] where reference was made to the decision of this Court in *ZP v PS* (1994) 181 CLR 639 at 664 per Brennan and Dawson JJ:

> "...And it may be entirely appropriate to order the speedy return of the child to the country from which he or she has been abducted [or retained] without making as full an inquiry as the Court would ordinarily make in determining an application for permanent custody...".

and at 670 per Deane and Gaudron JJ to the effect that the abduction (or as in this case retention) of children across national boundaries will almost invariably (as it does here):

20 > "... involve the infringement of the legitimate claims of the members of the child's immediate or extended family from whose custody or environment the child has been unlawfully taken. A court concerned with the welfare of the child will be conscious of the irreparable damage which might be done to the child's ties with those members of his or her immediate or extended family and with his or her homeland if it effectively overrides those legitimate claims by immediately embarking upon a lengthy hearing to determine what it considers to be the desirable final resolution of competing claims and allegations bearing upon the ultimate welfare of the child..."

30 33. Accordingly, while the nature of the power being exercised was the power to make a parenting order in interim proceedings, it was a parenting order of an explicitly temporary nature designed to effect the return of the children to Australia to facilitate the orderly conduct of an expert report concerning (among other matters) the

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[1] This was an interim application. A hearing of such a matter is ordinarily conducted without cross-examination, in a duty list, with a time limit of two hours. The Full Court of the Family Court of Australia confirmed in *Goode* (2006) Fam LR 422 at [68] that while the legal principles to be applied at interim hearing are identical with those at final hearing the procedure adopting by the Court on hearing an interim application will "continue to be an abridged process where the scope of the enquiry is 'significantly curtailed'."

children's views and adjudication in the children's place of habitual residence of any application to change the existing parenting orders.

34. As is apparent from the terms of Order 10 (2 AB 522), the Judge intended that the orders were to ensure the return of the children the subject matter of the litigation to the jurisdiction. To the extent that issues might arise in respect of implementation of the orders, Order 10 provided that the parties had and could utilise liberty to re-list the matter.

Children's views on the interim proposal

35. As noted the Court had earlier ordered the parties attend upon a child and family consultant. The *Family Law Rules 2004*, Rule 12.04 provide that parties to parenting proceedings may be ordered to attend the "Child Responsive Program". The program, as its name suggests, is designed to facilitate resolution of parenting disputes by providing parents with the opportunity to be responsive to the children's needs and expressed views, facilitated by a family consultant.

36. Family consultants are appointed by the Chief Executive Officer of the Family Court pursuant to s. 11B and under reg 7 of the *Family Law Regulations 1984*. The attendance of the parties and the children is directed under the terms of s. 11F.

37. The family consultant provides assistance to the parties and evidence to the Court. Any communications between the family consultant and the children and/or parents are rendered admissible under s. 11B.

38. The appellant was due to attend upon the family consultant pursuant to the order on 13 January 2016. He had left Australia on 10 January 2016 and attended by telephone on that day (2 AB 487.35).

39. The family consultant met with the child N in person on 20 January 2016. The father attended by telephone on that day (2 AB 487.45). R and J did not participate.

40. The resulting report "Child Responsive Program Memorandum" (2 AB 486-498) recorded the family consultant's observations. In the ordinary course, had the children R and J been in Australia, in compliance with the existing final orders and the proposed international move been flagged, their views would have been recorded by the consultant in the Memorandum.

41. The second respondent was obliged under s. 68LA(5)(b) to ensure that any views expressed by the children in relation to matters to which the proceedings relate are fully put before the Court. The attendance by the children on the family consultant was a mechanism to ensure that their views could be put before the Court.

42. The primary Judge and the Full Court understood (and it was not in contest) that the older two children R and J wished to live with their father (2 AB 511 [32] and 2 AB 563 [100]). Order 9 of Watts J.'s orders provided for precisely that as the first in a series of cascading options arising out of the factual circumstances that presented themselves. The appellant failed or declined to file material capable of directly addressing whether he would accompany the children in the short, medium or long term if the Court determined it was in the best interests of those children to reside in or return to (on a temporary basis) Australia.

43. When on 29 February 2016 the first respondent raised the option of the children staying with the paternal grandmother on return to Australia, those appearing for the appellant were unable to obtain his instructions (SAB 629. 26-.27). The matter was adjourned to permit that option to be canvassed with him. On 29 February 2016 (US time) the appellant swore an affidavit countering the suggestion that his mother's home was available (2 AB 301-306).

44. The appellant's affidavit of 29 February 2016 was filed 3 March 2016 (the adjourned date of the matter). In the meantime the mother had obtained the emails and undertakings from the third parties (Exhibit 1) (2 AB 499).

45. Counsel for the appellant submitted to Watts J. that a decision (about return) should be delayed until a report could be obtained: SAB 623. 44-.45. That submission, however, did not engage with the advantages of a report being prepared in the children's usual place of residence. The second respondent had submitted "*The boys would have the opportunity of meeting with someone, I would propose, meeting with someone to discuss and explore the real consequences of what is happening*" (SAB 629. 44-.46).

46. Importantly a report prepared in Australia could canvass the views of each of the three children, the relationships of each with the parents and with their siblings and reflect on the weight to be attached to any expressed views. As the Judge at first instance noted: "*A full family report, prepared in Australia, would not just look at the boys' views but look at the dynamics of the relationships, and in particular, the future of the relationship between N and her father and the future of the relationship between J and his mother*": 2 AB 512 [34].

47. The appellant's analysis narrows the focus so that a failure to seek the children's views in the manner posited by his counsel (adjournment of the proceedings and "wishes report") in New York is the error. The second respondent accepts the

contention in AS [29] that part of the second respondent's function was to place evidence of the children's views before the Court. The ultimate preference of the trial Judge to accept the submission that, to obtain the best evidence of the children's views (and determine the weight to be attached to them) the report should be obtained in Australia as previously contemplated, did not constitute error.

48. The views of Le Poer Trech J. at 2 AB 573, [FC 153] to the extent that they suggest that the paramountcy principle requires the father's conduct (including non-compliance with Court orders) to be disregarded does not sufficiently recognize the potential impact of the father's conduct on the formation of the children's views, the manner in which the father's conduct may be viewed by his own children (all three of them), the fact that the father was not prevented from making any application to change the children's place of residence (merely reminded that the was required to make such an application rather than just expect his unilateral actions to be approved retrospectively) and the other factors which supported his children to be returned which sit independently of the father's conduct.

Order which provided children may live with volunteers

49. The primary Judge's order regarding the person with whom the children would live was an order in favour of the father, followed by the mother, followed by agreed paid supervised accommodation and lastly with the "volunteers".

50. The Court had the following information about the volunteers LM and BA: LM was the mother of one of J's longstanding friends. J would have a bedroom. She indicated a preparedness to offer "nurturing and care". Given the longstanding nature of the children's friendship it should be inferred that LM was known to both parents. BA was the mother of one of R's friends. BA's son and R had been friends since they were about two years old. BA's son and R attended the same school. BA would implement arrangements for monitoring homework and transport to and from school as with her own son. BA's son and R would share a bedroom. The inference that BA was known to both parents was clearly available.

51. The option of living with the volunteers only arose if each of the following occurred – the father elected to remain in the United States, the children declined to reside with their mother, the parents had not reached an agreement for paid supervised accommodation. Notably at least one of those options was uniquely within the power of the appellant. It is difficult to understand why the Court would allow the appellant

to agitate grounds referable to a failure to have the children's views of that specific proposal when he himself was unavailable to provide instructions about its suitability. (SAB 661 28.35).

52. The Court's obligation is not to obtain the children's views or require that the children's views be obtained, but rather to "consider" the children's views. To the extent that AS [25] appears to contend otherwise it should not be accepted.

53. It is clear from s. 60CD(1) that s. 60CC(3)(a) requires the court to *consider* any views expressed by a child in deciding whether to make a particular parenting order in relation to the child. Section 60CD(2) sets out a number of ways in which the court *may* inform itself of the views of the child, which include through the provision of a family report, and/or the appointment of an independent children's lawyer. All of those were in train. The appellant's contentions, taken to their logical conclusion, would require a full exploration of each child's wishes on each order sought on each occasion (interim or final) where a parenting order is being made. Such an approach is not statutorily mandated, nor is it practical.

54. The question then arises whether, if obtaining the children's views was not mandated, was it otherwise an error of law for the trial Judge not have sought them.

55. To the extent that the appellant contends that it was necessary in the circumstances of this case the argument appears to require that one accept that the final default position was the most likely option. That skirts rather neatly around the appellant's refusal to be drawn on whether he would accompany the children.

56. The provisions of s. 65C relate to the standing of a person to bring an application. The third parties in question were not applicants. The third parties were not required to engage the provisions of s. 65C. The appellant's submissions conflate the concept of standing to bring an application for parenting orders, and the circumstances in which a parenting order may be made in favour of a person. At AS [34], the appellant submits that s 65C is a "statutory threshold to warrant conferral of a parenting order", and that until that statutory threshold is established, the court could not validly make a parenting order in a person's favour.

57. Section 65C, however, concerns only who may apply for a parenting order. It is s 64C which governs the people in whose favour the court may make parenting orders. Section 64C provides *"A parenting order in relation to a child may be made in favour of a parent of the child or some other person."* Section 64B(6) relevantly

provides that a parenting order that provides that a child is to live with a person is "made in favour" of that person.

58. The Full Court of the Family Court in *Faulkner v Rugendyke* (1995) 19 Fam LR 507 at 511 – correctly, it is submitted – held that it is not necessary that a person be a party to proceedings before the Court can make an order in his or her favour:

> "It is clear, in our view, from the wording of s 64(2), that it is not a requirement of that subsection that one must be a party to proceedings, before the court is entitled to make an order in one's favour under it. There must, however, clearly be evidence before the court that the person in respect of whom the court proposes to make such an order, is willing to accept that responsibility. It is apparent from the material placed before us that the Director-General was a person willing to accept that responsibility. It should, however, be emphasised that, in the normal course of events, a person who obtains an order pursuant to s 64(2) will and should be a party to the proceedings. However as stated previously, the reason that the Director-General was not a party to these proceedings appears to us to have been in the nature of an oversight. The Director-General was represented before the court, and that representative clearly signified to the court his client's willingness to accept an order placing the child in his/her interim custody."

59. Although the legislation has been amended since *Faulkner*, the principles remain applicable to the provisions currently in force. The broad discretion conferred by s. 64C has not been exceeded.

Relationship between parental conduct and weight afforded to children's views

60. To the extent that AS [31] raises any issue as to whether the primary Judge impermissibly allowed the father's conduct to impact on the weight to be attached to the views of the two older children it is submitted that the appellant's conduct was relevant and the conclusion that the weight to be given to their views was "weakened by the circumstances contrived by the father": 2 AB 511 [32] was within the ambit of the discretion conferred by s. 60CC(3)(a).

61. The primary Judge was not – compare [AS31] – disregarding or discounting the views of the children because the appellant was in breach of court orders. The majority in the Full Court rightly rejected such an analysis as simplistic, instead finding his synthesis to be a "carefully calibrated approach to weight": 2 AB 563 FC [100]. For example, the evidence was that the appellant formed a view that he was required to remain in the United States on 25 January 2016. He had obviously shared that view with R and J so that no later than 29 January 2016 – the day prior to their scheduled return – they are said by him to have expressed the view that they wished to remain with him in New York.

62. The Full Court of the Family Court has acknowledged that a multiplicity of factors may influence the weight to be attached to expressed views: *R v R* (2000) 155 FLR 29; 25 Fam LR 712. The reasons of the primary Judge set out the basis on which he has discounted the weight to be attached to the children's views and these were picked up by the Full Court (2 AB 564 FC [103] – [105]) including R and J living with the father, the manner in which the purported move occurred, the conversations between the father and the boys about the move and the excitement about New York and the benefits which might flow from the father's new proposal for their living arrangements. The primary Judge also took into account the lack of apparent reflection by J on the loss of time with the first respondent and N.

63. Each of the matters considered by the primary Judge was relevant and well within s. 60CC(3)(a) and that jurisprudence which has considered the impact of parental views on the formation of children's views,[2] the extent to which expressed views may be a function of a child's relationship with or attachment to a parent[3] and the extent to which the child has considered all relevant matters or had regard to objectively irrelevant or less relevant matters.[4]

64. The paramountcy principle does not require the father's conduct to be ignored. What is required is that the children's best interests are the paramount (rather than the sole) consideration. It is wrong to conclude that the primary Judge in this case was motivated by a desire to make orders which addressed the father's conduct at the expense of the best interests principle.

Le Poer Trench J.'s dissent.

65. Many of the aspects of Le Poer Trench J.'s dissenting reasons have been dealt with by the submissions above. The following further matters may be mentioned.

66. The gravamen of the dissent appears in the passage which appears at 2 AB 584, FC [201]. The conclusion that the matter lacked sufficient urgency is without foundation. The children were not returned to commence the school year at the school in which they were enrolled, they had been retained outside Australia contrary to the operation of the equal shared parental responsibility order, the child J was not seeing or

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[2] *RCB as litigation guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin Forrest* (2012) 48 Fam LR 236 at [52] per Heydon J

[3] *In the marriage of R (Children's Wishes)* (2002) 29 Fam LR 230; FLC 93-108

[4] *In the marriage of Boman* (1981) 7 Fam LR 586; FLC 91-077, *Mitchell and Mitchell* (1983) 9 Fam LR 267; (1984) FLC 90-254.

spending time with the first respondent or N and perhaps less significantly neither was R.

67. The statement by Le Poer Trench J. at 2 AB 574, FC [158] that J's text messages to his mother contained "a well-reasoned and apparently considered statement" should not be accepted. No statement by J grapples with the advantages and disadvantages of the various options and any consideration could only have taken place over a few days at most.

68. The comments of Le Poer Trench J. that the mother's text messages in return were "regrettable to say the least" (2 AB 574, FC [159]) overstates the case. The same is true of the observations in FC [160]. It could not be known with certainty that the mother's assertion was not accurate.

Part VII: Orders Sought

69. The first respondent has filed a submitting appearance in the appeal. The second respondent, whilst recognizing the age of the eldest child, considers that the decisions of Watts J. and the majority of the Full Court reflect what is in the best interests of the three children, and submits that the appeal should be dismissed and that in the circumstances the appellant should pay the second respondent's costs.

Part VIII: Cross-Appeal; Contention

70. Not applicable.

Part IX: Oral argument

71. The second respondent's oral argument is expected to take 1¼ hours,

Dated 25 November 2016

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