TEAM MOVES

LIABILITIES and REMEDIES

INTRODUCTION (1)

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"*Although team moves have always been a feature of employee competition litigation, the period since 2000 has seen a substantial rise in disputes concerning large teams, often in the inter-dealer broker, insurance and wealth management industries*"; Bloch & Brearley para 19.1

The rise in disputes has seen a considerable development in and refinement of the jurisprudence

INTRODUCTION (2)

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A ‘team move’ (involving any form of co-ordinated decision by serving employees to leave to set up or join a competitor) is difficult to achieve/defend legally.

In practical terms, secrecy is usually key to the success of the team move. However, there is a growing recognition in the case law that a senior employee (especially one with line management responsibility for some of those departing) owes reporting obligations in relation to nascent threats to the success and stability of his employer’s business, which are inconsistent with the desire for secrecy.

These obligations can arise as incidents of the employee’s implied good faith duty.

They can also arise where the employee owes functional fiduciary obligations (e.g. in relation to the management of his direct reports).

When must an employee disclose his knowledge of a team move? The position in contract

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- An employee may be required to disclose his knowledge of a planned team move by reason of his duty to:

1. disclose his own wrongdoing;

2. disclose the wrongdoing of his colleagues;

3. disclose his knowledge of a commercial threat to his employer not involving any wrongdoing; and/or

4. answer honestly questions put to him by his employer.

- When, and by whom, are these duties owed?

The duty to disclose one's own wrongdoing (1)

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- The traditional position was that an employee *never* owes a contractual obligation to disclose his own wrongdoing to his employer.

- *Bell v Lever Brothers Ltd* [1932] AC 161, per Lord Atkin (at p.227):

> *"...The servant owes a duty not to steal, but, having stolen, is there superadded a duty to confess that he has stolen? I am satisfied that to imply such a duty would be a departure from the well-established duties of mankind and would be to create obligations entirely outside the normal contemplation of the parties"*

The duty to disclose one's own wrongdoing (2)

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- This position has been softened in recent years.

- *Bell* was considered by Arden LJ in *Item Software (UK) Limited v Fassihi* [2004] IRLR 928 (CA). Arden LJ raised the possibility, but did not decide, that a duty of disclosure may arise under the implied term of good faith and fidelity (*Fassihi* was a fiduciary duties case, we will consider it further shortly).

- That point was considered by the CA again in *Ranson v Customer Systems Plc* [2012] IRLR 769. Lewison LJ rejected the argument the implied good faith duty imposes a duty on an employee to report his own wrongdoing (paras 54-55).

- However, he accepted that such a duty *may* arise on a proper construction of the employee's express contractual duties:

  "That is not to say that an employee can never have an obligation to disclose his own wrongdoing; but any such obligation must arise out of the terms of his contract of employment." (para 55)

The duty to disclose the wrongdoing of others (1)

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- The position is different in relation to the wrongdoing of others. Here, the implied term of good faith may give rise to a duty of disclosure.
- It does not do so universally. Whether the duty arises requires fact-specific analysis.
- Long established: *Syborn Corp v Rochem Ltd* [1984] Ch 112 per Stephenson LJ held:

  *"…there is no general duty to report a fellow-servant's misconduct or breach of contract; whether there is such a duty depends on the contract and on the terms of employment of the particular servant. He may be so placed in the hierarchy as to have a duty to report either the misconduct of his superior, … or the misconduct of his inferiors, as in this case" (*p.126-127)

- Fox LJ held in similar terms*:*

  'I am not at all saying that an employee has in every case a duty to disclose to his employers any information that he has about breaches of duty by his fellow employees. I can see that ordinary usage is in many respects against such a rule. The matter must depend, I think, upon all the circumstances of the case. The important circumstances in the present case are that [the defendant] was in a senior executive position in the group and there was existing a continuing fraud by the employees against the company, of which he was well aware.' (p. 129)

The duty to disclose the wrongdoing of others (2)

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- More recently, Legatt J (as he then was) held in *Marathon Asset Management LLP v Seddon* [2017] IRLR 503:

  "Whether a duty to report misconduct is to be implied as an aspect of the duty of fidelity and good faith depends on the circumstances, including the nature and terms of the employment, the nature of the misconduct and how the employee became aware of it" (para 138)

- *Marathon* involved wrongdoing by employees of equal standing: this militated against a reporting duty (see paras 139-140).

- Each case will turn on its facts, but a senior employee with management responsibilities is likely to owe a duty to report misconduct of his subordinates.

- Should not be thought that the duty only goes one way, however. A senior employee may also be required to disclose the wrongdoing of his manager: this was the case in *Swain v West Butchers Limited* [1936] 3 All ER 261

- It is also possible that the duty may apply to junior employees in some circumstances: for example in respect of very serious and ongoing wrongdoing, such as the embezzling of large sums of money.

The duty to disclose nascent commercial threats (1)

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- It is conceivable that a team move may begin without wrongdoing on the part of any employee: e.g. targeted recruitment by a 3rd party, or an approach by an ex-employee unbounded by any restrictive covenant. Will an employee owe a contractual duty to disclose the threat posed by such licit contact?

- The answer is, again, fact-sensitive. An employee may owe such a duty as part of the implied good faith obligation.

- *Imam-Sadeque v Bluebay Asset Management (Services) Limited* [2013] IRLR 344 at para 133 (per Popplewell J):

> *"The duty of fidelity may also require an employee to report to his employer a competitive threat of which he becomes aware, irrespective of whether he or any fellow employees are involved in that competitive threat. So too may an express term to act in the best interests of the company (cf Swain v West (Butchers) Ltd [1936] 3 All ER 261). Whether it does so is again fact sensitive, and will depend upon the terms of his contract of employment, the nature of his role and responsibilities, the nature of the threat, and the circumstances in which he becomes aware of it. A senior manager who becomes aware of a competitive threat to an aspect of the business for which he is responsible will normally come under such a duty, whereas a junior employee without such responsibility would not. The manager of a branch of a supermarket in the high street would normally be obliged to tell his superiors if he learned that a rival supermarket chain was proposing to open a store next door; whereas a junior employee working in the unloading bay would not."*

The duty to disclose nascent commercial threats (2)

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- *Tullett Prebon Plc v BGC Brokers LLP* [2010] IRLR 648 per Jack J at para 68 :

  "Where it is sought to recruit a desk as a whole, or the greater part of the desk, it is very likely that the desk head will be approached first with the object of sounding him out as to the desk. He is then in a difficult and sensitive situation. While the desk head may see his obligation to his desk as being to get the best for them, his duty in law as desk head is to act in the interest of his employer and not that of the desk. His employer's interest is to prevent the recruitment of the desk. He is obliged to inform his employer that the rival company is seeking to recruit the desk. He would be obliged to follow his employer's instructions to prevent that happening."

- Again, seniority of the employee is likely to be key. A highly paid, senior employee with reporting obligations will more readily fall under such a duty than a junior employee. However, even relatively junior employees have been held to owe the duty: *Kynixa Limited v Hynes* [2008] EWHC 1495 per HHJ Wyn Williams at para 283).

- The significance of the threat, and the likely impact on the employer, are also relevant factors.

The duty to be honest

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- Junior employees may escape many of the positive reporting obligations. But can they be obliged to disclose their knowledge of a team move if asked directly about their future plans by their employer? Must the employee answer such a question truthfully?

- The answer, again, is that it all depends.

> "*Whilst, consistently with the approach in MPT, [dishonesty] might not necessarily entail a breach of the duty of fidelity, the issue is fact-sensitive. There would very likely be a breach of the duty of the employee were to give a deliberately false answer with a view to obtaining some other employment advantage such as securing a more favourable bonus payment before departure. Similarly where it ought reasonably to be appreciated that the employer is likely to rely on the misleading information in permitting the employee to continue working in a role with access to clients and confidential information rather than exercising a right to move the employee to alternative employment or place the employee on garden leave, that is liable to be a significant consideration pointing towards the breach of duty*"
>
> Bloch & Brearley, 3.141

Fiduciary duties: their distinctive feature

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- The duty of fidelity is often confused with fiduciary duties. The duties are similar, but distinct.

- The hallmark of a fiduciary duty is *single-minded* loyalty.

- In *Helmet Integrated Systems Ltd v Tunnard* [2007] IRLR 126 Moses LJ explained at para 36:

> *"An employee owes an obligation of loyalty to his employer but he will not necessarily owe that exclusive obligation of loyalty, to act in his employer's interest and not in his own, which is the hallmark of any fiduciary duty owed by an employee to his employer. The distinguishing mark of the obligation of a fiduciary, in the context of employment, is not merely that the employee owes a duty of loyalty but of single-minded or exclusive loyalty."* (emphasis added)

When does a non-director employee owe fiduciary duties to his employer? (1)

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- Non-director employees do not owe fiduciary duties as a matter of course.

- The basic approach to determining whether they do or not is set down in Elias J's judgment in *University of Nottingham v Fishel* [2000] ICR 1462:

> *This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms…*
> *…*
>
> *In determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer. It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached, as Lord Upjohn commented in Phipps v Boardman…*
>
> *It follows that fiduciary duties may be engaged in respect of only part of the employment relationship, as was recognised by Lord Wilberforce, giving judgment for the Privy Council in New Zealand Netherlands Society v Kuys [1973]1W.L.R.1126 at 1130,*
>
> *"A person ...may be in a fiduciary position quoad a part of his activities but not quoad other parts: each transaction, or group of transactions, must be looked at."* (emphasis added)

When does a non-director employee owe fiduciary duties to his employer? (2)

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- In general, the significant factors for this analysis are likely to be:

1. Seniority.

2. Autonomy- in particular whether the employer was vulnerable to abuse because of the employee's role/responsibilities.

3. Responsibility for property or specific contracts.

4. The nature of the particular breach: the court's will readily impose a fiduciary duty in respect of a bribe or secret profit.

5. The express provisions of the contract.

Fiduciary reporting duties

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- No distinct fiduciary reporting duty: instead, these duties arise as part of the fiduciary's general duty to act in good faith in the best interests of his principal (now embodied in s.172 of the Companies Act 2006) (per Arden LJ in *Fassihi* at para 41).

- The analysis will, again, always be fact sensitive. Following *Fishel*, the Court will look at the particular position of the employee to determine whether he owes fiduciary reporting duties and, if he does, their extent. It is possible that such duties will be owed in respect of some aspects of the business, but not others.

- However, where fiduciary reporting duties are owed, they will be in broader terms than those imposed by contract.

Fiduciary reporting (2)

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- In respect of the fiduciary's own wrongdoing:

> "*It was clear law that an employee who owes fiduciary duties (whether a director or not) owes a duty, as part of those fiduciary duties, to disclose his own wrongdoing to his employer. The scope and extent of this duty could depend on the precise circumstances, but in the case of a clear commercial conflict of interests, it seems to me to be right to such that such a conflict must be disclosed"* per Vos J in *Bank of Ireland v Jaffery* [2012] EWHC 1377 at para 301.

Fiduciary reporting (3)

- In respect of nascent commercial threats not involving any wrongdoing:

  "…it can be incumbent on a fiduciary to disclose matters other than wrongdoing. The "single and overriding touchstone" being the duty of a director to act in what he considers in good faith to be in the best interests of the company … there is no reason to restrict the disclosure that can be necessary to misconduct. Were a director subjectively to consider that it was in the company's interests for something other than misconduct to be disclosed, he would, it appears, commit a breach of his duty of good faith if he failed to do so" per Newey J in *GHLM Trading Limited v Maroo* [2012] 2 BCLC 369 at para 195)

- In similar vein, Hart J held in *British Midland Tool Limited v Midland International Tooling Limited* [2003] 2 BCLC 523:

  "…where the activity involves both himself and others, there is nothing in the authorities which excuses him from it. This applies, in my judgment, whether or not the activity in itself would constitute a breach by anyone of any relevant duty owed to the company"

- Hart when on to consider the significance of public policy interests in competition. He held:

  "…It does not, furthermore, seem to me that the public policy of favouring competitive business activity should lead to a different conclusion. A director is free to resign his directorship at any time notwithstanding the damage that the resignation may itself cause the company…A director who wishes to engage in a competing business and not to disclose his intentions to the company ought, in my judgment, to resign his office as soon as his intention has been irrevocably formed and he has launched himself in the actual taking of preparatory steps…"

Accessory liability

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- Team moves are often instigated or facilitated by persons who owe no primary obligation to the affected employer: recruitment agencies and/or the recruiting employer.
- These persons may, however, incur accessory (or secondary) liability for their role in the team move.
- The most common claims that may lie against such persons are:
  - **Inducement of breaches of contract**: this requires that the defendant intentionally and knowingly induced or procured a breach of contract. The defendant must have known that the act induced by him amounted to a breach of contract, or have been recklessly indifferent to this. This means the defendant must have known (or turned a blind eye to) the existence of the relevant contractual term.
  - **Conspiracy:** this can be of two types (1) unlawful means conspiracy, which involves a combination or agreement between persons to injure the claimant by unlawful means and (2) conspiracy to injure, where the combination does not involve any unlawful means but its sole or predominant purpose is to injure the claimant. In both cases, the combination must cause the claimant loss. In practice, unlawful means conspiracy claims are more common in team move cases.
  - **Dishonest assistance:** this requires that the defendant knowingly and dishonestly assisted a fiduciary in the breach of his fiduciary duties. The standard of dishonesty is an objective one: the court will assess the defendant's conduct by reference to the ordinary standards of honesty.
- Inducement and conspiracy claims are tortious. They sound in damages. A claim for dishonest assistance is equitable and can give rise to an account of profits. It does not require the claimant to prove loss.

An injunction where a party is "*placed under a special disability in the field of competition in order to ensure that he does not get an unfair start*"; *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* per Roxburgh J at 392.

But are there 'easier wins' than seeking such a springboard order (e.g. enforcing PTRs)?

In springboard cases, the burden is on the applicant "*to spell out the precise nature and period of competitive advantage*"; QBE paras 240 to 247.

And "*even if [C] has raised an arguable case in relation to the unlawfulness of [D's] conduct, the court must also be satisfied that the relief sought does no more than proportionately negate the springboard advantage improperly obtained in consequence*"; Dorma para 47.

1. Non-dealing with clients improperly approached by the use of misappropriated confidential information; Bullivant –v- Ellis

2. Recruitment freeze; UBS –v- Vestra; Tullett

3. Imposing covenants of more senior employees on more junior ones; Dorma

4. Business freeze; Forse –v- Secarma

But there are no standard orders; in each case, the punishment must fit the crime

SPRINGBOARD HURDLES (1)

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"… an interim springboard injunction effectively delivers to the claimant, in advance of the trial, all or part of the substantive relief which the claimant seeks. At the same time, it operates in restraint of the defendant's freedom to trade or carry on business or to deploy their skills. Such an injunction may also have consequences for the defendant as regards third parties, whether employees or others, if the defendant is precluded from continuing to honour commitments to such third parties. For those reasons, save only where the time gap between the application for interim relief and the trial is insignificant, the court should adopt the approach in Lansing Linde on applications for an interim springboard injunction ..."

Forse –v- Secarma at [34]

And this means that:-

"*The judge should assess and take into account the strength of each side's case both as regards liability and also the length of time during which any unfair advantage from the springboard will continue. In carrying out that exercise, the judge cannot conduct a detailed mini trial on disputed evidence. He or she must, however, undertake a fair and reasonable evaluation of the evidence bearing in mind that there will have been no disclosure, and the witness evidence will be incomplete and untested by cross-examination. I will return to this issue in the context of the assessment of whether the period of unfair advantage would be likely to have expired before the trial has been completed*".

SPRINGBOARD HURDLES (3)

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And as to duration (para 59)

"*Since a springboard injunction should never last longer than is reasonable to remove the unfair advantage secured by the defendant, a judge granting an interim injunction must always do their best to estimate what is the length of the reasonable period. If it is shorter than the period before the trial will commence (the date of which should always be ascertained), they should specify the period and relief will be limited accordingly. If it is at least as long as the period prior to commencement of the trial, it will not normally be necessary to say more than that. In any case, the judge must always state the grounds for their conclusion. They should avoid being too prescriptive because the evidence will be incomplete and untested at the interim stage and, as the present case shows, it may prove to be incorrect and even knowingly false*".

FORSE –V- SECARMA; OTHER MESSAGES

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- Springboard relief well established up to Court of Appeal level, and the Court was not assisted by a debate about first instance authorities that suggested otherwise [34].

- Between the interim hearing and the appeal, further evidence had come to light "*which made that claim even stronger and showed that in certain respects the witness statements made by the defendants and placed before the Judge were seriously misleading*" [47].

- Delay of over 4 months from award of interim relief to 12 day speedy trial was "*surprising*" and "*the court will no doubt be astute to ensure that a claimant does not artificially seek to extend the period of any interim springboard injunction by delaying the expedited hearing*" [58].

- "*In a case where a defendant is subject to an interim injunction of a kind which is of its nature damaging to its business claimants may reasonably be expected to pull out all the stops*" [72].

"The substance of the claimant's case is that it suffered financial loss as a result of the defendants' breach of contract. The effect of the breach of contract was to expose the claimant's business to competition which would otherwise have been avoided. The natural result of that competition was a loss of profits and possibly of goodwill. The loss is difficult to quantify, and some elements of it may be inherently incapable of precise measurement. Nevertheless, it is a familiar type of loss, for which damages are frequently awarded".

One Step at [98]

"The economic effect of the breaches is inherently incapable of being precisely estimated, and may be incapable of even imprecise measurement. Nonetheless it is practically inconceivable that One Step has not suffered significant losses in this relatively small field of business. The law would be failing in its economic purpose if it confined One Step to the fraction of the business lost which was capable of being demonstrated with the necessary degree of confidence …."

One Step at [105]

PROVING LOSS; HOW CAN THE LAW HELP (1)

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In assessing the damages suffered by an employer who is the victim of unlawful competitive activity, the claimant does not have to prove on the balance of probabilities that his loss of profit would have been at a particular level; Parabola Investments Ltd v Browallia Cal Ltd at [22]-[24] and Wellesley Partners LLP v Withers LLP at [94]-[110].

Rather, it is for the court to estimate the loss by making the best attempt it can to evaluate the chances, great or small, taking all significant factors into account, with "*the exercise of a sound imagination and the practice of the broad axe*"; One Step at [37]-[38] and [105].

PROVING LOSS; HOW CAN THE LAW HELP (2)

Where the defendant's actions have denied the claimant visibility of or the ability fully to prove its losses, the law makes 'value' presumptions in the claimants' favour, applying the *Armory v Delamirie* principle, cited with approval in One Step at [38].

Moreover, the claimant does not have to establish (on the balance of probabilities) that a particular client or piece of business would have remained his (or been won by him). All he has to show is that there was a real and substantial (more than merely speculative) chance of this, but for the unlawful competition, and the Court then legislates for the contingencies in its damages assessment of the lost chance.

PROVING LOSS; HOW CAN THE LAW HELP (3)

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In a restrictive covenant case, damages are not limited to the losses suffered during the period of restriction, but can also include sums that reflect the employer's better chance of retaining a client or a parcel of work after the PTRs expire, if the contract-breacher had lawfully observed the restriction; SBJ v Mandy.

SBJ got damages in respect of the profits that would have been earned from the improperly solicited clients in the year of restriction and one third of likely profits that would have been earned over the next three years had the clients remained loyal: (i) painting with a broad brush *("[a] detailed examination of each case would be unrewarding of the effort involved, in my view"*), (ii) having regard to the fact that the evidence supported the conclusion that the clients' primary loyalty was to the defendant employee rather than the claimant employer, and (iii) assessing the extent to which that tie of loyalty might have been weakened (but not extinguished) had the defendant observed *"his year on the touchline … [and] not broken his covenants".* See, e.g., paras 81-83.

GAIN BASED REMEDIES (1)

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- Gain-based and proprietary remedies may be available even if there is no loss/no loss can be proved, if the employee owes and breaches a relevant fiduciary obligation.

- By way of example, what about the disloyal recruiting sergeant who receives a signing bonus for bringing across his team?

- Moreover, proving breach of fiduciary duty may open the door to accessory liability (for knowing receipt of assets transferred or dishonest assistance in breach of fiduciary obligation) by or on the part of the poacher.

- By way of example, what about the senior executive given a substantial year end bonus for successfully recruiting a team of his rival's employees, by using the rival's desk head as an internal recruiting sergeant and/or by giving him a recruitment fund with which to persuade his reports to move?

GAIN BASED REMEDIES (2)

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And whilst damages/an account are either/or remedies against a single defendant, it may be possible to combine the remedies against multiple defendants (thereby maximising recovery)

Consider the case of the bullion thief, the delinquent security guard, and the getaway driver (Lewison J's example in Ultraframe)

Or the poacher (who causes loss by stealing a business team), the poacher's employee who coordinates the poaching raid (and receives a substantial bonus for doing so), and the delinquent fiduciary employees rewarded for acting as recruiting sergeants

KEY CASES

1. Armory –v- Delamirie (1721) 1 Str 505
2. Terrapin Ltd v Builders' Supply Co (Hayes) Ltd [1967] RPC 375
3. Roger Bullivant Ltd v Ellis [1987] ICR 464
4. SBJ Stephenson Ltd v Mandy [2000] IRLR 233
5. Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch)
6. UBS Wealth Management Ltd v Vestra Wealth LLP [2008] IRLR 9
7. Tullett Prebon Plc v BGC Brokers LP [2010] IRLR 648
8. Parabola Investments Ltd v Browallia Cal Ltd [2011] QB 477
9. QBE Management Services (UK) Ltd v Dymoke [2012] IRLR 458
10. Dorma Ltd v Bateman [2016] IRLR 616
11. Wellesley Partners LLP v Withers LLP [2016] Ch 529
12. Morris-Garner –v- One Step Support [2018] UKSC 20
13. Forse –v- Secarma [2019] EWCA Civ 215

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