

Talk to STEP Charity Special Interest Group 2 April 2009

An Introduction to the Charity Tribunal

Good Evening. Thank you for inviting me to speak to the STEP Charity Special Interest Group.

My aim is principally to give you a general introduction to the Charity Tribunal as it is presently constituted, but I also want to tell you how the Charity Tribunal will change later this year, as part of a general program of tribunal reform under the Tribunals Courts and Enforcement Act 2007.

As a result of these reforms, we are currently consulting on our new procedural rules. So I hope I will be able to inspire you to respond to the consultation, whether individually or perhaps as a group. You have until 8 May to do so.

Background

- 1.1 The Charity Tribunal¹ was created by the Charities Act 2006. The policy rationale for its introduction was essentially two-fold: firstly, many charities felt that the Charity Commission could not effectively be challenged because it was too expensive for them to bring a case in the High Court. Secondly, it was felt that, due to the lack of test cases being brought in the High Court, charity law was not being developed and keeping pace with the changing role of charities in society.
- 1.2 The Charity Tribunal has been up and running since March 2008. Almost as soon as we started work we were caught up in proposals to reform the entire tribunal system under the Tribunals Courts and Enforcement Act, and I have spent much more time sitting in meetings on tribunal reform than I have sitting on charity cases so far! We are now starting to hear some cases. Details about the applications made to us, when we are sitting and the decisions we make are published on our website, along with lots of other useful information.

Jurisdiction

- 2.1 Our jurisdiction is established as follows. Section 2A of the 1993² Act provides that

**“(4) The Tribunal shall have jurisdiction to hear and determine—
(a) such appeals and applications as may be made to the Tribunal in accordance with Schedule 1C to this Act, or any other enactment, in respect of decisions, orders or directions of the Commission, and**

¹ The Charity Tribunal has jurisdiction in England and Wales only – charity law and regulation is devolved to both Scotland and Northern Ireland.

² References to the Charities Act 1993 are to that Act as amended by the Charities Act 2006.

(b) such matters as may be referred to the Tribunal in accordance with Schedule 1D to this Act by the Commission or the Attorney General”.

2.2 There are therefore three distinct types of application. As a short-hand guide:

- (i) Appeals, which are appeals against certain decisions, orders or directions of the Charity Commission as set out in Schedule 1C. The schedule lists (in column one) the relevant decision; states (in column 2) who has a right of challenge to that decision and (in column 3) what the Tribunal can do if the appeal is upheld;
- (ii) Reviews, which apply to the few decisions which are not capable of appeal, but in respect of which there is a right to review by the Tribunal, applying the principles that the High Court would apply on an application for judicial review;
- (iii) References, which are matters referred to the Tribunal by the Attorney General (or, with her consent, the Charity Commission) to clarify matters of charity law.

2.3 I will return to look at the different types of application in more depth later. The important point to note is that if you have a decision of the Charity Commission that you want to challenge, you need to find it in the table and read across the columns to find out if you are a person with a right to challenge it and also what the Tribunal can do for you.

2.4 The Tribunal became operational in March 2008 by way of the Third Commencement Order which provides that the Charity Tribunal has jurisdiction in respect of decisions, orders or directions of the Charity Commission made on or after 18 March 2008.

2.5 At the same time that the Tribunal came into force, the Charity Commission introduced a sophisticated internal review mechanism for its decisions. As noted above, the 2006 Act conferred statutory appeal or review rights in respect of the “decisions, orders or directions” set out in the table to Schedule 1C of the 1993 Act. The concept of a “final decision” of the Charity Commission (i.e. one that had been internally reviewed) appeared later, in the Charity Tribunal Rules. It has been a matter of some debate whether the “final decision” reference in the subordinate legislation should properly be regarded as imposing a mandatory “gateway” which charities must pass through before exercising the statutory right to apply to the Tribunal.

2.6 The Charity Commission’s own recent Board Paper reviewing the work of its Final Decision Review and Tribunal Team noted that its revised internal review process has been more resource-intensive than anticipated, but that there had not been the level of applications to the Charity Tribunal originally predicted³. Whilst it is understandable that charities will, on an individual basis, wish to settle any dispute in the fastest, cheapest manner, there is perhaps a wider policy concern that the Commission’s emphasis on local

³ See Board Paper No.(09) OBM 05 for meeting on 28 January 2009. Available on <http://www.charity-commission.gov.uk/>

resolution could result in missed opportunities for the sector to set useful precedent through the Tribunal.

- 2.7 It may be worth bench-marking the operation of the Charity Commission’s internal review process against other such systems, for example the revised procedure operated by HMRC and its relationship to the new Tax jurisdiction in the First-tier Tribunal. HMRC has decided to provide tax payers with an optional opportunity to seek local resolution, offering them an internal review which is to be conducted within a strict timetable, unless the tax payer agrees to allow them more time. In cases where the tax payer chooses not to use the internal system, or the internal review does not overturn the original decision promptly, the right of appeal to the Tribunal is engaged.⁴ It seems to me that this system has much to recommend it as it maintains the emphasis on local resolution but also allows appellants to bring issues forward to the Tribunal speedily if they wish to. We are currently consulting about new procedural rules for the Charity Tribunal and have specifically asked some questions about the relationship between “final decisions” and applications to the Charity Tribunal in that process. It would be very helpful to have your thoughts, I will give you the relevant contact details later.

Administration

- 3.1 The Charity Tribunal is administered by the Tribunals Service which is an Executive Agency of the Ministry of Justice. The administration is conducted by a team based at the Tribunals Operational Support Centre in Leicester. The Charity Tribunal has a dedicated web site at www.charity.tribunals.gov.uk where the legislation, procedural rules, forms and explanatory notes can be found. We also publish details of our hearings and decisions on this site.
- 3.2 The Charity Tribunal does not have its own dedicated hearing centre but moves around, using one of the Tribunal Services’ 42 hearing centres in England and Wales. The Tribunals Service is used to catering for a wide range service user needs, providing interpreters and signers, and has video conferencing facilities, so provided we have good notice there are a range of ways we can assist with any special requirements. The Tribunals Service target is for 75% of cases to be completed (that includes the written judgement being sent to the parties) within 30 weeks.
- 3.3 Assistance may be available to unrepresented litigants through the Chancery Bar Association/Bar Pro Bono Unit’s specialist panel. Details of this scheme are also available on the Charity Tribunal website.
- 3.4 In terms of our constitution, the Charity Tribunal has a salaried President, 5 Legal Members and 7 “Ordinary” Members. Ordinary members are people who appear to the Lord Chancellor to have “appropriate knowledge or experience relating to charities”. Our biographical details are available on the website if you are interested. We were appointed by the Lord Chancellor

⁴ See Customs Information Paper ref: JCCC CIP (09) 10, available on <http://www.hmrc.gov.uk>

following an open competition conducted by the Judicial Appointments Commission. The President or a Legal Member can sit alone to hear cases, and panels can comprise one two or three members (Legal or Ordinary).

Procedure

- 4.1 The Charity Tribunal's procedure is governed by the Charity Tribunal Rules 2008. The Rules provide the procedural framework for a staged exchange of notices and replies by the parties, set the time limits for these and provide the basis for judicial case management and for the final hearing. The Rules will change in September 2009 as a result of the TCEA reforms which I will mention later.
- 4.2 The Rules provide that the time limit for filing the initial notice of appeal or application for review is 42 days from the party being notified of the Commission's final decision (Rule 17) and there are specified time periods for the exchange of documents thereafter (Rules 18 – 20). There is power for the Tribunal to extend the time limit (Rule 17(9)) and to consider allowing an appeal which is out of time (Rule 4). The Tribunal may also give directions of its own motion or on application by the parties (Rule 3) and hold a pre-hearing review for case management purposes (Rule 13); it may also hold a preliminary hearing of any issue (Rule 14). There are specific provisions to deal with vexatious litigants (Rule 11). There are special provisions in respect of the Attorney General's role (Rules 22-23) and in respect of References (Rules 38-40).
- 4.3 The Rules also provide for appeals and reviews to be determined on the papers rather than by way of an oral hearing, if the parties agree (Rule 25). If there is to be an oral hearing, it will usually be in public, but there are certain limited exceptions to this rule (Rule 26). We used to think the Rules were pretty comprehensive, until we were faced with an intervention application by the Equalities and Human Rights Commission and found that intervention applications were not dealt with in the Rules! Our ruling on that issue is now available on the website.

Making an Application

- 5.1 Having "set the scene", I will now consider the three types of application mentioned above in a little more detail.

Appeals

- 5.2 Schedule 1C provides that appeals may be brought by the Attorney General or **"any person specified in the corresponding entry in column 2 of the Table"**. This generally includes the charity trustees of an unincorporated charity, the charity itself if it is incorporated, and **"any other person who is or may be affected by the decision"** but you need to check the table as it varies from case to case. The Commission is the respondent to an appeal.

- 5.3 Schedule 1C paragraph 1 also sets out the approach and powers of the Tribunal in determining an appeal :
- “(4) In determining such an appeal the Tribunal—**
(a) shall consider afresh the decision, direction or order appealed against, and
(b) may take into account evidence which was not available to the Commission.
- (5) The Tribunal may—**
(a) dismiss the appeal, or
(b) if it allows the appeal, exercise any power specified in the corresponding entry in column 3 of the Table”.
- 5.4 In considering the nature of this jurisdiction in our first case, the Tribunal was assisted by Lord Justice May’s comments in E.I. Du Pont Nemours & Co v S.T. Du Pont:⁵

“...the scope of a rehearing ...will normally approximate to that of a rehearing “in the fullest sense of the word” such as Brooke LJ referred to in Tanfern's case [2000] 1 WLR 1311, para 31. On such a rehearing the court will hear the case again. It will if necessary hear evidence again and may well admit fresh evidence. It will reach a fresh decision unconstrained by the decision of the lower court, although it will give to the decision of the lower court the weight that it deserves”.

An appeal to the Charity Tribunal is therefore by way of a substantive rehearing rather than a procedural review of the original decision.

Procedure for Appeals

- 5.5 Rule 17 of the Charity Tribunal Rules 2008 sets out the information which must be included in the appeal notice. It can be submitted electronically. There is no fee to pay. There is an application form available on the Charity Tribunal website together with guidance on how to complete it.

Reviews

- 5.6 As stated above, reviewable matters are those where there is no appeal as such, but there is a right to request a review by the Tribunal. These matters are listed in Schedule 1C paragraph 3(2) and (3), as follows:
- “(2) This sub-paragraph applies to decisions of the Commission—**
(a) to institute an inquiry under section 8 of this Act with regard to a particular institution,
(b) to institute an inquiry under section 8 of this Act with regard to a class of institutions,
(c) not to make a common investment scheme under section 24 of this Act,
(d) not to make a common deposit scheme under section 25 of this Act,

⁵ [2006] 1 WLR 2793 at paragraph 96.

- (e) not to make an order under section 26 of this Act in relation to a charity,
 - (f) not to make an order under section 36 of this Act in relation to land held by or in trust for a charity,
 - (g) not to make an order under section 38 of this Act in relation to a mortgage of land held by or in trust for a charity.
- (3) This sub-paragraph applies to an order made by the Commission under section 69(1) of this Act in relation to a company which is a charity.**

5.7 An application for a Review may be made to the Tribunal by the Attorney General, or any person mentioned in the entry in column 2 of the Table which corresponds to the entry in column 1 describing the reviewable matter. Unfortunately, the table in Schedule 1C does not itself distinguish between appeals and reviews, so you need to make a note in your copy of the table where the decisions mentioned above appear. The Commission is the respondent to such an application.

5.8 The Tribunal’s powers on hearing a Review are set out in Schedule 1C paragraph 4, which provides as follows:

“(4) In determining such an application the Tribunal shall apply the principles which would be applied by the High Court on an application for judicial review.

(5) The Tribunal may—

(a) dismiss the application, or

(b) if it allows the application, exercise any power mentioned in the entry in column 3 of the Table which corresponds to the entry in column 1 which relates to the reviewable matter”.

5.9 It is important to note that reviews under the 2006 Act are not in fact judicial reviews, but rather another type of review, applying judicial review principles. This judicial-review-type power appears in the enabling legislation for some other tribunals also (for example the Competition Appeal Tribunal applies judicial review principles in proceedings under Enterprise Act 2002⁶). As the power is also exercised by the new Upper Tribunal under s.15(4) TCEA, (where it is referred to as a “judicial review” jurisdiction, complete with inverted commas) it is perhaps likely that case law as to the exercise of that jurisdiction will emerge in the not too distant future⁷.

5.10 Column 3 of the table describes the powers of the Tribunal in respect of Reviews and variously includes power for the Tribunal to (a) quash the Commission’s decision; (b) remit the matter to the Commission; and (c) supplement the order or direction. The power to remit is further clarified in paragraph 5 of schedule 1C as:

“the power to remit the matter either—

⁶ <http://www.catribunal.org.uk/242/About-the-Tribunal.html>

⁷ Decisions of the Upper Tribunal are reported at <http://www.bailii.org/uk/cases/UKUT/AAC/2009/>

- (a) generally, or**
- (b) for determination in accordance with a finding made or direction given by the Tribunal”.**

Procedure for Reviews

5.11 Rule 17 of the Charity Tribunal Rules 2008 sets out the information which must be included in the application for review. The application can be submitted electronically. There is no fee to pay. There is an application form available on the Charity Tribunal website together with guidance on how to complete it.

The Role of the Attorney General

- 6.1 The role of the Attorney General is one of the more unusual jurisdictional features of the Charity Tribunal and potentially a significant tool in considering how precedent-setting charity law cases might come to be decided. Although the reference procedure is most often highlighted in this regard, there are in fact a number of ways in which the Attorney General might become involved in proceedings before the Tribunal to argue a novel point:
- (i) The Attorney General (or with her consent, the Charity Commission) may refer to the Tribunal any question “*involving the operation of charity law in any respect or the application of charity law to a particular state of affairs*”⁸. The Tribunal has the power to join other parties to references, for example charities operating in the jurisdictional area in question. “*Charity law*” for these purposes means the 1993 and 2006 Acts and any other enactment specified in regulations made by the Minister, and any rule of law which relates to charities. “*Enactment*” includes subordinate legislation⁹;
 - (ii) The Attorney General may herself instigate appeals and reviews of decisions and may intervene (whether at her own instigation, that of the Tribunal – either of the Tribunal’s own motion or on the application of one of the parties - or that of the High Court on appeal from the Tribunal¹⁰) in Appeals and Reviews commenced by others;
 - (iii) The Attorney General can also be joined as a party to any onward appeal from the Tribunal to the High Court, whether or not she was a party to the original proceedings before the Tribunal;

⁸ See Charities Act 1993, Schedule 1D paragraph 2.

⁹ See Charities Act 1993, Schedule 1D paragraph 7.

¹⁰ N.B After the TCEA reforms take effect, onward appeals in charity cases will be heard in the Upper Tribunal rather than the High Court.

- (iv) The Attorney General can also be asked to “assist” the Tribunal with any question arising in proceedings, without participating in the whole case.
- 6.2 Before the advent of the Charity Tribunal, when charity appeals were heard in the High Court under the Civil Procedure Rules (“CPR”), the Attorney General was a necessary party to appeals concerning s. 4 of the 1993 Act (registration), s.16 (schemes) and s. 18 (suspension and removal of trustees). The CPR provisions are not replicated in the Charity Tribunal Rules; however the Attorney General has expressed an interest in being notified of any such cases before the Tribunal, via the Treasury Solicitor. I have respectfully suggested to the Attorney General’s Office that it might clarify on its website the procedure for charities seeking to involve her in any other cases.¹¹ Whilst I am sure that charities “in the know” will feel able to petition the Attorney General to become involved in their cases or to make references to the Tribunal on general matters of importance to the sector, I am concerned that the average charity may not know how to go about involving her without more information being put into the public domain.
- 6.3 In the few cases that the Charity Tribunal has heard so far, the Attorney General has intervened (at the instigation of the Tribunal) in one case and offered assistance when requested to do so by the Tribunal in another. The involvement of the Attorney General has proved extremely useful to the Tribunal, but it is as yet difficult to predict how frequently her powers will be exercised.

Hearings

- 7.1 Rule 29 provides for the flexible conduct of Hearings as follows:

“(1) Subject to the 1993 Act, the 2006 Act and these Rules, the Tribunal must conduct all hearings under these Rules in such manner as the Tribunal considers most suitable to the clarification of the issues before it, and generally to the just, expeditious and economical determination of the proceedings.

(2) Subject to any directions by the Tribunal, the parties may—

(a) give evidence;

(b) make a request under rule 3 (directions) to present expert evidence;

(c) call witnesses;

(d) question any witnesses; and

(e) address the Tribunal on the evidence, and generally on the subject matter of the appeal or application.

(3) Evidence may be admitted by the Tribunal—

(a) whether or not it would be admissible in a civil trial in England and Wales; and

¹¹ See http://www.attorneygeneral.gov.uk/sub_our_role_work.htm

(b) whether or not it was available to the Commission when the Commission’s final decision was made”.

- 7.2 We try to make our hearings as informal as possible. You will not see any “fancy dress” of the sort shown here in the Tribunal! It should look more like this! The Tribunal takes the reference to “just expeditious and economical” in Rule 29 extremely seriously, and uses its case management powers as a way of managing the conduct of hearings in advance wherever possible. These may be more or less prescriptive, depending on the type of case and whether the applicant is represented. They might, for example, include directing that witness statements will serve as evidence in chief; providing for agreed bundles of documents to be prepared by the parties; requiring the submission of a list of issues in dispute or the provision of skeleton arguments on any matters of law.
- 7.3 Directions will usually be on paper, however there is power to hold a pre-hearing review if the Tribunal considers this appropriate (Rule 13) and there must be a directions hearing where the Attorney General has intervened (Rule 22(3)). We have thus far held some directions hearing by telephone, given some rulings on the papers and held several oral directions hearings.
- 7.4 The Charity Tribunal has specific powers to award costs. S.2B of the 1993 Act provides that:

“ (5) The Tribunal may award costs only in accordance with subsections (6) and (7) below.

(6) If the Tribunal considers that any party to proceedings before it has acted vexatiously, frivolously or unreasonably, the Tribunal may order that party to pay to any other party to the proceedings the whole or part of the costs incurred by that other party in connection with the proceedings.

(7) If the Tribunal considers that a decision, direction or order of the Commission which is the subject of proceedings before it was unreasonable, the Tribunal may order the Commission to pay to any other party to the proceedings the whole or part of the costs incurred by that other party in connection with the proceedings”.

This is supplemented by Rule 33, which requires the Tribunal to hear representations from the paying party before making a costs order and, having done so, for the Tribunal to award either a fixed amount or for costs to be assessed.

- 7.4 At present, appeals from the Charity Tribunal may be made to the High Court on a point of law and from there to the Court of Appeal – see s. 2C of the 1993 Act as amended. An appeal under this section may be brought only with the permission of (a) the Tribunal, or (b) if the Tribunal refuses permission, the High Court¹². Rule 34 provides for the Tribunal to review and set aside its

¹² N.B After our move into the General Regulatory Chamber of the First-tier Tribunal, appeals will be to the Upper Tribunal and from there to the Court of Appeal.

own decision in relation to appeals against Charity Commission decisions, orders and directions only, if it was wrongly made as a result of an administrative error by the Tribunal or its staff.

Tribunals Reform

- 8.1 I would now like to turn to the topic of tribunal reform. Some of you may know that the need to reform the tribunal system was highlighted by Sir Andrew Leggatt's 2001 Report *Tribunals for Users: One System, One Service*,¹³ which found that more than 60 tribunals had grown up in an almost entirely haphazard way and were operating essentially in parallel, without either common administrative procedures or a shared jurisprudential approach. In many instances, tribunals were perceived as part of the Executive rather than part of the civil justice framework, and were not truly independent of the public authority whose decisions they reviewed.
- 8.2 Leggatt argued that Tribunals should be seen as providing a valuable and distinctive approach to the resolution of disputes. The Government accepted Leggatt's recommendations and the Tribunals Service was established as an Executive Agency of the Ministry of Justice in 2006. The creation of the Tribunals Service provided a distinct administrative system for tribunals. It dealt with nearly 600,000 cases in 2007/8. The next phase involves the reform and integration of tribunals' judicial functions under the Tribunals Courts and Enforcement Act 2007 ("TCEA"). The first tranche of tribunals transferred into the new system on 3 November 2008, with more, including the Charity Tribunal, to follow shortly.
- 8.3 The end-result of the TCEA reforms is that most (but not all) of the existing tribunal jurisdictions will cease to exist as stand-alone Tribunals and transfer instead into a generic two-tier Tribunal, comprising the First-tier Tribunal and the Upper Tribunal. This has the effect, as noted above, of formally severing the individual jurisdictions from the Government Department or other body which in many cases sponsors them, and whose decisions they review. Both the First-tier Tribunal and the Upper Tribunal are organised into several judicial/administrative units, known as "Chambers". Each Chamber has a judicial head (the Chamber President), shares some degree of administrative support and operates under generic procedural rules, supported by jurisdiction-specific practice directions where appropriate.
- 8.4 Subject to Parliamentary approval, it is proposed that the Charity Tribunal will transfer into what is known as the General Regulatory Chamber ("GRC") of the First-tier Tribunal in September 2009. Other tribunal jurisdictions transferring into the GRC include the Information Tribunal, Gambling Appeals Tribunal, Consumer Credit Appeals Tribunal, Adjudication Panel for England and Estate Agents Appeal Panel. Onward appeals from decisions of the GRC will generally be heard in the Administrative Appeals Chamber of the Upper Tribunal (with appeals from the Upper Tribunal going straight to

¹³ See <http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm>

the Court of Appeal), however it is proposed that there should now be a “Chancery”¹⁴ Chamber of the Upper Tribunal, created to hear those Upper Tribunal cases in the finance, tax, land and charity jurisdictions. This will allow for the secondment of Chancery Division judiciary to sit in the Upper Tribunal with dedicated Upper Tribunal judges.

- 8.5 As mentioned above, the Charity Tribunal’s current procedure is governed by the Charity Tribunal Rules 2008. These rules are due to change in favour of generic procedural rules for the GRC. The rules are currently the subject of a consultation exercise being conducted by the Tribunal Procedure Committee, which has responsibility under s.22 TCEA for the making of “Tribunal Procedure Rules”. The consultation asks whether these new rules are appropriate for each jurisdiction, in addition to posing a number of specific questions with regard to the proposed conduct of charity cases in particular. There are also dedicated procedural rules for the Upper Tribunal and the consultation asks whether these will need to be amended for the conduct of hearings by the new “Chancery” Chamber of the Upper Tribunal in due course.
- 8.6 In most cases, the First-tier Tribunal will be the natural starting point for proceedings, with appeal to the Upper Tribunal on a point of law. However, in appropriate cases, it is proposed that proceedings could be transferred so as to be heard at first instance in the Upper Tribunal, with onward appeals on points of law going straight to the Court of Appeal. This flexibility of approach would allow appropriate cases to be “fast-tracked” to a level where precedent could be set for the benefit of the sector as a whole. The current consultation on the GRC Rules asks whether Attorney General’s references should always be heard by the Upper Tribunal, and also what the role of the parties should be in considering whether any other case should be fast-tracked in this way. The draft rules provide for a high degree of procedural flexibility so that cases in the First-tier (perhaps more likely to involve litigants in person) can avoid unnecessary formality, whereas Upper Tribunal hearings can take a more legalistic form.
- 8.7 In terms of staffing the new system, the present members of the Charity Tribunal (Legal and Ordinary) will transfer into the GRC as Judges and Other Members of the First-tier Tribunal¹⁵. They will be “ticketed” to sit in the charity jurisdiction. My own role will also evolve, as I shall cease to be the President of the Charity Tribunal and become instead the Principal Judge for Charity Appeals Reviews and References. I will be appointed as a Deputy Judge of the Upper Tribunal, so able to divide my time between the two tiers. There will in future be opportunities for all tribunals’ judiciary (legal and lay members) to be “ticketed” to sit in more than one jurisdictional area within the First-tier, or indeed “assigned” to different Chambers, but only if they meet the statutory eligibility requirements for each jurisdiction and there is a

¹⁴ This Chamber does not have a definite name as yet.

¹⁵ See s.4 TCEA 2007.

business need. The Upper Tribunal will have a dedicated hearing centre in London but maintain the ability to sit elsewhere if needed. The First- tier Tribunal will sit in various shared tribunal hearing centres in England and Wales, as is currently the case.

- 8.8 For the full consultation document, see www.tribunals.gov.uk/Tribunals/PlannedChanges/grconsultation.htm. I hope you will respond, in which case your responses should be sent to tpcsecretariat@justice.gsi.gov.uk by 8 May 2009. That is all I want to say for now, but I will be happy to answer your questions.

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