

Environment Protection Authority v Rashleigh [2005] ACTCA 42 (18 November 2005)

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ENVIRONMENT PROTECTION AUTHORITY v SCOTT RASHLEIGH[2005] ACTCA 42 (18 NOVEMBER 2005)

ADMINISTRATIVE LAW – appeal from Administrative Appeals Tribunal – application for licence to take water – whether lessee has proprietary interest in groundwater – whether regulation of access to groundwater impermissible acquisition of property.**ADMINISTRATIVE LAW** – merit review – need for Tribunal to make findings of fact and reach correct or preferable decision.*Water Resources Act 1998* (ACT), s 13, s 27 [Australian Capital Territory \(Self-Government\) Act 1988](#) (Cth), s 23

The Constitution of the Commonwealth of Australia, s 51 [Administrative Appeals Tribunal Act 1989](#) (ACT), s 44 *Water Resources Management Plan 1999*

Iris Frank v Australian Capital Territory (2001) 146 ACTR 15 *Scott Rashleigh v Environment Protection Authority* [2005] ACTSC 18 *Ballard v Tomlinson* [1885] 29 Ch D 115 *Cambridge Water Co v Eastern Counties Leather PLC* [1993] UKHL 12; [1994] 2 AC 264 *Gartner v Kidman* [1962] HCA 27; (1962) 108 CLR 12 *Xuerab v Viola* (1990) Aust Torts Reports 81-012 *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 *Commonwealth of Australia v The State of Tasmania and Others* [1983] HCA 21; (1983) 158 CLR 1 *Federal Commissioner of Taxation v Swift and Others* (1989) 18 ALD 679 *Halsbury's Laws of England* (4th ed 2004 reissue) Vol 49(2): Water
ON APPEAL FROM A SINGLE JUDGE OF THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORYNo. ACTCA 15-2005No. SCA 55 of 2004Judges

Gray, Connolly and Marshall JJ Court of Appeal of the
Australian Capital Territory Date 18 November 2005 **IN THE
SUPREME COURT OF THE)** No. ACTCA 15-
2005 **AUSTRALIAN CAPITAL TERRITORY)** No. SCA 55
of 2004 **COURT OF APPEAL)** **ON APPEAL FROM A
SINGLE JUDGE OF THE SUPREME COURT OF THE
AUSTRALIAN CAPITAL TERRITORY**

BETWEEN: ENVIRONMENT PROTECTION

AUTHORITY

Appellant

AND: SCOTT RASHLEIGH

Respondent Judges: Gray, Connolly and Marshall JJ Date: 18
November 2005 Place: Canberra

ORDER

THE COURT ORDERS THAT:

1. The Appeal is allowed.
2. Orders 2 and 3 of Crispin J of 18 March 2005 be set aside.
3. In lieu thereof, the decision of the Administrative Appeals Tribunal of 7 September 2004 be set aside.
4. The matter is remitted to the Tribunal for determination in accordance with these reasons.

5 There be no order as to the costs of the
. appeal.

6 The appellant pay the respondent's costs of his cross-appeal and notice of
. contention.

**IN THE SUPREME COURT OF THE) No. ACTCA 15-
2005 AUSTRALIAN CAPITAL TERRITORY) No. SCA 55
of 2004 COURT OF APPEAL) ON APPEAL FROM A
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BETWEEN: ENVIRONMENT PROTECTION

AUTHORITY

Appellant

AND: SCOTT RASHLEIGH

Respondent

Judges: Gray, Connolly and Marshall JJ Date: 18 November
2005

Place: Canberra

REASONS FOR JUDGMENT

THE COURT:

1. This is an appeal from a decision of a judge of this court upholding an appeal from the Administrative Appeals Tribunal (the Tribunal) concerning the respondent's application for a licence to operate a bore to take groundwater from his

residential property in suburban Red Hill in the Australian Capital Territory. The Tribunal affirmed the decision of the primary decision maker that such a licence should not be granted. The respondent appealed to this court. An appeal lies from a decision of the Tribunal to a single judge of this court on a question of law. The primary judge upheld the appeal, set aside the decision of the primary decision maker affirmed by the Tribunal, and determined that the respondent should be granted a licence to take 1.5 megalitres of water per annum from his property. The primary judge issued a stay of that part of his order requiring the licence to be granted pending the determination of this appeal.

2. Prior to 1998, there was, it seems, no legal regime regulating access by residential lessees to groundwater below their leases. In that year the Legislative Assembly enacted the *Water Resources Act 1998* (ACT) (the *Water Resources Act*) which, inter alia, set up a regime to regulate access to subterranean water, and required lessees to obtain a licence to operate a bore. The *Water Resources Act* provides in s 13 that:

Subject to this Act, the right to the use, flow and control of all water of the Territory (other than ground water under land the subject of a lease of Territory land granted before the commencement of this section) is vested in the Territory and, subject to any other Act, those rights are exercisable by the Minister in the name of and on behalf of the Territory.

This section commenced on 11 December 1998.

3. It was common ground that Mr Rashleigh obtained his residential lease before the commencement of s 13 of the *Water Resources Act*, and so the Act, on its terms, did not purport to vest rights in water below his lease in the Territory. The scheme of the Act, insofar as it regulates access to groundwater, is that it provides for a regime of tradable water allocations as well as licences to operate bores. A water allocation is required to take surface water, groundwater under unleased Territory land, or groundwater under land the subject of a lease of Territory land granted after the commencement of s 13 of the Act (s 27). It was common ground that Mr Rashleigh, as the holder of a pre-

December 1998 lease, did not require a water allocation.

4. It is common ground that Mr Rashleigh established a bore to water his domestic garden well before the *Water Resources Act* commenced operation, and that he was unaware of the entry into force of the Act. The Act provided an exception in favour of owners of pre-existing bores in that they had a period of twelve months before they were required to obtain a licence. Mr Rashleigh was unaware of this. It seems that his neighbours were not, and it is apparent from material before the Court that his neighbours on both sides, and across the road, have obtained licences to operate their bores.

5. When Mr Rashleigh became aware of the requirement to obtain a licence he made appropriate application in December 2003. By this time a number of licences had been granted, to the point, says the appellant, that the sustainable volume of water that could be drawn from the aquifer in Red Hill was fully allocated, and it was primarily on this basis that his application was denied.

6. The argument proceeded before the primary judge on the basis that a requirement to obtain a licence to extract bore water was inconsistent with the property rights of the respondent as the holder of a residential lease, and that a refusal to permit him to extract water amounted to, or could amount to, an acquisition of property other than on just terms. The [Australian Capital Territory \(Self-Government\) Act 1988](#) (Cth) (the *Self-Government Act*) provides in s 23(1)(a) that the Legislative Assembly has no power to enact a law with respect to "the acquisition of property otherwise than on just terms". His Honour appears to have endorsed the view that the *Water Resources Act* did amount to an inappropriate "sterilisation" of the respondent's property rights. It was common ground that the effect of s 23(1)(a) of the *Self-Government Act* is the equivalent, for the purposes of the ACT, to [s 51\(xxxi\)](#) of The [Constitution](#) of the Commonwealth of Australia in respect of laws of the Commonwealth Parliament, and so much has been held by the Full Court of this Court in *Iris Frank v Australian Capital Territory* (2001) 146 ACTR 15.

7. The appeal appeared to be proceeding on the basis of a conflict between two important and significant legal principles - the prohibition on the acquisition of property otherwise than on just terms by the Territory Parliament, and the need in a drought prone environment for the Territory Parliament to conserve and regulate access to a scarce resource such as groundwater.

8. Senior Counsel for both parties, however, indicated to this Court that they were in substantial agreement that, to the extent that his Honour's judgment indicated that his Honour was of the view that the *Water Resources Act*, insofar as it requires a person who was, immediately prior to the commencement of the Act, the holder of a residential lease, to obtain a licence to operate a bore to extract groundwater, amounts to an acquisition of property otherwise than on just terms, that view would be in error. They were in agreement that, to this extent, the appeal should be allowed, and the order that a licence should be granted to the respondent should be set aside. The real issue in dispute between the parties on the appeal was whether the decision of the Tribunal affirming the refusal to issue a bore licence should stand, or whether that decision was tainted by such error of law that it should be set aside and the matter remitted to the Tribunal to be determined according to law.

9. An appeal court is not, of course, bound to accept any concessions or agreements of counsel on a point of law. The question as to whether the regulatory regime established by the *Water Resources Act* goes beyond the legislative power of the Legislative Assembly is an important one, and one on which this Court must form its own view.

10. His Honour did hold (*Scott Rashleigh v Environment Protection Authority* [2005] ACTSC 18 at [36]) that the holder of a residential lease has, pursuant to that lease, a right to the groundwater under that lease, and he said that he was:

... unable to see any reason to doubt that proprietary rights to water under land the subject of a Crown lease should not be regarded as "property" for the purposes of [s23(1)(a) of the Self-Government Act].

11. It seems to us that this proceeded on what appears to have

been an assumption in the course of argument before his Honour that the nature of the interest or right a property owner or lessee has to water under their land amounts to a proprietary interest. On a careful review of the authorities it seems to us that, at common law, an owner or lessee of land, while they have a right to access water flowing below that land, does not have property in that water. The position is well stated in Halsbury's Laws of England (4th ed 2004 reissue) Vol 49(2): Water, at [47]:

Although certain rights as regards flowing water are incident to the ownership of riparian property, the water itself, whether flowing in a known and defined channel or percolating through the soil, is not, at common law, the subject of property or capable of being granted to anybody. Flowing water is only of public right in the sense that it is public or common to all who have a right of access to it.

12. Thus, while one landowner may be able to bring an action in nuisance to prevent a neighbour from polluting groundwater, no action would lie to prevent a neighbour from extracting water in such quantities that another's ability to extract water would be adversely affected. So much was decided in *Ballard v Tomlinson* [1885] 29 Ch D 115 where Lindley LJ said (at 120):
... every owner of land has a right to sink a well in his own land and to take from his well all the water he can get, and that as every owner has this right no owner can maintain an action against another for exercising that right, even although by exercising it he drains underground water from the plaintiff's land and so deprives him of water which would otherwise come to his well.

This was said by his Honour to be "settled in law by the highest judicial authority" (at 125). To a similar effect, Cotton LJ (at 143, 144) and Brett MR.

13. The nature of this right to extract underground water was examined by Lord Goff in *Cambridge Water Co v Eastern Counties Leather PLC* [1993] UKHL 12; [1994] 2 AC 264 at 296-297 where he said:

In his judgment in Ballard v Tomlinson, 29 Ch D 115, 124,

Cotton LJ spoke of the plaintiff's right to abstract percolating water beneath his land as a "natural right incident to the ownership of his own land." In the present context, however, this means no more than that the owner of land can, without a grant, lawfully abstract water which percolates beneath his land, his right to do so being protected by the law of tort, by means of an action for an injunction or for damages for nuisance.... There is no natural right to percolating water, as there may be to water running in a defined channel...

14. In *Gartner v Kidman* [1962] HCA 27; (1962) 108 CLR 12 Windeyer J affirmed that (at 23) :

... by the common law the proprietor of land upon the banks of a natural stream of running water, is entitled to have, and is obliged to accept, the flow of water past his land....These rights and obligations...are proprietary in character.

His Honour was, however, there referring only to the nature of the claim to water flowing above land in a defined stream.

15. These English authorities have been followed in Australia (*Xuerab v Viola* (1990) Aust Torts Reports 81-012 per Giles J), and establish that, at common law, while any landowner may extract groundwater, no landowner has property in that water. It follows that Parliament may intervene to regulate, in the public interest, access to that water, without interfering with an interest in property.

16. Moreover, it seems to us that, even if the right to extract water percolating under land is anything more than one of the "bundle of rights" that go to make up "property" (*Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 at 366), the imposition by the Legislative Assembly of a regime to regulate access to underground water does not amount to an acquisition of any such property.

17. The objects of the *Water Resources Act* are set out in s 3 as follows:

The objects of this Act are-

(a) to ensure that the use and management of the water resources of the Territory sustain the physical, economic and social wellbeing of the people of the ACT while protecting the

*ecosystems that depend on those resources; and
(b) to protect waterways and aquifers from damage and, where practicable, to reverse damage that has already occurred; and
(c) to ensure that the water resources are able to meet the reasonably foreseeable needs of future generations;
and this Act shall be construed and administered accordingly.*

18. It seems to us that the regulatory regime established by the *Water Resources Act* requiring a landowner to obtain a licence to operate a bore to extract groundwater would not amount to an acquisition of property, even if the nature of the landowner's right to the water was proprietary. In *Commonwealth of Australia v The State of Tasmania and Others* [1983] HCA 21; (1983) 158 CLR 1 (the *Tasmanian Dams Case*), Deane J was part of the majority which held that a Commonwealth law which prevented the Tasmanian Government from erecting a dam to collect the waters flowing through Tasmanian Crown Lands in a wilderness area did not amount to an acquisition of property. His Honour said (at 283):

...laws which merely prohibit or control a particular use of, or particular acts upon, property plainly do not constitute an "acquisition" of property for purposes of the Commonwealth. Commonly, such laws are of general application and apply to property by reason of its being property of a particular description or by reference to the nature of the use or act prohibited or controlled. While a law which restricts or controls the use or enjoyment of property by means of specific identification of the property affected comes closer to the area of acquisition of property, it is, as a matter of ordinary language, impossible to say that there has been any acquisition of property if all that is involved is restriction of what can be done upon it...

19. The need for an acquisition, as opposed to a mere interference with the free exercise of a property right, was further emphasised in the judgment of Mason J in the *Tasmanian Dams Case* where his Honour said (at 145): *The emphasis in s 51(xxxi) is not on a "taking" of private property but on the acquisition of property for purposes of the*

Commonwealth. To bring the constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.

20. It should be noted that the regulatory regime in relation to subterranean water established by the *Water Resources Act* involves both licensing of bores and the concept of a water allocation. A water allocation must be acquired by a person wishing to extract water from unleased land, or from land the subject of a lease granted after the commencement of s 13 of the Act (s 27). Persons such as Mr Rashleigh, who held a residential lease issued before the commencement of s 13, do not need to obtain a water allocation from either the Territory, or by open market purchase. This provision, taken with the effect of s 13 (which vests the right all water in the Territory except for groundwater under land the subject of a pre-existing lease) seems to us to recognise the pre-existing common law right of a landowner to access groundwater. The legislature, it seems to us, has clearly evinced an intention not to interfere with these rights, even though, in our view, these rights do not amount to proprietary rights. To the extent that all landholders require a licence to operate a bore to access groundwater, whether or not they require an allocation to use that water, that requirement does not amount to an acquisition of property.

21. It follows that his Honour was to this extent in error, and the appeal must be upheld, and the order quashing the Tribunal's decision and substituting an order that a licence be granted should be set aside.

22. Counsel for the appellant argued that the Tribunal's decision should stand. Counsel for the respondent submitted that, notwithstanding the setting aside of the primary judge's orders, the decision of the Tribunal was vitiated by such error that it should be set aside by this court, and the matter remitted to the Tribunal to determine according to law.

23. Mr Robertson SC, for the respondent, submitted that the

Tribunal had both misconceived its proper role in reviewing the primary decision, and had also misconceived the appropriate nature of the statutory discretion to grant a bore licence under the *Water Resources Act*.

24. The Tribunal is an administrative review tribunal created by statute and clearly modelled on the Commonwealth Administrative Appeals Tribunal (AAT). [Section 44](#) of the [Administrative Appeals Tribunal Act 1989](#) (ACT) provides that - *For the purposes of reviewing a decision, the tribunal may exercise all the powers and discretions that are given by any relevant enactment on the person who made the decision and shall make a written decision-*

(*affirming the decision under review;*

a or

)

(b) varying the decision under review; or

(c) setting aside the decision under review and-

(i) making a decision in substitution for the decision so set aside; or

(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the tribunal.

25. The nature of merit review in the Commonwealth AAT is now well settled, and it seems to us that, given the similarity between the statutory language used by both the Commonwealth and ACT Acts, this same approach must govern the exercise of the jurisdiction of the Tribunal. The jurisdiction exercised by the Tribunal is not an appellate jurisdiction. Rather, it is a jurisdiction to examine the evidence and make the "correct or preferable decision". The law is well summarised by French J in *Federal Commissioner of Taxation v Swift and Others* (1989) 18 ALD 679 where his Honour said (at 691) that the Tribunal was: *... bound to consider the relevant facts proved on the evidence before it and to decide on the basis of those facts what was the correct or preferable decision: Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577 at 589 (Bowen CJ and Dean J); Nevestic v Minister for Immigration*

and Ethnic Affairs (1981) 34 ALR 639 at 640 (Franki J); Commonwealth of Australia v Ford (1986) 65 ALR 323 at 328 (Wilcox J); Freeman v Secretary, Department of Social Security (1988) 15 ALD 671 (Davies J); Fletcher v FCT (1988) 84 ALR 295 at 306 (Full Court). In that process it was neither entitled nor required to place weight upon the fact that the Commissioner had exercised his discretion in a particular way: Collins v Minister for Immigration and Ethnic Affairs [1981] FCA 147; (1981) 36 ALR 598 at 603 (Full Court).

26. Mr Robertson made the submission that, in exercising its jurisdiction the Tribunal appears to have examined the reasoning of the primary decision maker, and considered, not whether that was the correct or preferable decision on all of the evidence, but whether the findings of the primary decision maker were open on the evidence. While this is an appropriate approach for judicial review, it is not the appropriate role for the Tribunal.

27. In the Tribunal's reasons, it is stated at [73] (AB 75) that the primary decision maker's finding that the grant of a licence to the respondent to take additional water from the aquifer would result in an adverse effect on the aquifer "is clearly open".

28. As a matter of law as well as logic, any administrative decision maker exercising a statutory discretion may have a range of determinations that would be properly open to reach. In exercising the statutory function conferred by the legislature on the Tribunal, the Tribunal is required to stand in the shoes of the primary decision maker, and reach the correct or preferable decision. To merely conclude that a decision was open to the primary decision maker is insufficient, and, it seems to us, ground for intervention on appeal.

29. The primary decision maker refused the respondent's application for a licence on the ground, inter alia, that the sustainable extraction capacity for the relevant aquifer had already been allocated, and that to grant an additional bore licence would result in an adverse effect on the aquifer. Clearly this was an important finding, which, on the respondent's case, was not fully demonstrated on the evidence. In exercising its function the Tribunal was required, as French J put it, "to

consider the relevant facts proved on the evidence before it and to decide on the basis of those facts what was the correct or preferable decision". To find merely that a decision was open to the primary decision maker, it seems to us, is to fall into appellable error.

30. Mr Gageler SC, for the appellant, did not dispute that the proper role of the Tribunal is that set out in *FCT v Swift*, but made the submission that the Tribunal had merely fallen into linguistic slips, and in reality had made its own findings. It is certainly correct that at [83] (AB 76) the Tribunal notes that its role is to make the correct or preferable decision in the circumstances of the case. It seems to us, however, that at [73], and also at [77] and [85] the Tribunal has, rather than making its own findings on the evidence and deciding on the basis of these findings what was the correct or preferable decision, limited its review to finding that the decision made by the primary decision maker was one which was open to be made, and has proceeded on this basis to dismiss the appeal. This is an erroneous approach, and it seems to us that the matter must on this basis be remitted to the Tribunal.

31. Mr Roberson further submitted that the Tribunal, and the primary decision maker, were both in error in that they approached the exercise of the statutory discretion to grant a licence to operate a bore on an erroneous basis. Section 35(7) of the *Water Resources Act* sets out a range of factors which a decision maker is required to take into account in determining whether or not to grant a licence. It was common ground between the parties, and a correct approach to statutory construction, that such a provision provides a non-exhaustive list of factors that are to be taken into account in exercising an administrative discretion. Mr Roberson's submission is that both the primary decision maker, and the Tribunal, by referring to these factors as "criteria", adopted an approach that these were the sole relevant factors to be taken into account, and that failing to meet, or an adverse finding relating to any one of the criteria would result necessarily in a refusal to grant a licence. Such an approach would be in error.

32. Section 35(7) provides:

In deciding whether or not to grant a licence to take water, the authority shall take into account-

(a) the applicant's environmental record both in the Territory and elsewhere so far as it relates to water; and

(b) whether to grant the licence-

(i) would have an adverse effect on the environment; or

(ii) would adversely affect environmental flows of a particular waterway or aquifer or the rights of other water users; and

(c) whether the applicant has been convicted of an offence against this Act or a corresponding law of a State or another Territory; and

(d) in the case of an application for a licence to take ground water-

(i) whether the quantity of water available can meet the demand or there is a risk that the available water will not be sufficient to meet future demand; and

(ii) whether the taking of the water will or is likely to affect the quality of the water in the place to which the application relates.

33. In the primary decision (AB 91) the primary decision maker said that:

In approving a licence to take water, the Environmental Protection Authority must take into account section 35(7)(a), 35(7)(b)(i), 35(7)(b)(ii), 35(7)(c), 35(7)(d)(i), 35(7)(d)(ii) ...of the Water Resources Act 1998.

This is correct, but it does not follow that these are the only factors to be taken into account. The decision maker then said that (AB91):

The Environment Protection Authority refused to grant the licence to take water on the basis that: the reasons for removal did not satisfy all of the Criteria for Approval, as outlined below.

The decision maker then proceeded to assess the application against each of the provisions of s 35(7). While these factors must be taken into account in proper decision making, the

primary decision maker, insofar as they refer to these as the "Criteria for Approval", creates the impression that these are the sole and mandatory "criteria" for the exercise of the statutory discretion.

34. In exercising the administrative review, the Tribunal also adopted the terminology of "criteria" in reference to this non-exhaustive list of factors to be taken into account. Although, as Mr Gageler pointed out, the Tribunal did look at other factors in [86] and [87], clearly indicating that the enumerated factors in s 35(7) were not exhaustive, the Tribunal said that of one such additional factor that it "does not justify the grant of a licence where to do so would clearly be contrary to one of the criteria necessary to be satisfied". It seems to us that this falls into the same error identified in the primary decision, that is, to take failure to meet one of the factors as necessarily resulting in an adverse decision. This, it seems to us, is further reason to remit the decision to the Tribunal for redetermination according to law.

35. The redetermination of the respondent's application for a bore licence in the Tribunal will necessarily focus on questions going to the factors identified in s 35(7), particularly the question of whether the grant of a licence would have an adverse effect on the environment, or would adversely effect environmental flows of a particular aquifer (s 35(7)(b)). There was material in the appeal book going to certain determinations that the appellant has made concerning sustainable environmental flows from the relevant aquifer. These are set out in a document referred to as the *Water Resources Management Plan 1999* (WRMP). These will clearly be questions of fact for the Tribunal to determine for itself on the evidence, but is appropriate for this Court to note, with some criticism, that the primary decision maker did not purport to make a specific finding of fact that the grant of a licence to Mr Rashleigh would adversely affect the environment. Rather, the reasons for determination stated that (AB 92):

It would be reasonable to assume that abstraction over the sustainable limit of 70 megalitres as set out in the WRMP would

result in an adverse effect on the environment.

36. Mr Robertson, correctly it seems to us, criticised this approach on the basis that it not only assumed the correctness of the finding that 70 megalitres was the definite sustainable flow limit, but that it openly made an assumption that any further abstraction would damage the environment. These were both factors, it seems to us, on which independent findings of fact must be made.

37. Counsel were agreed that there be no order as to the costs of the appeal and that the issues raised in the cross-appeal and notice of contention concerning, amongst others, the matters dealing with the Tribunal's approach to the exercise of its discretion, lead to costs following the event in that respect.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Date: 18 November 2005

Counsel for the Appellant: Mr S Gageler SC and Mr D Mossop
Solicitor for the Appellant: ACT Government
Solicitor
Counsel for the Respondent: Mr A Robertson SC and Mr B Meagher SC
Solicitor for the Respondent: Bradley Allen Lawyers
Dates of hearing: 7 November 2005
Date of judgment: 18 November 2005

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