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AR DISCLOSURE UPDATE

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1.

Further to my Note on Gohil and Sharland last year, there is now a very helpful synopsis of the law to be found in the decision of Roberts J in AB v CD [2016] EWHC 10 (Fam), which guidance embraces cases involving innocent/negligent non-disclosure, as well as cases of fraud. As Roberts J said at paragraph 177(iv):

"Even innocent misrepresentation as to a material fact can be a vitiating factor if the undisclosed fact was material to the decision which the court made at the time and/or if it undermines the basis on which the order was made."

2.

See the summary at paragraphs 149 to 165 (below), and also the top-line statement of principles at paragraph 177 (below):

149. In a recent case reported as **KG v LG (No 2) [2015] EWFC 64**, Moor J set out the law in this way:

50. Although I have been referred to a significant number of authorities, the law is in fact extremely straightforward and set out clearly in the leading case of ***Livesey v Jenkins*** [1985] AC 424 in which Lord Brandon said:-

"…in proceedings in which parties invoke the exercise of the court's powers under sections 23 and 24 (of the Matrimonial Causes Act 1973), they must provide the court with information about all the circumstances of the case, including, inter alia, the particular matters so specified. Unless they do so, directly or indirectly, and ensure that the information provided is correct, complete and up to date, the court is not equipped to exercise, and cannot therefore lawfully and properly exercise, its discretion in the manner ordained by section 25(1).

…It follows necessarily from this that each party concerned in claims for financial provision and property adjustment (or other forms of ancillary relief not material in the present case) owes a duty to the court to make full and frank disclosure of all material facts to the other party and to the court".

51. There have been a significant number of authorities in this area since. I need only mention three principles that have been drawn to my attention by Mr Amos. I accept the first two without reservation:-

(a) It is fundamental that any attempt to overturn a consent order on the basis of non-disclosure will not succeed if the disclosure would not have made any substantial difference to the order which the court would have made. This simply reiterates the point made in ***Livesey v Jenkins*** that the non-disclosure must be material.

(b) The Applicant must act without delay once he or she has discovered the alleged non-disclosure. The justification for this requirement is the overriding importance of finalising litigation promptly and conclusively (see Thorpe LJ in ***Burns v Burns*** [2004] EWCA Civ 1258). Indeed, in ***Rose v Rose*** [2003] 2 FLR 197, CC J held that a delay of one year between the discovery of the alleged non-disclosure and the issuing of an application to set aside was wholly unreasonable and an additional reason why the application in that case was not permitted to proceed.

52. The third principle advanced by Mr Amos requires at least some clarification. Mr Amos submits that an applicant should not be able to rely on putative non-disclosure if such would have been avoidable by reasonable enquiry by her. He relies on ***B v B [2007] EWHC 2472***; [2008] 1 FLR 1279 per Sir M Potter, President. He submitted with vigour that the Wife in this case had taken the conscious decision to abandon the exchange of Forms E in favour of negotiation. The Husband had offered full disclosure and she cannot therefore now complain that she chose to settle without that disclosure.

53. Mr Posnansky QC for the Wife responds equally forcefully that, if that was the law, no case would ever settle again without exchange of complete Forms E and all supporting documentation. He submits that a decision by parties to negotiate does not absolve them from their duty of full and frank disclosure. In short, one cannot allow the other to settle on information that is materially in error.

54. The submissions of Mr Posnansky in this respect are correct. I remind myself that ***Livesey v Jenkins*** itself was a case involving a consent order. ***B v B*** arose in very different circumstances. A wife was attempting to set aside an order on ***Barder*** [1987] 2 All ER 440 principles, complaining about an allegedly inaccurate valuation of a matrimonial home. In such circumstances, each party is in a position to test the valuation evidence by reasonable enquiry and cannot complain if they fail to do so. A more pertinent example would be a case in which there is £100,000 in a bank account that happens to be in the joint names of the parties. It is not disclosed by either party. If the Wife knows that the account exists, she can make

reasonable enquiry herself (as she is a joint holder of the account) and cannot complain if she fails to do so. It is just possible, however, that she might not know about the account. If that is the case, she cannot make reasonable enquiry herself and she must rely on her husband's disclosure being full and frank.

55. In this particular case, the Wife did not have access to the trust deeds or accounts. She was reliant on the Husband making full and frank disclosure in that regard. Her solicitors did ask questions but both parties (not just the Wife) decided to abandon the formal Form E procedure and negotiate. In doing so, the duty of both parties to provide full and frank disclosure did not disappear. A husband cannot simply rely on an offer to provide full disclosure in a future Form E. He has to provide sufficient disclosure to give the wife a proper picture of his financial resources. In such circumstances, a Wife is entitled to rely on the information that is provided.

56. I therefore have to decide three things:-

(a) Whether or not the information provided was full and frank?

(b) If it was not, was the deficiency material?

(c) If so, has there been unreasonable delay in making this application such that it would not now be right for it to proceed ?"

Sharland v Sharland; Gohil v Gohil

150. That summary of the law (which I respectfully adopt as entirely accurate) now has to be seen in the light of the decisions of the Supreme Court in the appeals of ***Sharland v Sharland*** [2015] UKSC 60 and ***Gohil v Gohil*** [2015] UKSC 61.

151. In ***Sharland***, the parties had reached a settlement in circumstances where one of the main issues in the case had been the value of the husband's shareholding in a software business which he had developed. Both parties instructed valuers who provided valuations on the basis that there were no plans to float the company by means of an Initial Public Offering (IPO). The husband had represented to the court that there was no IPO "on the cards today". Under the terms of the settlement, the wife agreed to receive 30% of the net proceeds of sale of the company, whenever that took place, together with further assets including £10 million in cash and property. As a result of various press reports, and before a consent order was sealed, she became aware that the company was being actively prepared for an IPO. It was anticipated that this would value the company at a figure significantly in excess of the valuations prepared for the purposes of the court hearing. The wife immediately invited the judge not to seal the consent order but to resume the hearing in respect of her application for financial

remedy orders. The judge found that the husband's evidence had been dishonest and that, had he disclosed the true state of affairs, the court would have been like to adjourn the wife's claims to establish whether the sale of the company was likely to have gone ahead. By the time the hearing resumed, the IPO had not gone ahead and was no longer in prospect. The judge declined to set aside the consent order on the ground that he would not have made a substantially different order, applying the principle set out above in Livesey ***(formerly Jenkins) v Jenkins.***

152. The Court of Appeal upheld the judge's order and the wife appealed to the Supreme Court which unanimously allowed her appeal. The consent order would not be sealed and the wife's application for financial relief was remitted to the Family Division of the High Court.

153. Lady Hale, as Deputy President, delivered the leading judgment. Having set out the principles (i) that it was impossible for parties to oust the jurisdiction of the court, and (ii) that the court nevertheless retained the power to achieve finality through a clean break order from the foot of an independent assessment of the section 25 criteria 11, her Ladyship went on to consider the duty of the parties to make full and frank disclosure of all relevant information to one another and to the court. In ***Livesey***, the House of Lords had made it clear that the parties' duty of full and frank disclosure continued after they had reached agreement on their financial arrangements. This was because "unless a court is provided with correct, complete and up to date information on matters to which, under section 25(1), it is required to have regard, it cannot lawfully or properly exercise its discretion in the manner ordained by that subsection", per Lord Brandon of Oakbrook. The wife in Livesey had failed to disclose her engagement to another man before the agreement was put into effect by means of a sealed court order. This was not a case where she had deliberately set out to deceive either the husband or the court. As Lord Hailsham observed, "I do not think she was fully aware (though she should have been) of the vital nature of the information she was witholding…" (p 430). Thus, there was neither a misrepresentation nor deliberate non-disclosure.

154. Similarly, in ***Dietz v Lennig Chemicals Ltd*** [1969] 1 AC 170, a case referred to by Lady Hale in ***Sharland***, a consent order reached in a civil claim brought by a widow against her deceased husband's employers was set aside because, prior to securing the court's approval to its terms, the claimant widow remarried. The House of Lords held that the defendant employers were entitled to have the consent order set aside as their consent had been induced by an innocent misrepresentation that the claimant was a widow at the date of the order.

155. The next question was whether, in the light of that, the consent order should be set aside. Sharland involved a case of deliberate misrepresentation or fraud. However, in ***Robinson v Robinson*** (Practice Note) [1982] 1 WLR 786, Templeman LJ said,

"In the Family Division, as has been said many times, this power to set aside final orders is not limited to cases where fraud or mistake can be alleged. It extends, and has always extended, to cases of material non-disclosure…. [T]he power to set aside arises when there has been fraud, mistake or material non-disclosure as to the facts ***at the time the order was made.****"*

In ***Livesey***, Lord Brandon had concluded his judgment with "an emphatic word of warning". At pages 445 to 446, his Lordship said this:

"It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases where the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good. Parties who apply to set aside orders on the ground of failure to disclose some relatively minor matter or matters, the disclosure of which would not have made any substantial difference to the order which the court would have made or approved, are likely to find their applications being summarily dismissed…".

156. Lady Hale's analysis of the position in Sharland is set out in paragraphs 29 to 35 of her judgment. I set these out in full not least because of the clarity of her Ladyship's exposition.

"29. It follows that the majority in the Court of Appeal in this case were correct to say that matrimonial cases were different from ordinary civil cases in that the binding effect of a settlement embodied in a consent order stems from the court's order and not from the prior agreement of the parties. It does not, however, follow that the parties' agreement is not a sine qua non of a consent order. Quite the reverse: the court cannot make a consent order without the valid consent of the parties. If there is a reason which vitiates a party's consent, then there may also be a good reason to set aside the consent order. The only question is whether the court has any choice in the matter.

30. This may well depend upon the nature of the vitiating factor. We know from ***Dietz*** that innocent misrepresentation as to a material fact is a vitiating factor. The court set aside the order because the misrepresentation had induced the defendants to agree to the settlement. We know from Livesey that in matrimonial cases innocent non-disclosure of a material fact is a vitiating factor. The court set aside the order because the undisclosed fact undermined the whole basis on which the order was made.

31. Although not strictly applicable in matrimonial cases, the analogy of the remedies for misrepresentation and non-disclosure in contract may be instructive. At common law, the general effect of any misrepresentation, whether fraudulent, negligent or innocent, or of non-

disclosure where there was a duty to disclose, was to render a contract voidable at the instance of a party who had thereby been induced to enter into it. This has now been modified by the Misrepresentation Act 1967, which empowers the court to impose an award of damages in lieu of rescission for negligent or innocent misrepresentation. This does not, however, apply in cases of fraudulent misrepresentation, where there is no power to impose an award of damages in lieu. The victim always has the right to rescind unless one of the general bars to rescission has arisen.

32. There is no need for us to decide in this case whether the greater flexibility which the court now has in cases of innocent or negligent misrepresentation in contract should also apply to innocent or negligent misrepresentation or non-disclosure in consent orders whether in civil or in family cases. It is clear from ***Dietz*** and ***Livesey*** that the misrepresentation or non-disclosure must be material to the decision that the court made at the time. But this is a case of fraud. It would be extraordinary if the victim of a fraudulent misrepresentation, which had led her to compromise her claim to financial remedies in a matrimonial case, were in a worse position than the victim of a fraudulent misrepresentation in an ordinary contract case, including a contract to settle a civil claim. As was held in ***Smith v Kay*** (1859) VII HLC 749, a party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality. Furthermore, the court is in no position to protect the victim from the deception, or to conduct its statutory duties properly, because the court too has been deceived. In my view, Briggs LJ was correct in the first of the three reasons he gave for setting aside the order 12.

33. The only exception is where the court is satisfied that, at the time when it made the consent order, the fraud would not have influenced a reasonable person to agree to it, nor, had it known then what it knows now, would the court have made a significantly different order, whether or not the parties had agreed to it. But in my view, the burden of satisfying the court of that must lie with the perpetrator of the fraud. It was wrong in this case to place upon the victim the burden of showing that it would have made a difference.

34. In my view, the second and third reasons given by Briggs LJ for setting aside the order flowed from the first. Sir Hugh Bennett had been clear that the misrepresentation and non-disclosure as to the husband's plans for the company was highly material to the decision made in July 2012. Indeed, it could not have been anything else. It had coloured both valuers' approach to the valuation of the husband's shareholding. That in turn had coloured the wife's approach to the proportionality of the balance struck between her present share in the liquid

assets and her future share in the value of the husband's shareholding. Sir Hugh may have been right to say, with the benefit of hindsight, that had he known the truth then he would have waited to see what transpired. But in doing so, he would have had to bear in mind the husband's ability to manipulate the timing and manner of any offer to the public in a way which suited him best. Be that as it may, it is enough that Sir Hugh would not have made the order he did when he did had the truth been known.

35. It being clear that the order should have been set aside, it is also clear that Sir Hugh should not have gone on to re-make the decision then and there on the basis of the evidence then before him. The wife was entitled to re-open the case, when she might seek to negotiate a new settlement or a rehearing of her claims when all the relevant facts were known. Thus, in my view, Briggs LJ was also correct in the third reason he gave for allowing the appeal. The wife had been deprived of a full and fair hearing of her claims. …"

157. ***Gohil v Gohil*** [2015] UKSC 61 also concerned a case of fraudulent non-disclosure in relation to a financial consent order. In making his financial presentation to his wife and the court, Mr Gohil, a former solicitor, had asserted that all of his ostensible wealth represented assets which he held on behalf of his clients. He produced a balance sheet which he said was representative of his personal assets. Once his liabilities were set off against those assets, he claimed to have a net deficit of just over £310,000. Despite misgivings that her husband had not disclosed the full extent of his wealth, Mrs Gohil was persuaded to settle her financial claims at an FDR hearing. The deal was struck in 2004. Under its terms, he was to pay her a lump sum payment in full and final settlement of her claims (which he eventually paid) together with periodical payments (which he stopped paying after about four years). The consent order which was approved by the court contained a recital recording the wife's suspicions but stating that she had agreed to compromise her claims in order to achieve finality. Some three years later, in 2007, the wife applied to set aside the consent order on the basis of Mr Gohil's fraudulent non-disclosure. He was charged with serious money-laundering offences dating back to mid-2005. A period of imprisonment followed his subsequent conviction. It was evidence which had emerged during the criminal proceedings which provided Mrs Gohil with the material on which she made her application to set aside the matrimonial consent order. Following a lengthy contested hearing Moylan J set aside the 2004 consent order on the basis of findings that Mr Gohil had been guilty of serious non-disclosure and the result would undoubtedly have been different had the court been in possession of the full facts. Mrs Gohil was permitted to rely upon the fresh evidence she sought to adduce on the basis that she had satisfied the well-known criteria set out in ***Ladd v Marshall*** [1954] 1 WLR 1489.

158. Mr Gohil appealed and his appeal was allowed on the basis that the judge at first instance had incorrectly applied the ***Ladd v Marshall*** test. The effect of the order made by the Court of Appeal thus prevented Mrs Gohil from asking the court to revisit the capital provision made for her under the terms of the 2004 consent order. She appealed to the Supreme Court which unanimously allowed her appeal and reinstated the order made by Moylan J.

159. Of the recital in the consent order recording Mrs Gohil's original suspicions about her husband's financial disclosure, the Supreme Court held that it had no legal effect whatsoever. Lord Wilson of Culworth delivered the leading judgment. Leading counsel for Mr Gohil had relied on a recent Court of Appeal decision in a civil case called ***Hayward v Zurich Insurance PLC*** [2015] EWCA Civ 327. The claimant alleged that he had sustained an injury at work as a result of the negligence of his employers. Their defence included an allegation that he had not been truthful and had exaggerated the extent of his injury. The claim was settled. Some five years later, the insurers received fresh evidence that the claimant had in fact made a full and complete recovery before settlement was achieved. They sought to reclaim most of the award in an action for deceit. The Court of Appeal held that their claim must fail. Having pleaded in the original action that the claimant's presentation of his injuries had been dishonest, they could not be said to have relied on that presentation when they decided to enter into a settlement with him. Permission has been given to the insurers to appeal that decision in the Supreme Court.

160. Whatever the outcome of that appeal, Lord Wilson was clear that the reasoning in ***Hayward*** had no application to a case in which the dishonesty takes the form of a spouse's deliberate non-disclosure of resources in financial proceedings following a divorce. The duty of each spouse to make full and frank disclosure of his or her resources is owed to the court (see Livesey) and without it the court is disabled from discharging its duty under section 25(2) of the Matrimonial Causes Act 1973. In the absence of full and frank disclosure, any order it makes is to that extent flawed: see paragraph 24. As his Lordship made equally clear, ***"one spouse cannot exonerate the other from complying with his or her duty to the court".***

161. As Lord Neuberger's judgment demonstrates, materiality is still an ingredient in any application to set aside a consent order where the non-disclosure alleged does not amount to deliberate fraud. Mr Gohil's egregious conduct might well have been at one end of the scale, but what of a situation where the failure to disclose a particular fact or set of circumstances is not deliberate but merely accidental or negligent (i.e. something which the relevant party ought to have known he should have disclosed but failed to do so) ? At paragraph 44, his Lordship said this:

"The ultimate question in these proceedings is whether the 2004 order should be set aside, and that turns on whether the husband had been guilty of material non-disclosure in the proceedings leading up to the hearing at which the 2004 order was made. If there had been such non-disclosure, but it had been accidental or negligent, the wife would also have to establish that the effect of the non-disclosure was such that the 2004 order was substantially different from the order which would have been made (or agreed) if the husband had afforded proper disclosure – see per Lord Brandon in ***Livesey v Jenkins*** *[1985] AC 424, 445. However, as the non-disclosure alleged by the wife in this case is said to be intentional, then, if there was such non-disclosure, the 2004 order should be set aside, unless the husband could satisfy the court that the 2004 order would have been agreed and made in any event – see per Lady Hale in* ***Sharland v Sharland*** *[2015] UKSC 60, paras 29-33. In other words, where a party's non-disclosure was inadvertent, there is no presumption that it was material and the onus is on the other party to show that proper disclosure would, on the balance of probabilities, have led to a different order; whereas where a party's non-disclosure was intentional, it is deemed to be material, so that it is presumed that proper disclosure would have led to a different order, unless that party can show, on the balance of probabilities, that it would not have done so."*

162. The issue of whether or not there has been non-disclosure is a question of fact which involves an evaluative assessment of the available admissible evidence: see para 49 of ***Gohil*** per Lord Neuberger. Part of that evaluation involves an assessment of the degree of culpability which should properly be attributed to the non-disclosing spouse. In an earlier case involving non-disclosure (not referred to in either of Sharland or Gohil), Thorpe LJ had this to say:

"During the course of argument there has been some debate as to whether a distinction is to be drawn between the various vitiating factors including: fraud, mistake, misrepresentation, duress and material non-disclosure. The authorities suggest that in other fields fraud stands alone, such is the public interest in its suppression. However the duty of full and frank disclosure that operates in ancillary relief is distinctive. In almost every case the application to reopen will rest on an allegation of material non-disclosure. Litigants are invariably informed of the duty. I find it hard to conceive of non-disclosure, material because of its significant scale, that was unwitting or unintentional. At some level of consciousness the party in breach of the duty acts in the hope or with the intention of diminishing the other party's allocation. Thus differing degrees of culpability depend upon either the scale of the undisclosed assets or the lengths to which the offender has gone. But distinctions important in other fields, such as the distinction between innocent and false misrepresentation, do not seem to me to have much validity in ancillary relief litigation. In practice there is probably but a single vice, namely intentional non-disclosure achieved either by active concealment or passive failure to mention."

see para [44](ii) in ***Shaw v Shaw*** [2002] 2 FLR 1204, 1217.

163. The issue as to whether an objective approach, a subjective approach or one that has subjective elements should be adopted in determining whether or not a party would have agreed to a consent order being made had full and frank disclosure been made and whether, with or without the additional disclosure, had the agreed terms been put before the court, it would have made the order because in the court's view it was in the range of fair orders, was considered at some length by Charles J. The case concerned a situation where a husband had failed to disclose during the course of negotiations which led to a consent order that he was in discussion with new employers in relation to a position which would have provided him with a significantly higher level of remuneration. Charles J's judgment, reported at [2008] 2 FCR 527, [2009] 1 FLR 201, recorded his findings that the husband was in breach of his duty in his failure to disclose the likelihood of his imminent move but he refused the wife's application to set aside the order on the basis, inter alia, that the district judge would have approved the order had the parties reached the same agreement on the basis of the enlarged information. The Court of Appeal reversed that decision and allowed the wife's appeal. In ***Bokor-Ingram v Bokor-Ingram [2009] EWCA Civ 412***, [2009] 2 FLR 922, Thorpe LJ said this at para 12:

"The judge considered the duty of disclosure at some length in the context not only of the leading cases of ***Jenkins v Livesey (Formerly Jenkins)*** [1985] 2 WLR 47, [1985] FLR 813 and ***Robinson v Robinson (Practice Note)*** [1982] 1 WLR 786, (1983) 4 FLR 102 but also in the context of the ***Dreyfus v Peruvian Guano Company*** [1889] 41 Ch D 151 test and Part 31.6 of the Civil Procedure Rules 1998. In our view, this insertion of the duty of disclosure in ancillary relief proceedings was unhelpful and unnecessary. The duty of disclosure in ancillary relief proceedings was well stated by Sachs J, as he then was, in the case of ***J v J*** [1955] P 215, [1955] 2 WLR 973. The standard there set has never varied. As his Lordship expressed it at 288 and 984 respectively:

'… it is as well to state expressly something which underlies the procedure by which husbands are required in such proceedings to disclose their means to the court. Whether that disclosure is by affidavit of facts, by affidavits of documents or by evidence on oath (not least when that evidence is led by those representing the husband) the obligation of the husband is to be full, frank and clear in that disclosure.'

164. Later, at para 18 of his judgment, Thorpe LJ said this:

"The court's duty under s 25 of the Matrimonial Causes Act 1973 is to have regard amongst other things, to '(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future…'. The fact

that the contract had not been signed by [the date of the consent order] was irrelevant to the question of whether the negotiations had to be disclosed. Disclosure was essential to enable the court to assess the husband's future prospects. **The duty to disclose extends beyond what is certain on the date that the order is made to any fact relevant to the court's review of the foreseeable future.'** [my emphasis]

165. Thus, it is not for a litigant to judge the ambit of the duty to disclose or the consequences of disclosure; any information which is relevant to outcome must be disclosed. Also in play in these types of set aside applications is the important principle of the public interest in the finality of litigation. That this case has gone on for as long as it has after a marriage of such short duration, and at such significant financial as well as emotional cost to these parties, is little short of a tragedy in human terms. However, we are where we are and it falls to me to reach my findings and conclusions so that each can now move on in whatever direction the outcome of this case dictates.

177. I remind myself about the principles of law which I must apply.

(i) The duty of each spouse to make full and frank disclosure of his or her resources is owed to the court and without it the court is disabled from discharging its duty under section 25(2) of the Matrimonial Causes Act 1973. In the absence of full and frank disclosure, any order it makes is likely to be flawed if the undisclosed fact or facts is/are material to outcome.

(ii) In these circumstances, one spouse cannot exonerate the other from complying with his or her duty to the court.

(iii) The court cannot make a consent order without the valid consent of each of the parties. If there is a reason which vitiates a party's consent, then there may also be a good reason to set aside the consent order.

(iv) Even innocent misrepresentation as to a material fact can be a vitiating factor if the undisclosed fact was material to the decision which the court made at the time and/or if it undermines the basis on which the order was made.

(v) Any information which is relevant to outcome must be disclosed; it is not for a litigant to judge the ambit of the duty to disclose or the consequences of disclosure.

(vi) The duty to disclose extends beyond what is certain on the date that the order is made to any fact relevant to the court's review of the foreseeable future.

(vii) The court's duty under s 25 of the Matrimonial Causes Act 1973 is to have regard amongst other things, to '(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future…'. The fact that negotiations which might lead to the existence of a material matter or event remain uncrystallized or subject to further negotiations is irrelevant to the question of whether the negotiations have to be disclosed. Disclosure is likely to be essential to enable the court to assess one or other, or both, of the parties' future prospects.

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