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Neutral Citation Number: [2023] EWHC 2760 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION



No. CH-2022-000227

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Wednesday, 11 October 2023

Before:

MR JUSTICE MICHAEL GREEN

B E T W E E N :

LIDL LOGISTICS LTD
WILLIAM JAMES HOGGER

Appellants

- and -

LIDL STIFTUNG & CO KG

Respondent

PROFESSOR M ENGELMAN appeared on behalf of the Appellants.

MR T ST QUINTIN appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE MICHAEL GREEN:

- 1 This is an appeal by the appellants, Lidl Logistics Limited, and its director and owner, Mr William Hogger, from decisions of the Company Names Tribunal (“Tribunal”) that required the appellants to change the name of Lidl Logistics, essentially to remove the word “Lidl”. That order was made on the application of Lidl Stiftung & Co. KG under section 69 of the Companies Act 2006 as it is the operator and owner of the goodwill of and well-known supermarket chain that trades under the name “Lidl”. It has over 860 grocery stores and 13 regional distribution centres across the UK, employing over 25,000 people. It owns a portfolio of trademarks, including the name “Lidl”, and has registered domain names. There is no dispute that it has substantial reputation and goodwill under the name “Lidl” and has done so since 1994.
- 2 Under s.69 of the Companies Act 2006, a person may object to a name that is similar to its and that its use in the UK would be likely to be misleading by suggesting a connection between the company and the applicant.
- 3 I will call Lidl Logistics and Mr Hogger collectively as the “appellants” and Lidl Stiftung & Co. KG the “respondent”. They were, of course, the other way around before the Tribunal. Professor Mark Engelman appears, as he did before the Tribunal, for the appellants, and Mr Thomas St Quintin appears for the respondent.
- 4 No permission was required to appeal the Tribunal’s decision.
- 5 As I said, there were two decisions of the Company Names Tribunal, both in writing. First of all, there was an interim decision of 18 January 2022, which rejected an application by the appellants seeking to strike out the respondent’s application to the Tribunal. This was based on their contention that because the company was registered before section 69 of the Companies Act 2006 came into force, that section would have to be construed to have retrospective effect in order to apply to the appellants. The Tribunal held that section 69 did apply to a company that was registered before it came into force.
- 6 Secondly, there was a final decision of 11 November 2022 which adopted the interim decision and dealt with the merits of the application before the Tribunal. Both decisions were made on the papers without an oral hearing.
- 7 I have to say that I did not find Professor Engelman’s written submissions and grounds of appeal easy to follow and there is some inconsistency between the grounds of appeal and the skeleton argument. But the substantive issues were clarified in his oral submissions and they can be divided, it seems to me, into two broad parts: (1) he challenges the legal conclusion in the interim decision as to the retrospective nature of section 69; and (2) he challenges the conclusions in the final decision, particularly in relation to the appellants’ defence under section 69(4)(e), namely whether the respondent’s interests were adversely affected to any significant extent.
- 8 There are some other points raised, such as in relation to section 69(1)(a) and (b), which were effectively admitted by the appellants before the Tribunal and in relation to new arguments as to the respondent’s alleged consent or acquiescence in the use of the name. I do not deal with those points as they were either admitted by the appellants or were not pleaded or relied upon below.

- 9 There was no issue between the parties as to the principles to be applied on hearing an appeal from the Tribunal. It was decided by Mr Recorder Douglas Campbell KC, sitting as a Deputy High Court Judge in *AXA Wholesale Trading Limited v AXA* [2023] EWHC 1339 (Ch) at [6]-[13] that the standard of appeal that applies to appeals from a decision of the hearing officers in the UKIPO should apply to appeals from decisions from the Tribunal.
- 10 Those principles were recently summarised in the decision of Joanna Smith J in *Axogen Corporation v Aviv Scientific Limited* [2022] EWHC 95 (Ch) at [24] and they were set out verbatim by the Deputy Judge in *AXA Wholesale* at [8] of his judgment. The pertinent principles were as follows:

“(i) The appeal is by way of a review, not a rehearing (see *TT Education Ltd v Pie Corbett Consultancy Ltd* ...;

“(ii) The appeal court will allow an appeal where the decision of the lower court was ‘wrong’ (see CPR 52.11). Neither surprise at a Hearing Officer’s conclusion, nor a belief that he or she has reached the wrong decision suffices to justify interference ...;

“(iii) The decision of the lower court will be ‘wrong’ if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge’s conclusion was ‘outside the bounds within which reasonable disagreement is possible’ ...;

“(iv) The approach required by the appeal court depends on a number of variables including the nature of the evaluation in question There is a ‘spectrum of appropriate respect for the Registrar’s determination depending on the nature of the decision’ ..., with decisions of primary fact at one end of the spectrum and multi-factorial decisions (of the type which the parties agree were made in this case by the Hearing Officer) being further along the spectrum.

“(v) In the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions

“(vi) An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. The evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge’s conclusion is outside the bounds within which reasonable disagreement is possible

“(vii) Another variable to be taken into account will be ‘The standing and experience of the fact-finding judge or tribunal’ Expert tribunals are charged with applying the law in the specialised fields and their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts ...;

“(viii) The appellate court should not treat a judgment as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed; ‘The duty to give reasons must not be turned into an intolerable burden’ The reasons need not be elaborate. There is no duty on a judge, in giving her reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what she says shows the basis on which she has acted The issues the resolution of which were vital to the judge’s conclusions should be identified and the manner in which she resolved them explained

“(ix) In evaluating the evidence, the appellate court is entitled to assume, absent good reason to the contrary, that the first instance judge has taken all of the evidence into account”

(I did not include within that quotation all the references to the authorities.)

- 11 So, importantly, this appeal is by way of review, not a rehearing. The appellants’ skeleton argument suggested in [3] that this court should not be too reluctant to interfere with the Tribunal’s decisions on primary facts. However, as Joanna Smith J said, decisions on primary facts are evaluations at the end of the spectrum, to be treated with the most respect. Multi-factorial assessments or evaluations are slightly further along the spectrum the other way and in respect of which there should be “real reluctance” to interfere. This was such a decision in relation to the defence under section 69(4)(e), but I do take into account the fact that these decisions were made without hearing oral evidence or cross-examination.
- 12 Turning to the interim decision and the question of whether section 69 had retrospective effect, the tribunal found that section 69 did have such an effect and that it, therefore, did apply to the company. The company was incorporated on 7 December 2004. Section 69 was new in the Companies Act 2006 and was brought into force on 1 October 2008: see The Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007 (the “2007 order”).
- 13 There were no transitional provisions in relation to section 69. Professor Engelman argued that it should not be taken to work retrospectively and that, therefore, no section 69 application could be made against a company using a name before the section came into force.
- 14 The Tribunal seemed to accept that it had to be shown that section 69 did operate retrospectively, but it found that it did. However, the respondent filed a respondent’s notice and Mr St Quintin made submissions in writing on what he described as a fundamental misapprehension of the concept of retrospectivity and its meaning.

15 I think that Mr St Quintin is correct in what he said. There is a confusion at the heart of the appellants' case that section 69 is required to operate retrospectively. Section 69 does not seek to impose past liability for past events. It merely provides a mechanism by which the future use of a name can be controlled. The section only looks to the future and does not seek to make a company liable for past events, when it was not so liable under the laws existing at the time.

16 I should set out section 69 itself:

“Objection to company’s registered name

- (1) A person (‘The applicant’) may object to a company’s registered name on the ground—
 - (a) that it is the same as a name associated with the applicant in which he has goodwill, or
 - (b) that it is sufficiently similar to such a name that its use in the United Kingdom would be likely to mislead by suggesting a connection between the company and the applicant.
- (2) The objection must be made by application to a company names adjudicator (see section 70).
- (3) The company concerned shall be the primary respondent to the application.

“Any of its members or directors may be joined as respondents.

- (4) If the ground specified in subsection (1)(a) or (b) is established, it is for the respondents to show—
 - (a) that the name was registered before the commencement of the activities on which the applicant relies to show goodwill; or
 - (b) that the company—
 - (i) is operating under the name, or
 - (ii) is proposing to do so and has incurred substantial start-up costs in preparation, or
 - (iii) was formerly operating under the name and is now dormant; or
 - (c) that the name was registered in the ordinary course of a company formation business and the company is available for sale to the applicant on the standard terms of that business; or
 - (d) that the name was adopted in good faith; or
 - (e) that the interests of the applicant are not adversely affected to any significant extent.

“If none of those is shown, the objection shall be upheld.

- (5) If the facts mentioned in subsection (4)(a), (b) or (c) are established, the objection shall nevertheless be upheld if the applicant shows that the main purpose of the respondents (or any of them) in registering the name was to obtain money (or other consideration) from the applicant or prevent him from registering the name.
- (6) If the objection is not upheld under subsection (4) or (5), it shall be dismissed.
- (7) In this section ‘goodwill’ includes reputation of any description.”

17 As can be seen, the section operates only prospectively following its date of commencement. The following sections, sections 70-74, provide for the Tribunal and the procedure to be adopted for removing names from the register. It is essentially a different and probably a speedier method than a passing off action and seeks to prevent the use of a similar company name to one that already has an established reputation and goodwill. I fully accept Professor Engelman’s point that passing off is a different beast and that section 69 has to be looked at on its own terms. Section 73 makes clear that an order can only be made for changing the name in the future.

18 Accordingly, Mr St Quintin submitted that any presumption against retrospectivity has no application to section 69 because it does not even purport to operate retrospectively.

19 Mr St Quintin referred to *Wilson v First County Trust Limited* [2004] 1 AC 816. This case was referred to by the Tribunal, but only by reference to the speech of Lord Nicholls. Mr St Quintin referred to Lord Rodger’s speech (with which Lords Hobhouse and Scott agreed). Lord Rodger expressly addressed retrospectivity and said the following under the heading “Statutes making prospective changes to existing rights”. At [188], he said:

“Retroactive provisions alter the existing rights and duties of those whom they affect. But not all provisions which alter existing rights and duties are retroactive. The statute book contains many statutes which are not retroactive but alter existing rights and duties – only prospectively, with effect from the date of commencement.”

At [192], he said:

“Since provisions which affect existing rights prospectively are not retroactive, the presumption against retroactivity does not apply. Nor is there any general presumption that legislation does not alter the existing legal situation or existing rights: the very purpose of Acts of Parliament is to alter the existing legal situation and this will often involve altering existing rights for the future.”

20 That paragraph in Lord Rodger’s speech is clear. Provisions that affect existing rights prospectively are not subject to the presumption against retroactivity on which the appellants rely. Further, there is no general presumption that legislation does not alter existing rights.

21 Lord Rodger also went on to consider the presumption against interference with vested rights at [193]-[196]. He said, first of all at [193], that:

“Often, however, a sudden change in existing rights would be so unfair to certain individuals or businesses in their particular predicament that it is to be presumed that Parliament did not intend the new legislation to affect them in that respect.”

22 However, as Mr St Quintin pointed out, this presumption can only arise where the legislation is in some way ambiguous. At [195], Lord Rodgers said:

“More often, the presumption falls to be considered in relation to legislation which alters rights only for the future. Since it is more likely that Parliament intended to alter vested rights in this way than that it intended to make a retroactive change, in practice the presumption against legislation altering vested rights is regarded as weaker than the presumption against legislation having retroactive effect.”

At [196], he said:

“The presumption is against legislation impairing rights that are described as ‘vested’. The courts have tried, without conspicuous success, to define what is meant by ‘vested rights’ for this purpose. ... It is not easy to reconcile all the decisions. This lends weight to the criticism that the reasoning in them is essentially circular: the courts have tended to attach the somewhat woolly label ‘vested’ to those rights which they conclude should be protected from the effect of the new legislation. If that is indeed so, then it is perhaps only to be expected since, as Lord Mustill observed in *L’Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co* [1994] 1 AC 486, 525A, the basis of any presumption in this area of the law ‘is no more than simple fairness, which ought to be the basis of every general rule.’”

23 At [201], Lord Rodger suggested that the test could well be expressed in these terms:

“Would the consequences of applying the statutory provision retroactively, or so as to affect vested rights or pending proceedings, be ‘so unfair’ that Parliament could not have intended it to be applied in these ways?”

24 It must not be forgotten that we are talking about presumptions for interpreting legislation. Where a section is not ambiguous, there is no room for or need for any such presumption. As I said, the stronger presumption against retrospectivity is inapplicable in relation to section 69 because it does not operate or purport to operate retrospectively. It only affects existing rights such as they are, prospectively.

25 As to the weaker presumption that Lord Rodger discussed against unfair interference in vested rights, first of all, as I have said, there is no room for any presumption as the section is clear. Secondly, in any event, it is difficult to see what vested rights the appellants

actually had. It is the name of a company which has never traded, according to Mr Hogger, and what rights to that name have actually vested? Professor Engelman submitted that the rights are essentially to be able to prevent others using the name, but that of course is only granted by section 69 itself.

26 Thirdly, even if the registration of the name did give rise to any vested right and even if there was an ambiguity in the application of section 69 to the names of companies that existed before it came into force, there is no unfairness in it applying to those companies. Section 69 itself provides all the protections necessary to prevent unfairness. It does so in its requirements in section 69(1) for goodwill and a likelihood that the use of the name, if not identical, might mislead; and it does so also in the defences provided by section 69(4).

27 I, therefore, dismiss the appeal against the interim decision.

28 I can deal with some of the appellants' other arguments very shortly. Professor Engelman relied heavily on section 1297 of the Companies Act 2006, which is concerned with the continuity of the law. Section 1297 has the following material terms:

“(1) This section applies where any provision of this Act re-enacts (with or without modification) an enactment repealed by this Act.

(2) The repeal and re-enactment does not affect the continuity of the law.

(3) Anything done (including subordinate legislation made), or having effect as if done, under or for the purposes of the repealed provision that could have been done under or for the purposes of the corresponding provision of this Act, if in force or effective immediately before the commencement of that corresponding provision, has effect thereafter as if done under or for the purposes of that corresponding provision.”

29 As Mr St Quintin pointed out, this is a purely procedural section that has nothing to do with retrospectivity. It ensures that there is no gap in between sections of earlier acts being repealed and new sections coming into force. Professor Engelman argued that in some way acts done legally under the Companies Act 1985, such as incorporating a company with a particular company name, cannot be later governed by later legislation. I do not understand this as it would seem to provide some sort of immunity for earlier acts that cannot be corrected by later legislation. In any event, it is totally unclear how this helps the appellants in any way.

30 Furthermore, section 1297 only applies when there has been a repeal and a re-enactment of a particular section. I debated this with Professor Engelman in the hearing and pointed out that the tables in the Companies Act 2006 show that section 69 was totally new in the Companies Act 2006 and did not have a corresponding section in the 1985 Act that was repealed.

31 Professor Engelman also criticised the Tribunal for relying on section 1 of the Companies Act 2006 as showing that section 69 applies to a company incorporated under earlier Acts, but it seems to me that it was entirely right for it to do so, even if, as I have found, section 69 does not operate retrospectively anyway.

32 Professor Engelman also sought to rely on a new point on appeal by reference to the 2007 Order and the lack of any transitional provisions relating to section 69. However, this works against the appellants as it means that as soon as section 69 came into force it applied to all company names. This is also something that was made clear by section 1.

33 I, therefore, dismiss the appeal from the interim decision.

34 Turning to the final decision, there is complaint in the Grounds of Appeal and skeleton argument as to the Tribunal's findings as to section 69(1)(a) and (b) and to section 69(4)(e). However, as I have already said, the Tribunal found in the appellants' favour on section 69(1)(a) and the appellants admitted, and Professor Engelman conceded before me, that section 69(1)(b) was made out.

35 The appeal in relation to section 69(4)(e) is really, it seems to me, largely based on the Tribunal's factual findings. To repeat, section 69(4)(e) provides a defence to the appellants and the burden is on them to prove that the name has not adversely affected the respondent's interests to any significant extent. I have to say that I was a little sceptical about the Tribunal's finding in this respect, given that Mr Hogger had explained that the company had never traded and was dormant and that he had no intention to trade it in the future. Furthermore, the name had been there for a very long time and the respondent had done nothing about it, so was it really adversely affecting the respondent to a significant extent?

36 The Tribunal found as follows at [27], that despite the evidence from Mr Hogger, as summarised in [25] of the decision, that:

“...in the context of the current circumstances, we do not consider that the original ‘ills’ are ‘cured’. The contested company name can still be used to create confusion.”

In [27], the Tribunal went on to give certain reasons for that conclusion. First of all, it said:

“Mr Hogger has stated that he has no intention to use the name or the company, however, even if this is correct, it remains open to him to sell the name to someone who may use the company name in a way that would misrepresent as having a connection to the applicant.”

Then it went on to say this:

“Further, Mr Hogger may change his mind and decide he does want to use it or permit use by someone else with permission.”

In the final sentence of [27], the Tribunal said, in a finding that would apply to every moment between the registration of the company and the date of the decision and so, therefore, applies from the date on which the application under section 69 was made:

“... the original ‘ills’ remain the same now as the day the contested name was incorporated and, to borrow the language used in *Zurich*, have not been ‘cured’ in the time that the primary respondent has been on the register.”

37 There was much discussion of the *Zurich* decision referred to in that last quote. That is a decision called *Zurich Insurance Company v Zurich Investments Limited*, BL O-197-10 [2011] RPC 6, a decision of the Tribunal. In [47] of the *Zurich* decision, the Tribunal said:

“To adversely affect the interests of the applicant to any significant extent the company name must do more than just sit on the register at Companies House.”

38 That is what the appellants said happened in this case and, therefore, that that principle should have been followed by the Tribunal in this case. Furthermore, Professor Engelman said that it was bound to follow the earlier ruling in *Zurich* by the rules of precedent. However, the paragraph in *Zurich* crucially continues to say in the next sentence:

“In this case, the adverse effect must relate to the potential use of the company name in business.”

That seems to me to be important, recognising that potential future use would be relevant to adverse effect.

39 The Tribunal discussed *Zurich* and considered that the sentence relied on by the appellants had to be understood in the context in which it was written. It relied on the totality of the various subsections in section 69(4) as a guide to the meaning of section 69(4)(e) and it concluded that:

“... all that was meant by the underlined comment was that an adverse effect is created by the use or potential use of the name.”

40 Furthermore, the Tribunal said that the sentence should not be elevated into some sort of statutory test. The Tribunal was basically saying that the potential use of the name could amount to a sufficient adverse effect, but it depends if that potential use actually would cause significant harm. The Tribunal relied on the risk of sale. It would appear that the value of the name lies in it being or included “Lidl” and, therefore, any purchaser of the company name would only be prepared to pay anything for it if it wished to exploit that.

41 Mr St Quintin referred me to the Tribunal’s decision in *AXA Wholesale Trading Limited*, a decision given on 26 October 2022. The Tribunal said in that case, at [47] and [48]:

“47. To rely on a ‘no adverse effect’ defence it is for the respondent to show, in evidence, what it has done or intends to do. The onus is therefore on the primary respondent to show why its company name does not adversely affect the applicant’s interests to any significant extent. The onus is not on the applicant.

“48. The primary respondent has not filed any evidence about its current activities or intentions as regards the objected company. However, the actual or potential field of activity is not strictly pertinent because the Act refers to the connection under Section 69(1) (b) being made upon the basis of the names themselves. Consequently, the fact that the primary respondent may not be trading is not relevant as the primary respondent’s intentions may change over time. This may include expanding the primary respondent’s business

in future or selling the company to someone who may trade in the same field in which the applicant operates and has goodwill. As this will, in my view, affect the applicant's interests to a significant extent, the defence based upon Section 69(4)(e) also fails."

42 *Zurich* does not appear to have been cited but one can see that the focus in both cases was on the potential future use of the company and its name. *AXA* was appealed to this court and I have already referred to Mr Recorder Campbell KC's decision. At [37], he endorsed the Tribunal's approach. [37] says:

"The burden of establishing the defence is upon the appellants and not upon AXA. The adjudication officer correctly pointed this out in paragraph 47 of the decision on the appeal."

At [38], he said:

"In my judgment, the adjudication officer properly considered the likely nature of the appellant's business with proper caveats, as set out in the judgment and she also considered the nature of AXA's business in, for instance, paragraph 48 of the decision on the appeal. Again, I find no error of principle in the adjudication officer's approach, and it was a conclusion plainly open to her. I would have reached the same conclusion."

43 As a consequence, it was submitted on behalf of the respondent that:

- (1) the onus was on the appellants to show what they intend to do and that its company name does not adversely affect the respondent's interests.
- (2) the fact that the company may not be trading is not relevant because its intentions may change over time; and
- (3) it was a possibility that the company may be sold to someone who may trade in the same field in which the respondent operates and will affect the respondent's interests to a significant extent.

44 In this case, the decision of the Tribunal was consistent with the approach approved in *AXA Wholesale* and it took into account the risk that Mr Hogger might change his mind and the risk that he might sell the company.

45 Professor Engelman complained that these findings of fact were not open to the Tribunal, particularly as the respondent had not sought to cross-examine Mr Hogger. However, Mr Hogger's witness statement had said that the company had not traded and he did not intend to trade it as he was 72 years old at the time and retired. He furthermore said that he had not tried to sell the company name to the respondent. He did not say that he had not tried to sell the company to a third party. Professor Engelman submitted that where he said he did not intend to trade the company, that this necessarily included a potential sale of the company. I disagree and I think that the Tribunal was entitled to also. The fact that he separately referred to a sale to the respondent that did not take place shows that he was using "trade" in a different sense.

- 46 One does have to wonder, given those facts, why Mr Hogger is so doggedly resisting the change of name.
- 47 In any event, it does seem to me that the Tribunal's factual conclusions were open to it on the evidence. Mr Hogger gave no positive evidence about what his future intentions for the company were. There was, therefore, no evidence from which it could be concluded that it would be used in a way that did not adversely affect the respondent. Further, as Mr Hogger has kept the company registered for 18 years without trading and has fought these proceedings vigorously, it would be right to conclude that some future purpose for the company under the name must be contemplated.
- 48 The Tribunal was entitled to be sceptical of the evidence which he did give and, especially as the burden to prove the requirements in section 69(4)(e) fell upon the appellants, to treat the matters on which he was silent adversely to him. I, therefore, consider that the Tribunal was entitled to find that the defence under section 69(4)(e) was not proven and I dismiss the appeal based on those grounds.
- 49 The appellants also complain about the date relied upon for assessing the section 69(4)(e) defence. The Tribunal considered it as at the date of its decision, whereas the appellants say it should have been as at the date of the respondent's application, some 13 months before. This is, however, irrelevant because if the assessment was made at a later date, it necessarily included the earlier date because nothing happened in the meantime. Furthermore, it is more favourable to the appellants because it is their case their defence got stronger the longer the time was from the registration of the company.
- 50 As to the unpleaded and new defences of consent, acquiescence and estoppel, I do not think it is necessary to deal with these. The appellants have sought to rely on some alleged new evidence to support this, but this has not been put in a witness statement. It is far too late and there was no application for it to be admitted. In any event, the alleged knowledge of Mr Hogger's immediate supervisor is irrelevant in establishing that the respondent itself had the requisite knowledge.
- 51 In short, I dismiss the appellant's appeal and uphold the order made by the Tribunal in both of its decisions.
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CERTIFICATE

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