23 of 1977

No. 19 of 1974

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

BETWEEN:

1. TAN KENG HONG
2. YOONG LEOK KEE CORPORATION LIMITED (Defendants) Appellants

- and -

NEW INDIA ASSURANCE COMPANY LIMITED (Third Party) Respondents

CASE FOR THE APPELLANTS

RECORD

1. This is an Appeal from the Judgment and Order of the Federal Court of Malaysia (Appellate Jurisdiction) (Suffian, C.J., Malaya; Gill and H.S. Ong, F.JJ.) dated 2nd March, 1974, whereby the Appeal of the Appellants herein (the First and Second Defendants at the trial respectively) against the Judgment and Order of the High Court in Malaya at Seremban (Wan Suleiman, J.) dated 23rd October, 1973, whereby the Plaintiffs, Fatimah Binti Abdullah (f) and Mohd. Yusof Bin Ibrahim as Administrators of the estate of Ibrahim Bin Kimpal, deceased, were awarded $21,600/- general damages against both Defendants (the Appellants herein) and dismissed their claim for an indemnity against the Third Party (the Respondents herein), was dismissed with costs. Pp.64-65 Pp.51-52

2. The principal point for determination in this Appeal is whether or not the

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Respondents are able to avoid their liability to indemnify the Appellants in respect of the damages and costs the Appellants have been ordered to pay to the Plaintiffs in this action; by reason of the Respondents' contention that the said deceased's carriage, upon the motor vehicle driven by the First Appellant on behalf of the Second Appellants, falls within an exception to the Respondents'

Pp.78-81 liability to indemnify the Appellants under a policy of insurance issued by the Respondents in respect of the Appellants' use of the said motor vehicle.

Pp.3-6 3. By their Statement of Claim dated 9th October, 1965 the Plaintiffs as Administrators of the deceased's estate claimed damages on behalf of his said estate and for his dependants in respect of the negligent driving of the First Appellant in the course of the

Pp.12-14 Second Appellants' business. By their Joint Defence, dated 17th November, 1965, the Appellants denied liability in respect of the alleged negligence; such denial is however no longer material for the purposes of the Appeal herein.

Pp.9-10 4. By Leave of the Assistant Registrar, Mr. Lee Moh Wah granted on 2nd November, 1965,

Pp.10-11 the Appellants issued a Third Party Notice against the Respondents dated 11th November, 1965 claiming an indemnity against the Plaintiffs' claim and costs of the action or a contribution to the extent of the Plaintiffs' claim inclusive of costs on the grounds that the Respondents were the insurers of the material motor vehicle. By their Statement of Claim against the Respondents, delivered by the Appellants on the 6th day of July, 1966, the Appellants recited that the Plaintiffs' claim against the Defendants was denied on the grounds appearing in their Defence. The Appellants went on to state in paragraph 2 thereof

P.18,L.11-P.19, L.5 "but in the event of their being held liable to the Plaintiffs they claim and are entitled to be indemnified by the Third Party, New India Assurance Company Limited, against the Plaintiffs' claim of any liability they may be under to the Plaintiffs under the following circumstances:

(a) the said motor lorry was at all material times insured under Policy

No. M.V.(C) 619/04/10223/63, issued by the said Third Party, against all Third Party risks including liability to passengers travelling on the said lorry (other than for hire or reward) in connection with the Defendants' business.

(b) That at the material time the deceased was travelling on the said motor lorry, without payment of any hire or reward, but in connection with the Defendants' business, or alternatively getting a lift for social domestic or pleasure purposes

/The words underlined above were inserted by amendment made at the trial of the action pursuant to the Leave of the learned trial Judge given on the 5th June, 1972/ P.32,L.5-25

(c) That the second Defendants had a licensed logging concession at Parit Tinggi, Kuala Pilah and have their Sawmill at the 4th Mile Seremban/Kuala Pilah Road.

(d) That the second Defendants' transport felled timber logs, by the said lorry from the working site at their aforesaid logging concession, to their aforesaid Sawmill. /sic/

(e) That on the material date, the deceased was an employee of the Forest Department as a Forester and as such was a person holding authority, whose request for a lift could not be refused for fear of reprisal.

(f) That a Forester has powers to stop a lorry loaded with logs for purposes of checking and can even demand to travel on it, to any Company's Sawmill for checking logs already transported.

(g) That it is customary and also obligatory in the logging business to give a Forester a lift if he asked for it."

5. The Respondents delivered the Amended Statement of Defence of the Third Party on 11th

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October, 1966. In it the Respondents denied that they were liable to indemnify the Appellants but admitted that the relevant motor vehicle was insured by the Respondents. The Respondents pleaded that under the insurance policy covering the said vehicle there was no liability in respect of the death or bodily injury to passengers save "a passenger carried by reason of or in pursuance of a contract of employment". The Respondents were therefore putting their case on the basis that the carriage of the deceased pleaded in the Statement of Claim as a passenger and admitted in the Appellants' Defence was outside the scope of the insurance cover provided by the Respondents for the Appellants. The substantive allegations pleaded in paragraphs 2b to 2g of the Appellants' Statement of Claim against the Third Party are, it is submitted, admitted by paragraphs 4-8 of the said Amended Statement of Defence of the Third Party which state

Pp.20, Ll. 19-21

P.4, Ll.30-35
P.13,Ll.17-25

P.20,Ll.25-38

"4. That the deceased travelled on the lorry without payment of any hire or reward alleged in paragraph 2(b) is denied.

5. Paragraphs 2(c) and 2(d) are admitted.

6. As to paragraph 2(e) it is denied that a request for a lift could not be refused as alleged or at all.

7. Paragraph 2(f) is admitted but the Third Party contends that a demand by a Forester to travel on a lorry can be refused.

8. The Third Party denies the custom and obligation referred to in paragraph 2(g). "

It is further respectfully submitted that the allegation pleaded in paragraph 2(b) of the Statement of Claim against the Third Party that "the deceased was travelling . . . . in connection with the Defendants' business. . ." is admitted by the Respondents' Amended Statement of Defence of the Third Party as quoted above.

6. The trial of the action commenced on 30th May, 1972 at Seremban before Mr. Justice Wan Suleiman. The Appellants made various admissions of fact that are not relevant to this Appeal. The Plaintiffs called two

Pp.82-83

witnesses in support of their case, the attendant on the Appellants' motor vehicle, Ahmad bin Kassim, and the deceased's widow, Fatimah Binti Abdullah. Their evidence is not material for the purposes of this Appeal. Pp.22-26

7. The Appellants called five witnesses at the trial. Most of the evidence given was not material to the issues falling for determination in this Appeal. The First Appellant, whose evidence was not disputed by the Respondents, stated in relation to the deceased's carriage in the said motor vehicle as follows :-

> "On arriving near Tex Cinema, a male Malay stopped my lorry, I recognised him as a person who worked in Forest Department - used to see him around Kuala Pilah. He told me he wanted a lift to Seremban. I agreed to give him lift - and he sat between me and PW 1. No fare was agreed upon. I was afraid to refuse him lift for fear his feelings would be hurt - and he being a Forest Department employee I feared he might cause delay in checking my logs or cause other trouble." P.27,Ll.14-24

The Managing Director of the Second Appellants, Michael Yoong Chin Ngian, gave evidence with regard to the use of the said motor vehicle at the material time. He stated :-

> "First defendant was the driver and PW 1 the attendant of this lorry. In 1963 my company had a forest concession at Pelangi, Bukit Tinggi, and the lorry would carry logs from that place to my sawmill." P.31,Ll.8-12

Although the witnesses' evidence was subject to cross-examination, it does not appear to have been disputed. Ibrahim Bin Haji Said, a Special Grade Forest Ranger gave evidence of the duties of a Forester employed by the Forest Department. At the material time the deceased was so employed. The witness stated :- P.18,Ll.29-35

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P.33,Ll.13-17 "A forester has a duty to inspect timber lorries at the checking station, or on the way to a sawmill for the purpose of determining if they had paid royalty on the logs being carried."

In cross-examination on behalf of the Respondents the witness stated :-

P.33,Ll.21-25 "I am not suggesting that Forest Rangers and Foresters have a legal right to demand lifts from timber lorry drivers. Lifts are merely a gesture of courtesy accorded to us."

8. The Respondents elected to call no evidence. The relevant Insurance Policy
Pp.19-21 referred to in the Amended Statement of Defence of the Third Party had already been
P.21,Ll.32-33 admitted in evidence in the Agreed Bundle. The said policy in relation to the scope of cover states as follows in the material parts :-

Pp.78-81 " SECTION II - LIABILITY TO THIRD PARTIES

1. The Company will subject to the limits of liability indemnify the insured in the event of accident caused by or arising out of the use of the motor vehicle . . . . against all sums including the claimants costs and expenses which the insured shall become legally liable to pay in respect of

(a) death of or bodily injury to any person

(b) damage to property.

2. In terms of and subject to the limitations of and for the purposes of this Section the Company will indemnify any Authorised Driver who is driving the Motor Vehicle provided . . . .

EXCEPTIONS TO SECTION II

The Company shall not be liable in respect of

(i) . . . .

(ii) death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment.

(iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises.

(iv) . . . .

(viii) death or bodily injury caused by or arising out of the explosion of a boiler forming part of attached to or on the Motor Vehicle except so far as is necessary to meet the requirements of the Legislation.

(ADDENDUM)

GENERAL EXCEPTIONS

The Company shall not be liable in respect of

1. Any accident loss damage or liability caused sustained or incurred

   (a) outside the Geographical Area

   (b) whilst the Motor Vehicle is

      (i) being used otherwise than in accordance with the Limitations as to Use

      (ii) . . . . .

LIMITATIONS AS TO USE

1. Use in connection with the insured's business

2. Use for the carriage of passengers (other than for hire or reward) in connection with the insured's business.

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3. Use for social, domestic and pleasure purposes."

9. The trial concluded on the 14th July, 1972 and the learned Trial Judge reserved his Judgment until 23rd October, 1973. In his Judgment Wan Suleiman J. first dealt with the issues between the Plaintiffs and the Appellants with regard to liability. He concluded that the Appellants were wholly to

P.43,L17 - P.47,L.11 blame for the accident by reason of the First Appellant's negligence. He then turned to the issue as to whether or not the Appellants are entitled to be indemnified by the

P.47,Ll.12-42 Respondents. The learned Trial Judge recited exception (iii) to Section II of the Policy. He stated that he had been invited to consider whether or not there was a conflict between the exceptions (ii) and (iii) to Section II of the Policy and the limitations as to use endorsement. The learned Trial Judge however declined that invitation but went on to consider another point, it is submitted wrongly because the same had not been pleaded nor it appears taken orally before him. The issue that the learned Judge considered was

P.47,Ll.42-46

> "For the purposes of this action I think it will be more useful to decide whether in the first place there had been a user of the lorry contrary to the 'Limitations as to Use' endorsement."

The learned Trial Judge then reviewed the

P.48,Ll.15-35 P.48,L.1- P.49, L.13 evidence in relation to the deceased's carriage in the said vehicle. The learned Trial Judge then reached the conclusion, after considering the limitations as to use clauses, that the Appellant's use of the vehicle was outside those clauses and accordingly the Respondents were not liable to indemnify the Appellants. This particular conclusion in the Judgment of the learned Trial Judge does not appear to have been considered in the Judgment of the Federal Court. The Appellants respectfully submit that the learned Trial Judge erred (a) in considering this issue of his own volition, and, (b) concluding that the Appellants' said motor vehicle was being used outside the limitations as to use specified in the Policy. It is clear from the learned Trial Judge's findings of fact as to user (quoted below) that the particular journey that

the said motor vehicle was on was undertaken in connection with the Second Appellants' business of logging and the processing of logs; in the premises the usage of the vehicle at the material time was in connection with the insured's business and complies with the limitations as to use clause of the said Policy. Alternatively, the Appellants respectfully submit that, as it is clear from the said passage, one of the purposes of the said journey was the transport of logs in connection with the Second Appellants' business, this suffices for compliance with the limitations as to use clause in the said Policy.

10. The findings of fact of the learned Trial Judge in relation to the carriage of the deceased at the material time were as follows

> "The lorry attendant at the time of the accident - (PW 1) - was not even acquainted with the deceased, merely saying that the latter had got into the lorry at Kuala Pilah after speaking to first defendant. First defendant however recognized him as an official of the Forest Department. Deceased told him he wanted a lift to Seremban and the driver agreed to give him a lift free of charge, fearing to annoy one in a position of authority in the timber trade." P.48,Ll. 15-25

The learned Trial Judge drew the following inferences from the evidence

> "There was no suggestion that the deceased's trip to Seremban was in order to inspect second defendant's sawmill there or that it was in the course of his duties as Forest Ranger. Neither of his colleagues Wong Ah Pin (CW 1) nor Ibrahim (DW 3) were able to say if the deceased had been travelling in the course of his duties. I am satisfied that he was merely getting a free lift, which Ibrahim said was commonly taken by Foresters and Rangers before this accident, from timber lorries." P.48,Ll. 25-35

The Appellants respectfully submit that the

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inference that the learned Trial Judge ought to have drawn from the evidence was that the deceased was in the forest in connection with his duties as a Forester and that the lift out of the forest was also in such connection. The Appellants further submit that the onus of proving that the deceased was not travelling in connection with his duties as a Forester - and thus falling within the exception of Section II of the said Policy as adverted to below - lay on the Respondents. In the absence of such evidence the inference that ought to be drawn is that the deceased was being carried in connection with his employment.

11. The said findings of fact set out in the previous paragraph hereto are germane to the learned Trial Judge's consideration of Exception (iii) to Section II of the said Policy. In relation thereto the learned Trial Judge stated

P.49,Ll.15-33

> "It was also submitted on behalf of the defendants that deceased had been carried 'by reason of or in pursuance of a contract of employment'. My attention was drawn to the decision in Izzard v. Universal Insurance Co. (1937) A.C. 773 where it was held by the House of Lords (in construing a clause identical to Exception (iii) to Section II of the Policy) that the 'contract of employment' need not be necessarily with the insured, but also applies to 'persons who are on the insured vehicle for sufficient business or practical reasons, and has taken a contract of employment in pursuance of which they are on the vehicle'. If for instance deceased was on his way to inspect second defendant's sawmill, then the Insurers would be liable. However on the evidence I would say that deceased was merely taking a free lift to Seremban for purposes of his own so that under this exception the Insurers are again not liable."

It is respectfully submitted that (a) because of the wrong inferences drawn from the facts as adverted to in the previous paragraph hereto, and/or (b) his failure to correctly interpret the said Policy on the basis propounded below, the learned Trial Judge fell into error.

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12. The learned Trial Judge then dismissed the Appellants' claim against the Respondents with costs. He went on to consider the amount of damages and ordered the Appellants to pay the Plaintiffs $21,600 as general damages together with costs. P.49,Ll.35-36 P.49,L.37-P.50,L.8

13. By Notice of Appeal dated 14th November, 1973 the Appellants appealed the whole of the said Judgment. Pp.53-54

14. The Judgment of the Federal Court was delivered on 2nd March, 1974. Suffian C.J., Malaya; (with whom Gill and H.S.Ong, F.JJ. concurred) commenced his Judgment by briefly reviewing the facts giving rise to the action. He went on to state that the Appellants' Appeal in respect of their being held liable to the Plaintiffs and in respect of the amount of damages were dismissed for reasons stated in the course of argument. No formal Judgment was delivered in respect of this. The Appellants do not seek to re-open these matters further in this Appeal. P.59,Ll.8-22 P.59,Ll.23-27

15. The learned Chief Justice then turned to the matters relevant to the instant Appeal. He quoted the Sections in the said Policy dealing with the liability of the Respondents to indemnify the Appellants in respect of death to any person and the most relevant exceptions thereto. The learned Chief Justice then considered the effect of Izzard's case (Loc.cit.supra.) upon the interpretation of the said Policy. The learned Chief Justice concluded therefrom that, in effect, the Respondents would only be liable to indemnify the Appellants in respect of the death of any passenger carried on the Appellants' said motor vehicle when such carriage was "by reason of or in pursuance of a contract of employment". The Appellants respectfully adopt these conclusions as correct. P.59,L.28-P.60,L.17 P.60,L.18-P.61,L.4

16. The learned Chief Justice then went on to interpret the expression "contract of employment" in the said Policy in a manner inconsistent with Izzard's case and other authority. The Chief Justice stated, it is submitted incorrectly, as follows

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P.61,Ll.6-22

"In this case the contract of employment cannot mean contract of employment with the second defendant, because exception (ii) clearly excludes the insurers from liability in respect of death of any person in the employment of the second defendant arising out of and in the course of such employment. So it is clear that the words underlined

P.60,Ll.9-10

/i.e. "passenger carried by reason of or in pursuance of a contract of employment"/ can only mean that the insurers will be liable to indemnify the defendants in respect of the death of a passenger not employed by the second defendant and carried by reason of or in pursuance of a contract of employment.

From the above it is clear that the insurers are liable to indemnify the defendants if Ibrahim bin Kimpal was a passenger carried on the lorry by reason of or in pursuance of a contract of employment between him and his employer not being the second defendant."

It is respectfully submitted that the learned Chief Justice fell into error in assuming (a) that the passenger himself must be a party to the contract of employment, and (b) the insured under the said Policy could not be the employer for the purpose of such a contract. The Appellants further submit that Exception (ii), which excuses liability in respect of "any person in the employment of the insured arising out of and in the course of such employment" is irrelevant in construction of Exception (iii), which by way of an exception to an exception extends cover to "a passenger carried by reason of or in pursuance of a contract of employment", because of the difference of the wording of the two exceptions. (See Vandyke v. Fender, 1970 2 Q.B. 292).

17. The learned Chief Justice went on to consider the authority of Baker v. Provident Accident and White Cross Insurance Co.Ltd. (1939) 2 A.E.R.690. In the course of the Judgment in that case Cassels J. said, (at page 695 H - page 696 B);

"Insofar as there is a difference - and there undoubtedly is - between the phrase

'in pursuance of a contract of employment' and the phrase 'by reason of the contract of employment' I think its effect is this. A person is being carried in pursuance of a contract of employment, if it is a term of the contract of employment that he or she shall be carried. That is the meaning which I would attach to the phrase 'in pursuance of a contract of employment'. Insofar as the person may be affected by reason of a contract of employment, I would say with reference to a case where an employer says to an employee, 'go on that vehicle', or 'be carried upon that vehicle', and he is only able to give that order by reason of the fact that there is the relationship of employer and employee between them, that, by reason of a contract of employment it would certainly cover such an instance or example as arose in Izzard v. Universal Insurance Co.Ltd., where in fact a passenger was employed, not by the insurers, but by somebody else altogether."

Basing himself upon that proposition, the learned Chief Justice said P.61,Ll.25-33

". . . we hold that a person is carried 'by reason of' a contract of employment if, for instance, he is directed by his employer to travel in a vehicle, and the employer is able to give that direction because of the relationship of employer and employee; and that person is carried 'in pursuance of' a contract of employment if it is a term of the contract that he shall be carried."

The Appellants respectfully submit that the learned Chief Justice, and Cassels J. fell into error in their interpretation of the expression "by reason of or in pursuance of a contract of employment". The Appellants so submit because, it is contended, the words "by reason of" merely mean that carriage of a passenger must be because a "contract of employment" is the cause, or one of the causes, of such carriage. (See Vandyke v. Fender (loc.cit. supra.), Ormrod v. Crosville Motor Services

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Limited (1953) 1 W.L.R. 1120; and Lister v. Romford Ice and Cold Storage Company (1957) A.C. 555.)

18. The learned Chief Justice then went on to consider the evidence in relation to the travel of the deceased upon the Appellants' said motor vehicle. He concluded

P.62,Ll.16-20

> "But there was no evidence that the deceased was on duty when he boarded the lorry. On the evidence the learned trial judge's finding was that the deceased was merely getting a free lift."

It is respectfully submitted that it is not for the Appellants to prove that the deceased was on duty. The inference that should have been drawn was that at the time the lift was requested (presumably about 3.30 p.m.) the deceased was on duty. Alternatively the Appellants submit that it was irrelevant whether he was on duty or not and that the deceased's status as a Forester was enough to enable him to be carried by reason of a contract of employment. Indeed the learned Trial Judge appears to have found that the deceased's status was the cause of his carriage, when he stated

P.48,Ll.21-24

> "Deceased told him he wanted a lift to Seremban and the driver agreed to give him a lift free of charge, fearing to annoy one in a position of authority in the timber trade."

and

P.49,Ll.6-10

> "On the evidence I would without hesitation hold that a lift given largely out of fear of the passenger is not a use for social, domestic and pleasure purpose being given neither out of kindness, courtesy or charity."

P.62,Ll.21-45

19. The learned Chief Justice went on to consider that because there was no term in the contract of employment between the deceased and the Forestry Department that the deceased should be carried in the Appellants' said motor vehicle, and because of the learned Trial Judge's finding of fact that the deceased was getting "a free lift", the Respondents

were not liable under the said Policy.

20. The Appellants respectfully submit that the Federal Court was wrong in holding that they were not entitled to an indemnity under the said Policy from the Respondents. The Appellants so submit because

(a) The Respondents failed to prove and/or there was no evidence from which it could be inferred that the deceased was not travelling "by reason of or in pursuance of a contract of employment".

(b) The reference to "a contract of employment" in the expression in the said Policy "by reason of or in pursuance of a contract of employment"

(1) means a contract whereby any person (whether natural or corporate) engages another person (whether natural or corporate) to carry out work which is by way of that latter person's professed trade or occupation

and

(2) includes any contract of employment that

(i) which may cause any person for sufficient practical or business reasons to be carried on the insured vehicle,

or, alternatively

(ii) is a cause, or one of the causes, of the carriage of any person.

(c) In the instant case, each (or alternatively, any) of the following contracts are contracts which, by reason of or in pursuance of, the deceased was carried as a passenger on the said motor vehicle :-

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P.16,Ll.10-20 (i) the deceased's contract with the Forestry Department

P.26,L.30-P.27,L.10 (ii) the First Appellant's contract with the Second Appellants.

P.31,Ll.10-13 (iii) the Second Appellants' forest concession.

Pp.66-67 21. On the 19th August, 1974 an Order was made granting the Appellants Final Leave to Appeal to His Majesty the Yang di Pertuan Agong.

22. The Appellants respectfully submit that this Appeal should be allowed with costs (to include the costs incurred in resisting the Plaintiffs' action and in connection with presenting the Appeal against the Judgment obtained by the Plaintiffs to the Federal Court) for the following among other

R E A S O N S

(1) BECAUSE the deceased was being carried as a passenger by reason of or in pursuance of a contract of employment.

(2) BECAUSE the Appellants were using the said motor vehicle in accordance with the limitations as to use in the said Policy.

(3) BECAUSE the Trial Judge was wrong.

(4) BECAUSE the decision in Baker v. Provident Accident and White Cross Insurance Company Limited (1939) 2 A.E.R. 690 is wrong.

(5) BECAUSE the Federal Court was wrong.

NIGEL MURRAY

No. 19 of 1974

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

B E T W E E N :

1. TAN KENG HONG
2. YOONG LEOK KEE CORPORATION LIMITED (Defendants)

Appellants

- and -

NEW INDIA ASSURANCE COMPANY LIMITED (Third Party)

Respondents

CASE FOR THE APPELLANTS

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