Issue 42

October 2016

VALUATION TRIBUNAL SERVICE

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# Valuation in Practice

# News in Brief

## New VTE President

Gary Garland took up his appointment as President of the VTE on 12 September 2016. Looking forward to "an interesting mix of challenges for the foreseeable future", Gary sees a need to revisit the practice statements and guidance in the light of these challenges. "The overriding objective of all our efforts is to dispose of cases justly. This means… the Tribunal when considering cases will have to be more robust in applying the good principles of case management". He has also noted that the VTE and the VTS have to work together closely "and be creative in thinking of how we can progress cases in the most efficient fashion".

Gary was called to the Bar in 1989. A qualified mediator and Deputy District Court Judge, Gary was previously the Deputy Chief Legal Ombudsman. Gary's past employment has included the Crown Prosecution Service (including as a member of the International Branch), prosecutor for the UN in Kosovo, trial attorney at the International Criminal Tribunal for the former Yugoslavia in The Hague, Commissioner of the Independent Police Complaints Commission (responsible for the northeast, HMRC and the Serious Organised Crime Agency).

## NDR pilot for appeals from Kent and Leicestershire

A new approach to the listing and hearing of NDR appeals for the Kent and Leicestershire areas began in July. The pilot's aim is to create a timeline that allows parties to make contact and openly discuss their cases and make a conscious decision about whether the matter requires a tribunal hearing.

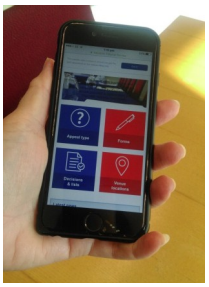
Parties are encouraged to discuss the appeal up to 10 weeks before the hearing and to exchange full cases at six weeks (appellant) and four weeks (respondent). The appellant also has to lodge a full copy of the hearing bundle with the Tribunal at two weeks before the hearing. The parties may vary any of the time constraints (other than the full bundle at two weeks) by agreement and without the need to seek the Tribunal's approval.

The pilot affects 1,955 listed appeals spread over 10 hearings. The first hearing was on 18 October. Of the 207 cases listed, there were only 6 cases on which the appellant and VOA exchanged case papers. Only one full evidence bundle was submitted to the Tribunal two weeks before the hearing and that appeal was subsequently agreed. In all, 96% of the cases listed on the first pilot hearing were resolved (23% agreed, 35% withdrawn, 38% struck out at the hearing). High settlement rates are also in evidence for the next four hearings.

## Check, Challenge, Appeal—reforming business rates appeals

The consultation on the proposals ended on 11 October and the conclusions are awaited. The VTS's response focussed on fees, defining a 'small business' and the proposal that the VTE may only order a change in the rateable value where the valuation is "outside the bounds of professional judgement".

## Valuation Tribunal website



Our revamped website has now been up and running for 6 months. Your views would help us to evaluate it and make further improvements. We have a survey on the website, which we hope you will complete. It should take you no more than 5 minutes. If you would like to do it now please click here. Thank you!

## Inside this issue:

**Stayed appeals**

There are a number of appeal types stayed by the VTE at the moment. The main ones are:

| Identifier | Reasons |
|---|---|
| Completion notice appeals where there is a dispute over the Tribunal's jurisdiction to decide anything other than the date | The Tribunal wishes to hear an appeal of this nature under Practice Statement A10 |
| Completion notice appeals that fail to state the name of the intended recipient, or that are delivered to the building, addressed to the owner | Court of Appeal to decide decision of Upper Tribunal in *Westminster City Council v UKI (Kingsway) Ltd* |
| NDR appeals on question of whether self-contained storage units within a building are separate hereditaments | Appeal to be heard by the President under Practice Statement A10 |
| NDR appeals seeking a reduction in RV to a nominal figure or removal from the list and where the material day legislation in relation to the state of the property is an issue | *Newbiggin (VO)* v. *Monk* [2015] EWCA Civ 78. Appeal to be heard in Supreme Court in November |
| NDR appeals ATM machines at sites in England: whether each ATM is rateable | Lead appeals with UT. Listed for hearing in January 2017 |

## Court of Appeal

**Hewitt (VO) v Telereal Trillium – update**

Following this decision of the Upper Tribunal (UT) (reported in ViP July 2016, Issue 41, page 2), Telereal Trillium has been given permission to appeal to the Court of Appeal.

The issue or principle to be addressed is stated by the UT as, "Where the evidence shows that there is no demand to occupy a hereditament which is capable of occupation, does the rating hypothesis require the valuer to assume demand that does not in reality exist?"

It recognises that the question needs answering because a situation where there are several vacant buildings with significant rateable values is likely to be/become common.

## Decision from the Upper Tribunal (Lands Chamber)

**ELS International Lawyers LLP v Prekopp (VO) [2016] UKUT 0423 RA/59/2015**

The Upper Tribunal (UT) upheld the rateable value (RV) of £68,000 as determined by a VTE panel, but contested by both the appellant and the VOA.

The appellant's representative presented seven comparable properties from in and around Ely Place, London, where the appeal office property was located. However, the UT found that rents in Ely Place were higher than those achieved in the surrounding area. The commencing rent on the appeal property was agreed at £75,145 pa from October 2011, with a 12-month rent-free period. The appellant's representative calculated that this equated to £60,116, which he devalued to £304/m$^2$. However, from his comparables, he argued that £270/m$^2$ was fairer and more correct, giving an RV of £56,000. The valuation officer (VO) presented comparable evidence solely from Ely Place; however, some of his analysis, based on the forms of return, was questioned. The VO considered that, based on the rental evidence, £360/m$^2$ was correct, giving an RV of £74,000.


The UT underlined that it was for the appellant to show that the VTE decision had been wrong, and it was unconvinced that its representative had shown that it was. Similarly there was no convincing evidence presented by the VO to show that the RV should be increased.

It was also noted that the wording of the Form of Return "invited ambiguity" and that there was a "lack of transparency on the VOA website" about the figures/m$^2$ shown in the summary valuations, which might differ from those used in evidence. This could put ratepayers at a disadvantage and might lead to "fruitless appeals". It was hoped that this situation would be corrected under Check, Challenge and Appeal, and with the revaluation.

# Decisions from the High Court

### Coll (LO) v Walters and Walters [2016] EWHC (Admin) 831

The appeal property was an annex to a house, within its curtilage, on an estate; it had a restrictive covenant on it that did not permit use of the house and annex except as a single private residence.

A VTE panel determined that, because of this, the annex, accepted by all as capable of being occupied as a separate dwelling, should be in band A, rather than band C. The LO contended that the panel had been wrong in law to hold that the restrictive covenant affected the valuation; the covenant was in effect an "incumbrance", which had to be disregarded under the regulations. She also drew a distinction between a restriction imposed by the state (which might be taken into account) and one imposed by a private individual, as in this case.

The High Court found that

- the definition of incumbrance did not encompass restrictive covenants
- there was no distinction to be made between a state and a private restriction if the person subject to it could do nothing to remove it
- such a covenant, which might be enforced for the benefit of the estate, would affect the value of the house and annex.

The panel had therefore been correct in taking the covenant into account and was entitled to come to the decision it did regarding the band.

An observation was made that this was different to the position in non-domestic rating, where the statutory hypothesis does not take account of restrictions imposed by covenants (*Williams v Scottish & Newcastle Retail Ltd and Another*). The "two statutory schemes are distinct and the council tax valuation exercise is not identical to that required in the non-domestic rating scheme" and so this decision was of no consequence for that.

### Leeds City Council v Broadley [2016] EWHC (Admin) 1839

This was a statutory appeal on a question of law. The VTE decisions it related to determined that the tenants, rather than the landlord, were liable for council tax when their tenancy agreements continued beyond six months as periodical monthly tenancies. They remained liable, with a material interest inferior to the landlord's, even though they had vacated the property because the tenancies had not been terminated on the date(s) the tenant(s) left.

The issue depended on the construction of the terms of a standard form of tenancy agreement used by Mr Broadley. It was argued by the billing authority that a single tenancy could not be both fixed term and periodic as this would offend the principle of uncertainty.

The High Court found that the plain words of the agreement did not offend the principle of uncertainty: it created a term which had the characteristics of a fixed term immediately followed by a periodic tenancy.

The appeal against the VTE decisions was dismissed.

### Okon v London Borough of Lewisham [2016] EWHC 864 (Ch)

This case from the Chancery Division concerned permission to appeal against a bankruptcy order, which had been made against the applicant upon a petition presented by the billing authority (BA).

The interest from the Valuation Tribunal's point of view is that the permission was granted on several conditions, including that the applicant undertook "to prosecute with all reasonable expedition and diligence an appeal" to the VTE on the question of liability.

The Deputy Judge noted that the applicant could have been advised by both the County Court and the Magistrates' Court that an appeal against liability for council tax was not within their jurisdiction and it was only through an appeal to the VTE (under S.16 of the LGFA) that she could challenge liability for the council tax in question. He added his view that that this case demonstrated "the substantial degree of uncertainty that exists so far as concerns how the courts, both magistrates' and the bankruptcy county court, should deal with the enforcement of domestic council tax liability orders in the context of the availability of the remedy by way of appeal to the Valuation Tribunal".

The Deputy Judge suggested that the cases of *Wiltshire Council v. Piggin [2014] EWHC 4386 (Admin)* and *Yang v. The Official Receiver, Manchester City Council [2013] EWHC 3577 (Ch)* should be more widely known than they appeared to be and that the magistrates' courts should review their advice to applicants who seek to set aside liability orders, to make clear the need to pursue remedies to the Valuation Tribunal and the VOA.

***You can sign up to receive email alerts when a new issue of Valuation in Practice is published, and/ or when a VTE Practice Statement is revised or a new one issued, at:***

***https://www.valuationtribunal.gov.uk/newsletter-signup/***

# Interesting VT Decisions

## Non-domestic rating

### Areas

The appellant took an informal letting of an industrial unit next to one they already occupied and agreed a reduced rent on it while they undertook work to make it ready for occupation. The rent paid would be offset against the full rent when the property was occupied and a formal lease was agreed. The VO merged the unit with the assessment for the unit already occupied by the appellant. There were no 'Mazars' or disrepair issues, but the appellant's agent argued that the appellant was not in rateable occupation of the void unit so it should be removed from the assessment.

The panel was advised that the absence of actual occupation did not preclude rateability. It was satisfied that while the appellant's letting of the unit was informal and the landlord could, in theory, try to let it to someone else during this time, the appellant did have sufficient control for there to be paramount/exclusive occupation of the unit, and beneficial occupation as they were allowed to prepare it for their own actual occupation. As the proposal did not seek a division of the assessment the panel concluded it could not look to divide the void area from the occupied area of this hereditament. The VO's valuation of £200,000 RV, with the void area deemed to be part of the assessment, was upheld.

After the decision was released, the parties requested that it be amended to £198,000 RV as the appellant's representative had since discovered errors in the VO's valuation. At no stage during the hearing had the VO's valuation been disputed by the appellant, if the void area was deemed part of the hereditament. The VTE panel refused to alter its decision on the basis of a clerical error. The VO then made a review application to allow him to alter the list entry to £198,000 RV, but the application was rejected by the Vice President as it was an abuse of the review process; the panel had not made any procedural or clerical error.

*Appeal no: 461524946814/541N10*

### Football club training grounds with academy facilities

These appeals were heard together as a test case. The appellants were three football clubs playing in the Premier League during the 2007-08 season. The issue in dispute was whether there should be an 'ability to pay' allowance for their training grounds and academy facilities. The material date and the effective date for these appeals was 1/4/10.

The panel was informed that the clubs' stadia were valued having regard to the contractor's test and in accordance with the agreed Football Stadia 2010 Valuation Scheme. Stage one was the build cost of the stadium based on a price per seat derived from analysis of the construction cost and stage two involved an adjustment made for superfluity to reflect the excess size of the stadium (calculated from maximum gate and licensed capacity). Stage three was the ability to pay adjustment. Having regard to Tomlinson (VO) v Plymouth Argyle Football Co. Limited and Plymouth City Council [1960], it was agreed practice to use fair maintainable trade (FMT) at the antecedent valuation date (AVD, 1 April 2008). The FMT for these football clubs was £42 million for Blackburn Rovers, £40 million for Middlesbrough and £13.75 million Derby County.

At the AVD, Blackburn Rovers (who finished 7th) and Middlesbrough (11th) were established Premier League clubs and ability to pay allowances were agreed at 19.47% and 31.4% respectively, having regard to their FMT. Derby County's season in 2007-08 was so poor (finishing bottom) they were effectively relegated by Christmas. As they would be playing in the Championship, where revenue streams would be lower, the allowance was agreed at 74.97%.

Middlesbrough's stadium was valued at £2,277,000 RV whilst Derby's was £2,225,370 RV. Once the ability to pay adjustment was factored into the equation, Middlesbrough's RV was reduced to £1,560,000 and Derby's to £550,000. Blackburn's stadium had a base RV £1,626,300, reflecting superfluity. Once the ability to pay factor and an end allowance of 10% for a defective stand had been factored in, the RV was £1,170,000.

The appellants' case was that the training grounds and academies were inextricably linked to their stadia; the FMT of each club could not be achieved without an academy, therefore its existence was implicit in the FMT figure. They argued that a modern purpose-built training ground and academy site was essential for any football club with premiership status or aspirations. There was no alternative hypothetical tenant for the appeal properties; the fact that the appeal properties had been valued having regard to the contractor's test as opposed to a rental basis proved their case.

*Continued on page 5*

Where we show an appeal number, this can be used to see the full decision on our website, www.valuationtribunal.gov.uk. Click on the 'Decisions & lists' tab, select the correct appeal type and use the appeal number to search 'Decisions'.

# Interesting VT Decisions

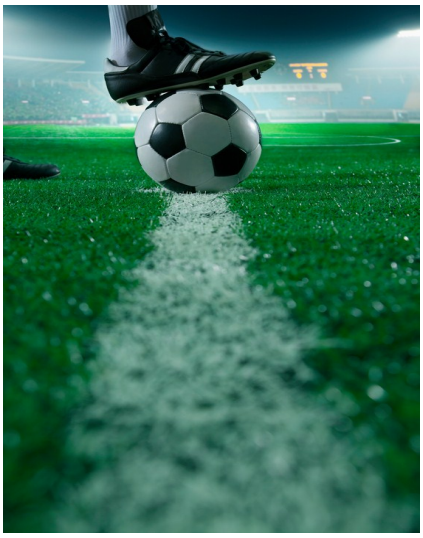
*Continued from page 4*

Consequently, the same level of ability to pay allowance applicable to the stadium should apply to the training ground and academy.

The valuation officers accepted that each football club was the only potential occupier for its stadium, so an ability to pay allowance was justified for them. Although the market for a football training ground and academy site (somewhat remote from the stadium) would be limited, their comparable evidence attempted to show that, if these facilities become vacant, there were other potential tenants out there. The appellants' representatives argued that most of this evidence was inadmissible because the changes of occupation referred to were events that had occurred after the AVD and after the material day. However, the panel noted that, although there had been a change of occupier, there had been no change in the mode or category of occupation of the hereditament(s) cited by the respondent. Consequently, there had been no material change of circumstances that had occurred after 1 April 2010 which would breach paragraph 2 (7) of Schedule 6 to the Local Government Finance Act 1988. The appellants' representatives' argument that this evidence should be excluded was therefore rejected.

The VOA argued that the respective football clubs were not the only potential tenants for the appeal properties. For example, the Blackburn Rovers site, if it became vacant, could appeal to Burnley or Preston North End. In any event a bid from a professional rugby club, other sports club or university was a possibility. The panel considered that other potential tenants could not be ruled out but, realistically, Blackburn, Derby and Middlesbrough were the only likely tenants. That did not necessarily mean that an ability to pay allowance was justified.

The VOA accepted that a modern purpose-built training facility and academy site were necessities for the appellant clubs. However, he maintained that an ability to pay allowance was inappropriate because the assessments proposed were modest and represented between around 0.5% and 2% of the clubs' FMTs.



Modern training facilities and academy sites usually include external pitches, grass or artificial; flood lights; an internal hall possibly with an indoor pitch; a gymnasium. Other accommodation may include offices, medical facilities, cafeteria, changing rooms and a pool. An academy site often has an educational element to it.

There was no requirement for any of the clubs to have an academy, but there was kudos attached to having one, as well as unquantifiable benefits. In addition to attracting potential new players, having the right training environment aided improved performances on the pitch, and assisted team morale.

The panel determined that the benefits of having a modern training ground and academy outweighed the financial savings of not having one. As the appeal properties were owner occupied, all three clubs had made a business decision to acquire these purpose-built facilities. The assumption had to be that they had the necessary finance in place to construct the facilities and the necessary income stream to finance the expected running costs.

The panel noted that the world had moved on since the Court of Appeal's 1960 judgment in Plymouth Argyle and, as at the AVD, the FA Premier League was in existence, arguably the most popular league in the world, and the clubs within it were benefiting from television and sponsorship income. Even Derby County benefited from parachute payments for the first two years in the Championship following relegation.

The panel had regard to the huge amount of money circulating in football at the AVD at Premier League level, where the appellant football clubs were playing at the time, as evidenced by the FMT. It determined that, given the size of the assessments, ability to pay should not have been a factor and therefore no allowance was applicable. The level of each assessment was less than 2% of the calculated FMT; in Blackburn's case it was just 0.56%.

In view of this, the assessments as proposed by the valuation officers were upheld.

*Appeal no: 235019317461/538N10*

**The summaries and any views given in this newsletter are personal and should not be taken as legal opinion**

# Interesting VT Decisions

## Council tax valuation

### Altering a list despite an earlier agreement

When the appellant bought the appeal property he disputed the band F assessment on the basis that an identical house opposite had its banding reduced to E on appeal to the VT. That decision had not been appealed by the listing officer (LO). The band of the appeal property was reduced to E by written agreement in 2004. In 2013, the LO served a notice to increase the band to F, having undertaken a review following an enquiry from a local resident.

A VTE panel had originally dismissed an appeal against the notice, but as it had only considered the valuation evidence, the appellant's application for a review of decision was allowed and a Vice President reheard the appeal. In particular he considered the LO's powers to alter the list entry, which had previously been altered following a written agreement between the parties.

With detailed reference to the High Court decision in *Zeynab Adam v Listing Officer* and that of the then VTE President in *Ward v Coll (LO),* the Vice-President concluded that the earlier agreement had not been made as a result of an error, which would allow the LO to make a correcting alteration, but as a result of the VT decision and based on the evidence available at the time. The appeal was allowed.

*Appeal no: 1850665940/176CAD*

### Material change of circumstances

The appeal sought an alteration from band B to band A on the grounds that there had been a material reduction in the value of the dwelling: a "superschool" had been built behind it.

The listing officer (LO) accepted that there had been a change in the physical state of the dwelling's locality, but contended that there was nothing to suggest that the value of dwellings in the locality had been adversely affected.

No other proposals challenging bands on this ground had been received.

The appellant's representative contended that there had been a significant reduction in the value of the appeal property. Although the outline planning permission had been for a school to accommodate 750 pupils, following the closure of another school in the area, the intake was increased to 1,300 pupils. The appellant described the problems associated with the school, which included noise, litter, cars parked across the driveway, extended hours of use due to the all-weather pitches, and floodlights shining into his house.

The panel first considered the value of the appeal property as at 1 April 1991 (antecedent valuation date, AVD), without the effect of the new school. Sales evidence demonstrated an estimated value of around £45,000 -£46,000 at the AVD, confirming band B.

The panel then considered whether the material reduction caused by the building of the new school would have reduced the value of the appeal property by over £5,000. There had previously been a school behind it but the panel found that the position and impact of the new school was significant. The car park situated close to the boundary of the property had been extended, and a school access gate close to it. There had been a substantial increase in traffic and on-street parking at drop-off and pick-up times due to much larger pupil numbers. The evening use of an all-weather pitch gave rise to noise and light glare not previously experienced.

Consequently, the panel's opinion was that the new school had affected the value of the appeal property sufficiently to cause it to fall below £40,000 in 1991 terms.

The panel allowed the appeal and confirmed an alteration to band A.

*Appeal no: 4230728530/254CAD*

## Council tax liability

### Class N student exemption

The appellant stated that he and his estranged wife decided in 2006 to part and both of them moved out of the appeal property. The property was let to tenants until September 2008, at which time the appellant decided to move back into the appeal property on his own with his children. As he was the only adult in the property and he was a student (which was not in dispute) he should be entitled to Class N exemption.

The BA concluded that the appellant's estranged wife was also resident in the property during the period in dispute. Their assertion was based on evidence of the electoral register and social media; the BA produced copies of the wife's facebook entries which showed photographs of her with the appellant. The panel placed little weight on the facebook entries because even though they showed the appellant and his wife had contact this did not prove she was resident. The panel considered it was not unusual for estranged couples to maintain contact if they had children, also the age of the photographs used was not known.

The panel found the evidence of the electoral role unreliable as it was proven that an entry for a Mr A-K was still showing at the appeal property even though he had moved out in 2010.

The panel allowed the appeal, persuaded by the appellant's evidence that he was the only adult resident in the property and was a student during the period in dispute.

*Appeal no: 5810M186253/084C*

# Interesting VT Decisions

## Council tax liability

### Liability without access

A VTE panel upheld an appeal where the billing authority (BA) had held the appellant liable for council tax accruing despite her being denied access to the subject dwelling (and her belongings) by a landlord who acted on an unsubstantiated complaint by a neighbour.

The first the appellant knew of a difficulty was some 10 weeks into a six-month assured short-hold tenancy. Upon returning home, she was physically barred from entering the building and the next day the landlord changed the locks to the flat. The appellant's mother was also unsuccessful in retrieving clothing for the appellant's very young child.

At the BA's request, the landlord had been added to the appeal but he did not attend, nor was he represented. On the basis of the initial contact from the appellant, the BA had held the landlord liable but, when he denied the events as outlined, the BA once again made the appellant liable.

In its defence, the BA decided that the strongest evidence it held was the six-month tenancy agreement and it held the appellant liable until the dwelling was next let, some five months into the six month period. It was never disclosed when the appellant's belongings were removed from the dwelling or where they were kept but they were returned only after a case for their return or damages was initiated in the county court.

Overturning the BA's decision, the panel held that the landlord had terminated the tenancy agreement (alleging breach of terms) and that the appellant's interest in the tenancy was frustrated from that point. The appellant was not liable for council tax from that date; it was beyond the appellant's control that her goods and belongings remained in the property for a time afterwards and this could not reasonably give rise to an assertion that occupancy remained, particularly as the landlord had changed the locks and access was impossible. The panel was satisfied the landlord was correctly added to the appeal as an interested party and that he had the opportunity to attend the hearing to present evidence to contradict the appellant's. For whatever reason, he chose not to attend.
*Appeal no: 3240M185138/176C*

### Discretionary hardship relief

This appeal challenged the BA's decision over the amount of relief granted in accordance with Section 13A(1)c) of the LGFA 1992. The BA initially refused the appellant's application; however, following receipt of additional information, a revised decision was issued on 14 October 2016, in which it granted discretionary relief equal to the outstanding balance on the appellant's account as at that date.

The appellant had made regular payments whilst his application was being considered and he requested discretionary relief be applied from the date of his application. But the BA did not consider it appropriate to grant relief for a greater amount than the outstanding balance.

Whilst a formal application for relief had been received by the BA on 22 July 2015, the panel found that the appellant had initially requested financial assistance by email on 19 June 2015. Having considered all the evidence, the panel allowed the appeal. In arriving at its decision, the panel made the following findings:

- the appellant had insufficient income to afford all his outgoings;
- when questioned, the BA's representative explained that, had the appellant not made any payments following his application, then discretionary relief would have been paid from the date of application;
- the BA had not made any investigations to clarify how the appellant had afforded to make those payments.

The panel found in favour of the appellant and held that full discretionary relief should be applied for the period requested by the appellant.

*Appeal no: 2001M168735/254C*

## Council tax reduction

### Backdating

The appellant had visited the billing authority (BA) in January to advise them of a change in her income for housing benefit purposes and was sent a CTR claim form, which she did not complete as, at that time, she did not think she was entitled to anything. In February she lost her job and again visited and advised the BA of this change. In April she enquired about CTR and was sent another form to complete which she did. The BA would only backdate the claim one month from the date when this form was received; the appellant wanted the claim backdating to when she lost her job.

The clerk asked about the provisions in the BA's scheme governing how a claim must be made. The BA representative was unable to find any such provision, and so the panel decided that the appellant's visit to the BA in February (confirmed in the BA's own evidence), when she told them she had lost her job was sufficient to be treated as her application date. In accordance with the scheme, the reduction could be backdated to the day she lost her job.
*CTR decisions are not published on our website.*

VALUATION TRIBUNAL SERVICE

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