Court of Queen's Bench of Alberta

Citation: Edinburgh Tower Development Ltd v Curtis, 2021 ABQB 239

2021 ABQB 239 (CanLII)

Date: 20210329
Docket: 1101 05683
Registry: Calgary

Between:

Edinburgh Tower Development Ltd. and Diamond Park Builders (2004) Inc.

Plaintiffs/Respondents

- and -

William Edward Curtis, Curtis Engineering Associates Ltd., Louis Allen Richards, Louis Allen Richards carrying on business as Richards Engineering

Defendants/Applicants

Memorandum of Decision
of the
Honourable Mr. Justice O.P. Malik

I. Introduction

[1] The Defendants ask that I dismiss the Plaintiffs' action for delay pursuant to *Rule* 4.31 or alternatively, for long delay pursuant to *Rule* 4.33 of the *Alberta Rules of Court*, Alta Reg 124/2010.

[2] The Plaintiffs commenced the action on April 21, 2011. On October 11, 2019, Louis Allen Richards and Louis Allen Richards carrying on business as Richards Engineering (the "Richards Defendants") filed their delay applications. On October 15, 2019, William Edward Curtis and Curtis Engineering Associates Ltd. (the "Curtis Defendants") did the same.

[3] For the reasons that follow, I find that the Defendants' applications to dismiss this action succeed under either *Rule* 4.31 or *Rule* 4.33.

II. Overview of The Applicable *Rules*

[4] The foundational rules found in *Rule* 1.2 promote the resolution of disputes in a timely, efficient, and cost-effective way and must be taken into consideration when applying *Rules* 4.31 and 4.33 (***Jacobs v McElhanney Land Surveys Ltd.***, 2019 ABCA 220 at paras 57–72). While a plaintiff bears the ultimate responsibility of advancing their lawsuit in a timely manner, a defendant bears the responsibility of complying with the *Rules* and cannot complain about prejudice caused by their own delay (***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd***, 2019 ABCA 276 at paras 27–31).

[5] *Rule* 4.31 grants the court the discretion to dismiss all or part of a claim or to make a procedural order where a party's delay in prosecuting the action results in significant prejudice to the other party. Where the delay is found to be inordinate and inexcusable, the delay is presumed to have caused significant prejudice pursuant to *Rule* 4.31(2).

[6] In applying *Rule* 4.31, the court begins with the six-part test set out by the Alberta Court of Appeal in ***Humphreys v Trebilcock***, 2017 ABCA 116 at paras 151–156, although there is no "universal mandatory formula" to follow (***TransAmerica*** at para 15; ***Arbeau v Shultz***, 2019 ABCA 204 at para 23).

[7] Unlike the discretionary nature of *Rule* 4.31, *Rule* 4.33 is mandatory and requires the court to dismiss an action that has not been significantly advanced in three years. The court does not assess prejudice under *Rule* 4.33. Instead, the court conducts a functional assessment sensitive to the particular context of the matter to see whether what has been done has "...mov[ed] the lawsuit forward in an essential way considering its nature, value, importance and quality...The focus is on substance and effect, not form" (***Ursa Ventures Ltd. v Edmonton (City)***, 2016 ABCA 135 at para 19).

[8] A significant advancement in the action occurs if the non-moving party has done something in the applicable timeframe that increases the likelihood that either of the parties or the court would have sufficient information to rationally assess the merits of the parties' positions or be in a better position to resolve the action through settlement or trial by a measurable degree (***Morrison v Galvanic Applied Sciences Inc***., 2019 ABCA 207 at para 35).

[9] Additionally, *Rule* 4.34 is relevant here as it triggered a stay upon the death of William Edward Curtis. A *Rule* 4.34 stay does not preclude parties from bringing delay applications pursuant to *Rules* 4.31 and 4.33 (***Kametani v Holman***, 2018 ABQB 18 at paras 13–14; ***Willard v Compton Petroleum Corp***, 2015 ABQB 766 at para 38), nor is the period of delay that accrues pursuant to a *Rule* 4.34 stay deducted from the total period of delay (***Kametani*** at para 32).

III. Chronology of Relevant Events

[10] From 2011 to 2013, the lawsuit was significantly advanced by the closing of pleadings, the filing of the parties' Affidavit of Records, questionings of the parties' corporate representatives and employees and the parties providing answers to undertakings.

[11] However, since 2013, progress in advancing the lawsuit stalled. Below is a chronology of key things that the parties have done since 2013:

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July 16, 2014	Curtis Defendants bring an application for security for costs and an application for civil contempt arising out of the Plaintiffs' failure to provide responses to undertakings. The application is heard on May 11, 2016, and the Plaintiffs post security on July 11, 2016
August 21, 2014	Plaintiffs provide Defendants with a breakdown of damages
November 26, 2015	Plaintiffs file an application to set a trial date. Application is adjourned
April 13, 2016	Plaintiffs provide Defendants with a second breakdown of damages
November 8, 2016	Plaintiffs provide Defendants with a revised response to Plaintiffs' answer to undertaking #22
February 3, 2017	Plaintiffs file a second application to set a trial date. Application is adjourned
April 30, 2018	Plaintiffs provide Defendants with Supplemental Affidavit of Records
April 17, 2019	Plaintiffs provide Defendants with an assessment of damages
July 9, 2019	Plaintiffs file a third application to set a trial date. Application is adjourned
October 8, 2019	Plaintiffs amend their third application to set a trial date Plaintiffs file Notice of Appointment for questioning of Mr. Staples
October 11, 2019	Richards Defendants file delay applications
October 15, 2019	Curtis Defendants file delay applications

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[12] I would broadly categorize progress in advancing the action that occurred since 2013 as falling into two categories: (1) the Plaintiffs' ongoing efforts to substantiate their damages claim; and (2) the Plaintiffs' repeated efforts to set the matter down for trial and obtain agreement on procedural next steps.

[13] I will now detail the chronology of each of these two categories, including some events prior to and including 2013, for context.

The Plaintiffs' Ongoing Efforts to Substantiate Their Damages Claim

[14] On October 3, 2012, the Plaintiffs' corporate representative Mr. Shah, gave undertaking #19 at his questioning, to "break down the specific damages claimed and to refer the defendants to specific invoices for each head of damages that they are seeking, and where the invoices haven't already been produced, to obviously produce those additional invoices."

[15] On March 1, 2013, the parties entered into a consent order which required the Plaintiffs to complete Mr. Shah's answers to undertakings by March 22, 2013.

[16] On March 22, 2013, the Plaintiffs provided Mr. Shah's answer to undertaking #19. It confirmed that the Plaintiffs' breakdown of damages had already been produced in document #43 of the Plaintiffs' Affidavit of Records.

[17] On April 13, 2013, in further questioning, Mr. Shah gave undertaking #22, "to provide all of the additional records that have not yet been provided, not only with respect to the damages claim, but with respect to the entirety of the claim, within 30 days of date of request".

[18] On June 14, 2013, Mr. Shah provided his answer to undertaking #22 which confirmed that all records had already been produced.

[19] On July 16, 2014, the Curtis Defendants filed an application for civil contempt. They asserted that the Plaintiffs had failed to provide complete answers to Mr. Shah's undertakings and that the Plaintiffs were thereby in breach of the March 1, 2013, consent order.

[20] On August 21, 2014, the Plaintiffs filed an Affidavit of Mr. Shah which attached the Plaintiffs' production document #43. Mr. Shah confirmed that all relevant information pertaining to the Plaintiffs' damages claim had already been itemized in the Plaintiffs' production document #43 and that as there was nothing further to produce, Mr. Shah's answers to undertakings #19 and #22 were complete.

[21] On April 13, 2016, the Plaintiffs provided the Defendants with a second breakdown of their damages claim. This breakdown included new invoices that had previously not been produced in Mr. Shah's answers to undertakings #19 and #22.

[22] On November 8, 2016, Mr. Shah provided a further answer to undertaking #22, attaching previously unproduced documentation in support of the Plaintiffs' damages claim.

[23] On April 30, 2018, the Plaintiffs filed a Supplemental Affidavit of Records. Mr. Hammond, the Plaintiffs' corporate representative who replaced Mr. Shah, testified during his questioning on February 21, 2020, that the "bulk" of invoicing materials had already been produced in the Plaintiffs' original Affidavit of Records and that he could only find a "handful of documents" that the Plaintiffs had not already produced. Mr. Hammond could not confirm whether the Defendants were correct in their estimation that out of the 195 documents listed in the Supplemental Affidavit of Records only 58 were newly produced.

[24] Mr. Hammond's understanding was that the value of the Supplemental Affidavit of Records was in its presentational rather than substantive value, so that the "...damages could be better laid out, better organized". Mr. Hammond's assessment accords with Plaintiffs' counsel who, at para 34 of his brief, noted that the purpose of the Supplemental Affidavit of Records was to "facilitate questioning by providing a more streamlined and organized Affidavit of Records".

[25] On April 17, 2019, the Plaintiffs provided the Defendants with an assessment of damages.

The Plaintiffs' Repeated Efforts to Set the Matter Down for Trial and Obtain an Agreement on Next Steps

[26] On November 26, 2015, the Plaintiffs filed their first application to set the matter down for trial and to obtain a procedural order for the completion of outstanding pre-trial steps. Filed in support of the application was an Affidavit sworn in November, 2015, by a legal assistant who listed the remaining pre-trial steps to be:

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- Questioning on answers to undertakings;
- Questioning of employees;
- Filing and serving of expert reports;
- Filing and serving of sur-rebuttal expert reports.

The application was adjourned.

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[27] The next day, the Plaintiffs wrote to the Defendants, suggesting that remaining steps including outstanding questioning on the parties' answers to undertakings, further questioning of the parties' employees, the filing and service of expert materials and the scheduling of trial, could be completed in 2016.

[28] On February 3, 2017, the Plaintiffs filed a second application to set a trial date. This application, like the one before it, was adjourned.

[29] On April 25 and May 24, 2017, the Plaintiffs provided the Defendants with draft forms of consent orders setting out various next steps for the parties to complete in 2017 and 2018, including the filing of supplemental Affidavits of Records, questionings of the parties' various corporate representatives and employees, questionings on answers to undertakings, the filing and service of expert reports, and the filing of witness lists and a final Affidavit of Records before trial. These draft orders contemplated that the parties could proceed to trial after September 1, 2018.

[30] On July 14, 2017, the Richards Defendants proposed an amendment to the Plaintiffs' draft consent order whereby the Plaintiffs would provide a complete outline of their damages claim by July 31, 2017. This amended order contemplated that the parties could proceed to trial after November 1, 2018.

[31] On October 4, 2018, the Plaintiffs provided the Defendants with another draft form of consent order regarding the completion of outstanding steps and which contemplated that the parties could proceed to trial after June 1, 2020.

[32] On November 7, 2018, the Plaintiffs provided the Defendants with a further draft form of consent order that incorporated the amendment proposed by the Richards Defendants in July, 2017.

[33] On May 15, 2019, the Plaintiffs provided the Defendants with yet another version of a consent order which contemplated that the parties would be in a position to proceed to trial after June 1, 2020.

[34] On July 9, 2019, the Plaintiffs filed a third application to set a trial date. This application, like the previous ones, was adjourned.

[35] On October 8, 2019, the Plaintiffs amended their third application to set a trial date. Unlike their previous applications that relied on the legal assistant's Affidavit from November, 2015, this application was supported by a new Affidavit sworn by the same legal assistant. The new Affidavit explained that due to Mr. Curtis' death in 2016, the Plaintiffs needed to question Mr. Staples. Ms. Staples had worked for Curtis Engineering Associates Ltd. and was, according to Mr. Curtis' questioning testimony given in 2012, responsible for the inspection and design of the shoring system.

IV. Analysis

Should I Dismiss the Plaintiff's Action Based on Delay Pursuant to *Rule* 4.31?

[36] I find that the Plaintiffs have failed to advance their action to the point that would reasonably have been expected. Their failure to do so has caused delay that is both inordinate and inexcusable and has resulted in significant prejudice to the Defendants.

[37] This action is not complicated. The Plaintiffs allege that the Defendants are responsible for the failure of a shoring wall which the Defendants were retained to design and inspect. Given the nature of the Plaintiffs' action, it would have been reasonable to anticipate that this action would be ready for trial by 2019. Certainly, it is clear from a review of the various correspondence and draft consent orders prepared by the Plaintiffs that they initially believed a trial could be conducted as early as the fall of 2016.

i. Inordinate Delay

[38] Since the Plaintiffs filed their first application in 2015, to set a trial date, the Plaintiffs did little (other than the filing of a Supplemental Affidavit of Records) to complete any of the steps that they knew (these they had identified in their applications to set a trial date and draft consent orders) had to be done to make their action ready for trial.

[39] The Plaintiffs knew about Mr. Staples and his involvement in the design and inspection of the shoring system when they questioned Mr. Curtis in 2012. But they did not take any steps to question Mr. Staples until October, 2019, when they filed their notice of appointment for the questioning of Mr. Staples, nearly seven years after Mr. Curtis had identified his role in the shoring project. As Plaintiffs' counsel conceded during his oral submissions, the Plaintiffs retained an expert in 2015, but did not file an expert report. Since 2013, the Plaintiffs did not take steps to compel the Defendants' corporate representatives or employees to attend questionings or to provide further answers to undertakings.

[40] I appreciate that the Plaintiffs continued to refine their production in respect of Mr. Shah's answers to undertakings #19 and #22. But it does not appear that any of the "new" materials that they provided were not already in the Plaintiffs' possession when they filed their Affidavit of Records or confirmed that Mr. Shah's subsequent answers to undertakings #19 and #22 were complete.

[41] In my view, the Plaintiffs' ongoing efforts to remedy their defective production caused by Mr. Shah's incomplete answers to undertakings #19 and#22 does not remedy their delay in moving their action forward. I may have reached a different conclusion had the Plaintiffs made *some* progress in completing at least *some of* the substantive steps that they knew needed to be done to move the matter closer to trial. But the lack of overall progress in moving the file forward dissuades me from so doing.

[42] A six-year period of inactivity, from 2013 to 2019, with respect to the completion of substantive pre-trial steps on a straightforward construction litigation file with a relatively simple factual matrix is an inordinate delay. The Plaintiffs knew what had to be done to move the matter to trial but failed to take the necessary steps that would have achieved that goal.

ii. Inexcusable delay

[43] Delay can be excusable (***John Barlot Architect Ltd. v Atrium Square Investments Ltd***, 2017 ABQB 749 at para 32). The Plaintiff bears the evidentiary burden (***Kametani v Holman***,

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2018 ABQB 18 at para 19) of providing an explanation that is "reasonably capable of belief and sufficient to excuse or justify the delay" (***Housser v Savin Canada Inc***, 2005 CanLII 35779 at para 14, 77 OR (3d) 251 (ONSC)).

[44] It is unclear why the Plaintiffs did not move ahead to complete the outstanding litigation steps that needed to be done. I disagree with the Plaintiffs' contentions that the delay was caused by the inordinate amount of time it took for the Defendants to reply to the Plaintiffs' correspondence and to schedule court attendance. I cannot identify any evidence in the correspondence between the parties that the Defendants deliberately obstructed or otherwise stalled the Plaintiffs from moving forward.

[45] I note that some of the delay in this matter was caused inadvertently: Plaintiffs' counsel moved firms in 2016, the death of Mr. Curtis' in 2016, Mr. Shah moved abroad in 2016, Mr. Hammond was appointed as the Plaintiffs' corporate representative for the action and would have required time to review the documents supporting the Plaintiffs' damages claim, and the appointment to the Bench in early 2019 of a defence counsel. However, none of these delays precluded the Plaintiffs from exercising the remedies available to them under the *Rules* to compel defence participation or to move ahead with the requisite steps the Plaintiffs knew had to be done to move this action towards trial.

[46] Therefore, I also find that the six-year delay in moving the matter ahead caused by the Plaintiffs is inexcusable.

iii. Rebutting the presumption of significant prejudice

[47] My finding that there has been inordinate and inexcusable delay gives rise to a presumption that the delay has resulted in significant prejudice, pursuant to *Rule* 4.31(2). However, this presumption can be rebutted if the Plaintiffs can demonstrate that there is insufficient prejudice that would warrant a dismissal of the action (***Transamerica*** at para 43).

[48] The meaning of "significant prejudice" includes "litigation prejudice (***Humphreys*** at para 131). For prejudice to be significant, it must be more than minor or trivial and it must impair a party's ability to defend its interests at trial (***Humphreys*** at paras 124–31). Examples of significant prejudice include the unavailability of crucial witnesses (***Humphreys*** at para 130), a witness' fading memory due to the passage of time, and whether a witness is being asked to provide evidence for the first time (***Humphreys*** at paras 182–83).

[49] The Defendants argue that the Plaintiffs' delay has resulted in significant prejudice in that Mr. Curtis is deceased, Curtis Engineering Associates Ltd. is defunct, Mr. Staples has been unresponsive to the Defendants' attempts to contact him, and Mr. Shah now lives abroad. I am not persuaded that any of these things resulted from the Plaintiffs' delay. Mr. Curtis' death in 2016, would have occurred had this matter proceeded more quickly and it is likely that Curtis Engineering Associates Ltd. being struck from the corporate registry simply followed as the natural result of Mr. Curtis' death. However inconvenient, Mr. Staples can be compelled to attend questioning and Mr. Shah can provide evidence remotely, if further evidence from him is even required.

[50] Rather, I find that litigation prejudice arises from the length of the delay and the corresponding impact this will have on obtaining reliable witness testimony.

[51] The events that give rise to the action occurred in 2008 and 2009. This matter will require at least another year for the necessary pre-trial steps to be completed. This means that an

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eventual trial is at least several years away. Allowing this matter to proceed to trial means that trial witnesses would have to testify more than ten years after the relevant events occurred. Witnesses, particularly those who work in construction, will be difficult to locate after such a length of time. Mr. Staples, who would likely occupy a central role at trial due to his involvement in the inspection and design of the shoring system would have to give evidence for the first time without the benefit of having given testimony in earlier questioning.

[52] The litigation prejudice that arises after such a length of time is neither trivial nor minor. It constitutes significant prejudice which the Plaintiffs have not rebutted. In this case, I find that that the prejudice caused by the delay significantly impairs the Defendants' right to fully present their defence.

[53] Having concluded that the Defendants have satisfied the criteria for a dismissal of the action pursuant to *Rule* 4.31, I cannot identify any compelling reason to deny the Defendants their relief.

[54] In this case, delay lasting six years is inordinate and inexcusable. The Plaintiffs knew what steps needed to be done to advance the action but did not do so. Despite their frustration with what they perceived to be defence delay, the Plaintiffs failed to exercise remedies available to them under the *Rules* to compel defence participation. The delay has caused the Defendants significant prejudice. Allowing the Plaintiffs' action to proceed would not only contravene the clear intent of the foundational *Rules* which must guide my decision but would also be contrary to the courts' exhortations to the profession regarding the imperative of timely litigation.

Must I Dismiss the Plaintiffs' Action Based on Long Delay Pursuant to *Rule* 4.33?

[55] In the alternative, I find that I must dismiss the Plaintiffs' action on the basis that, prior to the Defendants filing their applications for dismissal due to long delay in October, 2019, a period of three or more years has passed since anything was done to significantly advance the action.

[56] On October 8, 2019, the Plaintiffs filed a notice of appointment for questioning of Mr. Staples, but the mere filing of an appointment without more, is not a significant advancement of an action (***Forest Resource Improvement Assn of Alberta v Moore***, 2015 ABQB 588 at para 26).

[57] The Plaintiffs filed applications to set trial dates in 2015, 2017, and 2019, but these were adjourned and unheard and cannot be said to advance an action (***Jacobs*** at para 113; ***Alberta v Morasch***, 2000 ABCA 24 at paras 6–7). Generally speaking, the mere filing of a Form 37 (***Ivkovic v Tingle Merrett LLP***, 2018 ABQB 122 at paras 18–19) or requesting that a trial date be scheduled (***Altex International Heat Exchanger Ltd. v Foster Wheeler Limited***, 2018 ABQB 620 at para 123) is also not a significant advancement in and of itself.

[58] The Plaintiffs' various efforts to obtain the Defendants' approval to their draft consent orders circulated on April 25 and May 24, 2017; October 4 and November 7, 2018; and May 15, 2019, did not significantly advance the Plaintiffs' action. They were merely unreciprocated proposals which did not crystallize into enforceable obligations. These draft orders did not constitute anything that moved the matter towards trial or settlement.

[59] The Plaintiffs' assessment of damages in April 17, 2019, did not significantly advance the action. The assessment did not provide materially new information, but re-presented in a more accessible and readable format, information that the Plaintiffs had previously provided. Had the assessment been the "only live issue remaining in the action", then I may have taken a

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different view (***Philips v Sowan***, 2006 ABQB 579 at para 16). But in light of the many other substantive litigation steps that had yet to completed, the assessment of damages in itself was of minimal consequence.

[60] Generally speaking, providing material responses to an undertaking or ensuring that production is kept "evergreen" constitutes a significant advancement because these are extensions of the discovery process (***Ravvin Holdings Ltd. v Ghitter***, 2008 ABCA 208 at para 24; ***Heikkila v Apex Land Corporation***, 2009 ABQB 12 at para 33). Quite often, parties will require time to prepare responses to undertakings as that process may require work by others (***Ravvin*** at para 29). An exception to the general rule exists where the answer to an undertaking is merely "perfunctory" and "nothing hinges on the response", or where answers to undertakings have been deliberately dragged out to delay the process (***Ravvin*** at para 25).

[61] I do not go so far as to find that the Plaintiffs' Supplemental Affidavit of Records filed in April, 2018, was "perfunctory". Nor is there any evidence that the Plaintiffs' periodic updating of their production was done with any malintent, intended to frustrate a *Rule* 4.33 application.

[62] However, I cannot conclude, given Mr. Hammond's concession that there was not much difference between the first Affidavit of Records and the Supplemental Affidavit of Records and that the bulk of materials had already been provided, that the Supplemental Affidavit of Records moved the needle in advancing the action in any meaningful way.

[63] In August, 2014, Mr. Shah filed his Affidavit confirming that all materials relevant to the Plaintiffs' damages claim had been produced. I do not find that the Plaintiffs' continued refinement of their damages claim as it pertained to Mr. Shah's answer to undertaking #22 beyond 2014, significantly advanced the action. It merely corrected the Plaintiffs' deficient production. The Plaintiffs' incomplete production of their damages claim has clearly been a point of frustration for the Defendants and was not rectified with the issuance of the 2013, consent order.

[64] As I have conceded within my *Rule* 4.31 analysis, I might have taken a different view if the Plaintiffs had completed at least *some* of the outstanding substantive steps that they knew needed to be done for their action to be trial-ready. Taken together, this would have shown meaningful advancement of the action to trial. But again, that is not what happened here.

[65] I do not attach any particular significance to the fact that the Plaintiffs' assessment of damages and the Supplemental Affidavit of Records were prepared at the Defendants' request. While this is certainly a factor that I have considered (***XS Technologies Inc v Veritas DGC Land Ltd***, 2016 ABCA 165 at para 14), I do not find it to be determinative here given my overall view regarding the Plaintiff's lack of progress in significantly advancing the action in an essential or meaningful way.

V. Conclusion

[66] The Defendants' applications to dismiss this action succeed under either *Rule* 4.31 or *Rule* 4.33. The Plaintiffs' action is hereby dismissed.

[67] If the parties are unable to reach an agreement with respect to costs, they may provide written submissions, not exceeding 5 pages each, within the next 30 days.

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Heard on the 26th day of February, 2021.
Dated at the City of Calgary, Alberta this 29th day of March, 2021.

O.P. Malik
J.C.Q.B.A.

Appearances:

Dan B. Ramsay
for the Plaintiffs, Edinburgh Tower Development Ltd.
and Diamond Park Builders (2004) Inc.

Brent W. Mescall
for the Defendants, William Edward Curtis
and Curtis Engineering Associates Ltd.

Marc T.J. Matras
for the Defendants, Louis Allen Richards
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