A Retail revolution? Issues arising on retail parks and shopping centres

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1. Given the challenges faced by retail in recent years, there have been a few inevitable consequences. To name but a few:

   1.1. Tenants are trying to get out of their leases or to minimise their obligations thereunder; and

   1.2. Landlords are seeking to find any profitable use for empty units.

2. These drivers raise a host of legal issues but we are going to focus on a few of them.

Non-compete clauses and registration

3. It is relatively common to see, in a lease of a unit in a retail park or shopping centre, a covenant by the landlord promising that it will not lease out neighbouring units to other businesses in competition with that of the tenant. These are particularly common in leases of places serving food and supermarkets, but many types of business will seek to give themselves a limited monopoly via a non-compete clause. These limitations on the landlord's ability to let units out to sustainable businesses are likely to be reviewed particularly carefully in the current climate.

4. Going back to basics for a minute, a non-compete clause is a restrictive covenant, restricting what the landlord is able to do with land outside the non-demised premises. It is capable of binding the non-demised premises in equity. It is comparable to a covenant not to build given by a buyer in a transfer of land. Such a covenant gives rise to an equitable interest, binding on successors in title to the buyer's new land, preventing any building thereon. Likewise, a non-compete clause given by a landlord over the non-demised premises is capable of binding the non-demised premises in equity and amounts to an equitable interest over those non-demised premises.

5. There are lots of issues surrounding non-compete clauses but I would like to focus on one: registration. This is of no assistance to the original landlord, who is bound by the non-compete clause as a matter of contract. However, if your client is the subsequent owner of the retail park or shopping centre, the position with regards to registration needs to be considered.

6. As it is inevitable that the land on which a retail park or shopping centre is built will be registered, it is the Land Registration Act 2002 that will determine which interests are binding on the subsequent owner of the retail park or shopping centre. To keep it simple,

let's assume the subsequent owner bought the freehold interest in the retail park or shopping centre for valuable consideration, and was duly registered as proprietor thereof.

7. S. 29 of the Land Registration Act 2002 provides as follows:

> '(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.
>
> (2) For the purposes of subsection (1), the priority of an interest is protected—
>
> (a) in any case, if the interest—
>
> (i) is a registered charge or the subject of a notice in the register,
>
> (ii) falls within any of the paragraphs of Schedule 3 [overriding interests], or
>
> (iii) appears from the register to be excepted from the effect of registration, and
>
> (b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate.
>
> (3) Subsection (2)(a)(ii) does not apply to an interest which has been the subject of a notice in the register at any time since the coming into force of this section.' [emphasis added]

8. The interests of the tenants of the units in the retail park or shopping centre under their leases are likely to *'the subject of a notice in the register'* for s. 29(2)(a)(i) purposes, or treated as if they are (if they are leases of less than seven years and so not registrable dispositions: s 29(4)). So as the non-compete clause is a covenant given by the landlord within such a lease, one might assume it is binding on the landlord's successors in title.

9. However, when leases of a property affect part only of a registered title, they tend to be registered like this:

> 1 The parts of the land affected thereby are subject to the leases set out in the schedule of leases hereto.

And the schedule of leases identifies the particular parts of the registered title affected by the leases i.e. the specific premises demised by the leases (the units).

10. However, the non-compete clause will relate to the landlord's other land i.e. other than the demised premises. It may relate to the remainder of the registered title or to another registered title altogether, if the retail park or shopping centre is registered under a number of different titles. Therefore, the argument goes, the non-complete clause is not *'the subject of a notice in the register'* for s. 29(2)(a)(i) purposes unless it is separately registered.

11. Nor is the benefit under such a non-compete clause likely to be an overriding interest within schedule 3 of the Land Registration Act 2002. Paragraph 2 protects as overriding: '*An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation*'. However, the interest under the non-compete clause will not relate to *'land of which he is in actual occupation'*, but the successor's landlord's other land.

12. So, the argument goes, the non-compete clause is not binding on the landlord's successors in title *unless* it is separately registered against the landlord's title, even if the leases themselves are registered. The equitable interest to which the non-compete clause gives rise to, capable of binding the landlord's other land, must be registered in order to be effective.

13. As far as we know, this argument has not been tested at court in relation to non-compete clauses, but there are other indications in the Land Registration Act 2002 that it ought to work.

    13.1. S. 33(c) provides that '*no notice may be entered in the register in respect of … (c) a restrictive covenant made between a lessor and lessee, so far as relating to the demised premises'*. The LRA thereby recognises that a notice can entered in relation to a restrictive covenant affecting property outside of the demised premises. It is not much of a leap to assert that as a notice can be entered, it must be entered in order to bind successors in title.

    13.2. Further, property practitioners will be familiar with the prescribed clauses that have to be included at the start of most leases registered at the Land Registry (Land Registration Rules 2003/1417 s 58A). One of those prescribed clauses is this:

LR10. Restrictive covenants given in this lease by the Landlord in respect of land other than the Property	
Insert the relevant provisions or refer to the clause, schedule or paragraph of a schedule in this lease which contains the provisions.	

Rule 72A of the Land Registration Rules 2003 provides that the registrar must make entries in relation to such restrictive covenants.

13.3. This prescribed clause draws the drafter's attention to the fact that restrictive covenants affecting land other than the demised premises (which would include most non-compete clauses) need to be separately registered.

14. The tenant who benefitted from the non-compete clause may say that this the argument is inconsistent with Landlord and Tenant (Covenants) Act 1995. The non-compete clause is a landlord's covenant, binding on the reversion of the demised premises: s 3, *Oceanic Village v United Attractions* [2000] Ch 234. Therefore, the subsequent owner of the retail park or supermarket, who is otherwise bound by all the landlord covenants in that tenant's lease, is bound by the non-compete clause too. However, s. 3(6) provides:

> 'Nothing in this section shall operate … to make a covenant enforceable against any person if, apart from this section, it would not be enforceable against him by reason of its not having been registered under the Land Registration Act 2002…'

15. This argument is also supported by the textbooks: *Ruoff & Roper: Registered Conveyancing* at §25-031, *Woodfall: Landlord and Tenant* at §5.150.14, §11-069.

16. So the take-away message is: check the registration of non-compete covenants. They may not be enforceable against a successor in title to the original landlord unless separately registered.

Keep open covenants

17. It would be remiss not to mention keep open covenants in a talk about 'issues in retail and shopping centres' and at a time when there has been both forced closure of retail stores and closure by tenant choice.

18. Pre-Covid, we might have thought we know where we stand with keep open covenants. But is Covid going to give them a new lease of life? Can they provide a means for cash strapped landlords to recover from their tenants? Or do they remain a contractual term which, as some think is the case, lacks any real value?

19. Consider this increasingly familiar scenario:

(1) The retail tenant is the landlord's anchor tenant. So, when the lease was negotiated, the landlord put a keep open covenant in the lease.

(2) Here it is

At all times during the usual business hours of the locality to keep the demised premises open as a shop for carrying on the trade or business for the time being permitted by this Lease

(3) The user covenant is to use "the demised premises and each part thereof as a fashion retailer or any other retail use within Use Class A1 of the 1987 Use Classes Order".

(4) The tenant closed during the closures required by the Covid regs. The landlord, rightly, didn't seek to do anything about that because there would be no liability associated with that closure – either the keep open covenant would be read as qualified by the obligation to comply with statutes or there would be an illegality defence.

(5) But, now, the tenant is saying it won't re-open its store, even though the regs no longer bite.

20. In that scenario, it is very likely the tenant will be in breach of the keep open covenant.

21. What can the landlord do about this? There are two main issues here:

(1) Could the landlord obtain an injunction (or seek specific performance) requiring the tenant to re-open? There is a trip to the Supreme Court involved for an ambitious landlord.

(2) The *second* issue is damages. This is where keep open covenants get more interesting. What is the measure of damages that would be payable if there is no injunction? What can a tenant do to minimise the damages?

22. So: **Injunctions / specific performance**.

23. On the current state of the law, a landlord is most unlikely to obtain an injunction or order for specific performance. Here's why:

(1) ***Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd*** [1998] AC 1 is clear authority that the courts will not enforce a 'keep open' clause in a lease by mandatory injunction (or an order for specific performance) to keep trading.

(2) The reasons for the decision were fourfold but the two most notable aspects are these:

First, it requires the carrying on of a business. And as Lord Hoffmann explained in ***Argyll***, citing Slade J in an earlier decision, "*it is the settled and invariable practice of this court never to grant mandatory injunctions requiring persons to carry on business"* and, he went on to say, *"it is very well established that the court will not order specific performance of an obligation to carry on a business*".

Secondly*,* the order comes with the need for constant supervision and thus what Lord Hoffmann described as "*the possibility of repeated applications over …time*" to argue about compliance.

(3) The assumption behind that second point is that there will be aspects of the keep open covenant that will be sufficiently imprecise as to give rise to multiple hearings. It implicitly recognises that a contractual obligation can be sufficiently definite to escape being void for uncertainty whilst being sufficiently imprecise to be capable of being specifically performed.

24. Now, that's a decision of the ***then*** highest court in the land, the appellate committee of the House of Lords. It has been applied, and fairly recently, in the case of ***Zinc Cobham v. Adda Hotels*** [2015] 1 P&CR 5, where a Hilton hotel franchisee (and headlessee) sought to force a sub-tenant's compliance with operating standards, 'the Hilton Hotels Brand Standards'.

25. But it is worth noting that the decision in ***Argyll*** has been the subject of some criticism. The counter argument is this:

If the Court is capable of defining the hypothetical minimum operation necessary to ensure the tenant complies with its lease obligations for the purposes of assessing damages, then why should the court not be able to define the minimum operation required for performance of the covenant itself? And is it not the reality that an injunction would be complied with because it is unrealistic for a store to be traded at less than full capacity? Would that not make an order sufficiently precise as to be suitable for enforcement by mandatory injunction or order for SP?

26. So, who here wants a trip to the Supreme Court? Who here thinks the world has moved on sufficiently that the court would now be willing to "require persons to trade" by force of order?

27. That's enough about injunctions and specific performance. What about **damages**?

28. This talk looks at two aspects: (i) first, what is the measure? (ii) secondly, what might a tenant do to minimise damages?

29. There is a dearth of recent authority in the English Courts on damages in this context. Two English cases from the 1990s, ***Transworld*** and ***Costain*****,** are supplemented by a Scots decision in which Lord Reed provided the Opinion, ***Douglas Shelf Severn v. Co-operative Stores*** [2007] CSOH 53. All of those cases pre-date arguably important developments in English law relating to the assessment of damages for failures in operational performance, such as ***Durham Tees Valley Airport v. bmibaby Ltd*** [2010] EWCA Civ 485.

30. Dealing first then with the measure:

    (1) On the face of it, one might think there are three aspects to the loss:

        a. Loss to the value of the landlord's reversion caused by the closure.

        b. Consequential losses, such as the effect on rents of other stores when it comes to review.

        c. Losses to the extent that other tenants are paying, or will pay, a turnover rent and turnovers are affected detrimentally.

    (2) These are not, however, separate losses. The loss caused to the value of the landlord's reversionary interest will encompass both the consequential losses such as effect on rents when it comes to review and loss to the extent that other tenants are paying, or will pay, turnover rents which are detrimentally affected.

    (3) The figure will be reached on the basis of valuation evidence as to that diminution. So, the court will need to analyse two valuations in order to calculate the diminution:

        a. ***First***, to work out, at the relevant date, the actual value of the centre (with the anchor tenant's store closed).

        b. ***Secondly****,* the value the centre would have had at the valuation date, had the covenant been complied with.

    (4) In order to work out that second limb, one has to establish what the tenant would have to do to comply with the covenant – i.e., the minimum the landlord could expect

by way of covenant compliance where the tenant is acting reasonably. The decision in ***Douglas Shelf*** is the most helpful on this aspect.

(5) The valuation exercise is not straightforward, for four main reasons:

a. First, the landlord must show it has suffered damage. In order to do that, it needs to show the breach has caused damage over and above damage caused by matters which were not in breach. This is likely to get factually sensitive, particularly if a tenant tries to create factual noise by running closing down sales or issuing press releases about its trading difficulties.

It is not insurmountable for the landlord, however. Some of the noise can be silenced or diminished by appropriate valuation assumptions for each valuation. And it is worth noting that in ***Douglas Shelf***, Lord Reed was content to assess damages on a broad basis, since "*uncertainty as to the assessment does not relieve the wrongdoer of the necessity of paying damages for breach*".

b. Second, the landlord would have to find a date for assessment. The starting point is, of course, date of breach which in this scenario would be closure of the store. That date is can be regarded as problematic since it ignores losses which would have been unforeseeable from that date.

Again, Lord Reed didn't seem to think this prevented an award. He regarded the date of breach as unpersuasive and unrealistic and assessed as at date of trial: ***Douglas Shelf***.

c. The third point: finding suitable and relevant comparables is likely to present a challenge. True comps would be of reversionary estates of similar centres pre and post the departure of an anchor or similarly important tenant.

d. Fourth, the valuation evidence will need to support the conclusion that it is the anchor tenant's *closure* which has caused the dent in value, not the other factors which have or could be said to have affected consumer behaviour, such as social distancing, impact on consumer income, the shift to e-commerce.

This will require thought as to the presentation of evidence, and the assumptions to be made in each valuation, particularly to avoid the suggestion that the effect of the closure is wildly overstated.

31. Turning now to what a tenant might do to minimise damages?

32. The takeaway point is that a tenant might do, or try to do, quite a lot. The two main things are:

    (i) creating factual noise which makes the valuers task more difficult – for example, by behaving in a way which is inconsistent with being a 'draw' but without breaching the covenant - running a closing down sale is an example; and

    (ii) attempting to set up mitigation arguments by approaching the landlord with proposals for alternative uses or alternative developments.

33. All of that said, it is worth bearing in mind that, despite the multiple causation and remoteness issues raised in the Scots case of ***Douglas Shelf***, and the challenges to the valuation evidence in the Scots case of ***Douglas Shelf***, Lord Reed still felt able to assess damages and awarded.

34. Ultimately, building the evidential picture and being suitably advised along the way will be key to any claim.

User clauses

35. Another common covenant in leases of retail parks and shopping centres is a user clause. In virtually every lease, one will find a clause restricting the uses to which the tenant can put the demised premises. In retail settings, those uses are often strictly limited and user clauses are one method by which a landlord will seek to secure a good tenant and retail mix within its park or centre.

36. Like all leasehold covenants, user covenants can be absolute covenants (e.g. the tenant may only use the premises for the purposes of a supermarket) or qualified covenants (e.g. the tenant may only use the premises for the purposes of a supermarket, unless the landlord otherwise consents). In contrast to qualified covenants in relation to assignment and alterations, there is no term implied automatically into qualified user covenants to the effect that the landlord's consent will not unreasonably be withheld or delayed. The only real statutory limit on qualified user covenants is that the landlord is not entitled to charge fine as the price for its consent: s 19(3) Landlord and Tenant Act 1927 and see *Woodfall: the Law of Landlord and Tenant* at §11.190.

37. Of more recent interest is the impact of changes to the Town and Country Planning (Use Classes Order) 1987 ('**the Use Classes Order'**), as many user clauses in leases permit uses by reference to the particular use classes within that order. For example, retail or shopping centre leases may permit certain uses within Class A1, usually with various

exceptions; class A1 is the (now repealed) class referring to shops and other high street uses such as hairdressers. Substantial amendments were made to the Use Classes Order with effect from September 2020. Class A1 (shops/high street) has been repealed and a new, much broader use class E has been introduced, covering '*Commercial, business and service'* and lumping together retail, restaurants, offices and more.

38. So what will be the situation if your client's lease permits (say) any use within Class A1 of the Use Classes Order? As those uses have now been subsumed into the new Class E, might the tenant argue that it is entitled to use the premises for any '*Commercial, business and service'* use?

39. Obviously, the wording of the lease will be determinative but there are a few guiding principles to assist.

    39.1. First, check the definitions. Where the Use Classes Order is employed by reference, it is quite common to see that order defined '*as at the date of the lease'* or similar. Such wording will prevent any statutory modifications to the Use Classes Order from affecting the width of the user clause.

    39.2. Second, check the general wording. There may well be a clause indicating that references to statutes are to include those statutes as amended or re-enacted from time to time. If there is such a clause, that is likely to support the tenant's argument that its user covenant is now substantially broader.

    39.3. Third, there is a relatively old case which asserts that:

> 'Where a deed incorporates the provisions of a statute or subordinate legislation in the absence of express words, there is no presumption either way as to whether it was intended that that reference should include a reference to the law for the time being in force. The question depends on the proper construction of the words of incorporation in the context in which they are used'.

Brewers' Company v Viewplan plc [1989] 2 EGLR 133 (per Morritt J). In that case, the Judge decided that the reference to the Use Classes Order in the user clause of that Lease was not to be updated by a later amendment to that Order. He commented: '*It is readily understandable that the landlord should wish to confine that benefit [the qualified user covenant] within a range of which he knew at the time of the lease.'*

39.4. However, ***Brewers' Company,*** and Morritt J's comment that there was no presumption either way, concerned the Use Classes Order 1972. In relation to references in leases to Acts passed after 1 January 1979, s. 17(2) of the Interpretation Act 1978 may provide differently.

39.5. S 17(2) provides that where an Act repeals and re-enacts, with or without modification, a previous enactment, then unless the contrary appears *'any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted*.' s 23(1) extends the effect of this to subordinate legislation, and s 23(3) provides (for post 1-January 1979 acts/subordinate legislation) that the reference to any other enactment includes any deed or other instrument or document. Thus the effect of this is arguably that references to the old use classes in a lease, should be construed as a reference to the re-enactment thereof in the new use Class E, unless the contrary interpretation appears. See *Lewison, The Interpretation of Contracts* 7th. Ed at §3.79.

Rent under the '54 Act (in light of the pandemic)

40. This is such a 'hot topic' issue that we can't possibly do it justice in ten minutes. We have, therefore, picked two points which have arisen and continue to be raised: (i) turnover rents; (ii) rent free periods.

41. To ground ourselves first and remind ourselves of the statutory exercise:

42. Section 34(1): the Court determines the rent at which the property "*might reasonably be expected to be let in the open market by a willing lessor*" on the valuation date.

43. Section 34(3): the rent is determined by the court the court may, if it thinks fit, further determine that the terms of the tenancy shall include such provision for varying the rent as may be specified in the determination.

44. You will recall that there is a sharp distinction between the process the court carries out under s.34 and when dealing with terms under s.35. The power under s.34 is a matter of valuation, not of discretion. And terms come first, so that the valuation exercise is carried out based on the terms as agreed or determined.

Turnover rents

45. Turnover rent provisions are encountered and are rumoured to be becoming more common (as a component part of an aggregate rental) in leases of retail premises in shopping centres.

46. By turnover, we mean the income and other receivables generated at the premises. A turnover rent usually comprises a base rent, with a turnover component being an agreed percentage of turnover or calculated by reference to a formula.

47. In the context of a 54 Act renewal, a question of principle is said to arise as to whether the court has power under s.34 to determine that the rent is to be payable by reference to a formula, such as one which relates it to the tenant's turnover, rather than simply carrying out a valuation by reference to open market rack rents payable for comparable properties.

48. Tenants tend to assert two bases on which the Act, specifically s.34, enables the court to order a turnover rent / rent linked to a formula. One basis is, in our view, much better than the other.

49. The first argument comes from the words of s.34(1) that, in default of agreement, the new rent is that at which the holding "might reasonably be expected to be let in the open market by a willing lessor".

50. It is said that if the court finds, on the evidence presented at the hearing, that rents in the open market for premises like the demised premises would be assessed by reference to a turnover rent, such a rent would be the "market rent" for such premises, not a rent of a fixed amount assessed by reference to rack rent transactions. The question is what is the best rent of that type an incoming tenant would be willing to bid?

51. So far so plausible and, some might say, consistent with the language of s.34(1).

52. The landlord repost is to point out that s.34(1) contains express disregards of the effect of the tenant's occupation of the holding and of any goodwill by reason of the tenant's trade, which the fixing of rent by reference to a percentage of turnover cannot sufficiently exclude. Now, there is some debate to be had about whether, as a matter of valuation, the court can determine a turnover rent in a way which ignores any goodwill or past occupation. Some say it is possible and that the Act is clear; others say it is not.

53. Whatever the answer to that debate, if the tenant's reading of s34(1) is right, then a practical point for landlords arises:

For shopping centres / retail parks, landlords might want to think about their letting strategies, if they haven't already, and think twice about negotiating a turnover rent element. That way, the evidence for similar premises in the locality should not include turnover rent elements or, at the very least, it will not be the 'norm' or 'likely rent' in the market.

54. The second argument being aired is whether s.34(3) permits the court to include provision for a turnover rent. That section provides as follows:

"Where the rent is determined by the court the court may, if it thinks fit, further determine that the terms of the tenancy shall include such provision for varying the rent as may be specified in the determination."

55. This is an ingenious, perhaps mischievous, little point. But can it seriously be regarded as consistent with Parliament's intention in enacting s.34(3) or with the statutory language? We are not convinced.

56. Section 34(3) was introduced following a Law Com report (HC 38) in which the court's power to introduce rent review provisions was considered sufficiently doubtful as to justify an amendment to include an express power to insert rent review provisions.

57. The statutory language is consistent with that purpose and, at least arguably, does not encompass a turnover rent of the kind commonly encountered. Section 34(3) envisages rent has been determined but, in addition, provision may be made for varying that rent. Turnover rent is not a variation of some other rent, it is itself the rent to be paid. It is rent which is itself calculated by reference to some formula or agreed percentage.

58. A tenant might contend the way around that point is for the court to determine a 'headline' rack rent, and for the turnover element to kick in after a period of time or in the effect of the trigger. That way, so the tenant might say, the turnover rent is included in a provision 'for varying' the headline rent.

59. Is the answer nevertheless that this is not what was envisaged by s.34(3)? And that using the provision this way introduces an impermissible discretionary element to the court's determination of rent when that determination is meant to be reached as a matter of valuation?

Rent free periods

60. It is commonly the case that comparable transactions relied on by the valuers to ascertain the psf value for the holding was negotiated on terms that included a rent-free period.

61. Tenants sometimes run the following argument as a result when assessing those comparables. They say: the landlord would offer an incoming tenant a rent free period in order to fit out the premises and start trading; s.34 requires the court to disregard 'any effect on rent of the fact that the tenant has … been in occupation of the holding'; therefore, although the actual tenant does not need to fit out the premises, the judge should proceed on the basis it would and adjust the rent downwards so as to give the tenant the equivalent of three months' rent free occupation.

62. The way this is achieved as a matter of calculation is by spreading or amortising the rent-free period over the term of the lease. Headline rent of £10,000 for a term of five years, and 12-month rent free. Net effective rent (that is the rent as adjusted to reflect rent free) is £9,000.

63. The argument that rent should be adjusted downwards so as to reflect the grant of a rent-free period to the hypothetical tenant has largely found favour with the courts on the basis it is consistent with the requirement to disregard the tenant's occupation of the holding.

64. The point is not, however, settled or the subject of binding authority. In the recent case of ***WH Smith v Commerz***, the landlord's attempt to resist the adjustment based on the argument that the disregard is aimed at any overbid a sitting tenant might make, not incentives such as rent-free periods, was rejected. Conversely, HHJ Dight has said in a ***Boots*** lease renewal that only part of a rent-free period should be amortised.

65. These analyses have largely centred on the disregard in s.34. But there is potentially another way of looking at the point.

66. Looking at section 34(1) the first question involves identifying the holding which is defined as "the property comprised in the tenancy" which will exclude tenant chattels and tenant's fixtures. The effect would be to exclude tenant chattels which can be removed without causing substantial damage to the land - that is likely to catch at least some fit out.

67. The next question is then one of valuation: would the hypothetical tenant obtain a rent-free period for the purpose of fitting out the holding in its assumed state?

68. If it would, then isn't the analysis that there is nothing to disregard and it simply the case that the market rent for "the holding" includes a rent period.

69. If it wouldn't, then there is no amortisation. One might well imagine that is the more likely outcome where, as is quite common at the moment, tenants are asking for two-year terms with a break at one year.

70. In any event, watch this space as this is the analysis which featured in the recent further instalment in ***S Franses***.

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