Projector SA v Marubeni International Petroleum (S) Pte Ltd (No 3)
[2005] SGCA 5

Case Number : CA 42/2004

Decision Date : 25 January 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Choo Han Teck J

Counsel Name(s) : Lawrence Teh and Sean La'Brooy (Rodyk and Davidson) for the appellant; Ian Koh and Werner Tsu (Drew and Napier LLC) for the respondent

Parties : Projector SA — Marubeni International Petroleum (S) Pte Ltd

Injunctions – Mandatory injunction – Appeal against High Court judge's refusal to unconditionally discharge interim mandatory injunction – Whether appellant discharging obligations under letter of indemnity to provide on demand bail or security to prevent arrest of vessel or to secure release of vessel unconditionally – Whether appellant given sufficient time to discharge obligations before respondent obtained interim mandatory injunction – Whether mandatory injunction improperly obtained

Injunctions – Mandatory injunction – Appeal against High Court judge's refusal to unconditionally discharge interim mandatory injunction – Whether appropriate to grant interim mandatory injunction under the circumstances – Applicable principles for granting of interim mandatory injunction – Whether more appropriate to order inquiry as to damages suffered

25 January 2005

Chao Hick Tin JA (delivering the judgment of the court):

1 This appeal was against the decision of the High Court refusing:

(a) to lift unconditionally an *ex parte* interim mandatory injunction ("IMI") granted against the appellant; and

(b) to order an inquiry as to damages suffered by the appellant on account of the grant of the IMI.

Instead, the court decided to defer these questions to the trial judge. We heard the appeal on 24 November 2004 and dismissed it for the reasons which follow.

The background

2 The appellant, a Belize company with its head office in London and a branch office in Singapore, was in the business of trading in oil and petroleum products. The Singapore branch office had two local employees. Its directors were all resident outside Singapore. The respondent, a Singapore company and a member of the Japanese Marubeni group of companies, is also engaged in the petroleum business.

3 In June 2003, the respondent time-chartered the vessel, *Dynamic Express*, from Mitsui OSK Lines Ltd ("Mitsui"). On 3 July 2003, the respondent, in turn, sub-chartered the vessel to the appellant for the carriage of gas oil from Taiwan to South Korea. The voyage charterparty provided that should the appellant request for delivery of cargo without the production of original bills of lading ("B/Ls"), the appellant would give an indemnity to the respondent.

4 Upon the cargo's arrival at South Korea, the appellant asked for the delivery of the cargo without the production of the four relevant B/Ls. As a consideration for acceding to the request, and as provided for in the voyage charterparty, the appellant issued two letters of indemnity ("LOI") to the respondent.

5 Under the terms of the LOI, the appellant agreed in cll 4 and 5 that:

> 4. If the vessel or any other vessel or property belonging to you should be arrested or detained or *if the arrest or detention thereof should be threatened, to provide on demand such bail or security as may be required to prevent such arrest or detention* or to secure the release of such vessel or property and to indemnify you in respect of any loss, damage or expense caused by such arrest or detention *whether or not the same may be justified*.
>
> 5. As soon as all original B/Ls for the above goods shall have arrived and/or come into our possession, to produce and deliver the same to you whereupon our liability hereunder shall cease.
>
> [emphasis added]

6 Upon the issue of the LOI, the cargo was accordingly discharged to Petaco Petroleum ("Petaco") in South Korea without the production of the original B/Ls. On 24 November 2003, two banks, which were holding two of the four original B/Ls, had the vessel arrested in South Korea. On 28 November 2003, the respondent obtained from Tay Yong Kwang J an *ex parte* IMI against the appellant requiring the latter to, *inter alia*:

> (a) pay two sums, *ie*, US$1,125,981.32 and US$1,509,011.67, into the South Korean court through Mitsui in order to procure the immediate release from arrest of the vessel; or
>
> (b) pay the said two sums to Mitsui or the respondent to enable bank guarantees to be furnished to the banks who had the vessel arrested;
>
> (c) in addition to (a) or (b), take all steps which shall include paying all such sums as may be required to obtain the release of the vessel.

7 The IMI was served on the appellant on 2 December 2003. On the same day, the appellant filed an urgent application to set aside the IMI ("the discharge application"). On 5 December 2003, the discharge application came before Choo Han Teck J who ordered that the IMI be suspended except the part which required the appellant to pay the cash deposit into court. He also gave directions as to the filing and service of affidavits by the parties. On the same day, the necessary security in cash was furnished by the appellant through Mitsui to the South Korean court and the vessel was accordingly released.

8 On 19 May 2004, the discharge application came up for further hearing before Belinda Ang Saw Ean J and the orders she made were the subject of the present appeal. The substance of the orders was to the following effect:

> (a) that the IMI granted on 28 November 2003 be discharged on the condition that the cash deposit in the South Korean court be retained to abide by the outcome of the proceedings in Korea;

(b) that prayers 3 (relating to an inquiry as to damages suffered by the appellant) and 5 (relating to costs) be reserved to the trial judge; and

(c) that there be liberty to apply for further orders for both parties.

9 The original Notice of Appeal filed by the appellant related only to the order set out in sub-para (b) of [8] above. On 27 October 2004, this court, pursuant to the appellant's Notice of Motion, gave leave to the appellant to amend the Notice of Appeal to encompass also sub-para (a).

The decision below

10 As would have been apparent, the effect of the orders made by Ang J on 19 May 2004 was to postpone the decisions on the substantive issues, namely, whether the IMI was properly obtained, whether the condition imposed to have the IMI discharged was warranted and whether there should be an inquiry as to damages suffered by the appellant on account of the issue of the IMI and the consequential question of costs. She was of the opinion that the decisions on these questions, the main one of which was whether the respondent had acted reasonably in applying for the IMI, should be reserved to the trial judge after hearing full evidence. Moreover, such a course would be expedient as it would avoid going into the issues twice. In any event, at the time, security had already been furnished by the appellant and the vessel had been released from arrest. The IMI had effectively been spent.

11 As regards that part of the order which imposed the condition that the money deposited into the South Korean court should be left unaffected, the judge so decided for two reasons. First, it was not entirely clear whether the security paid into the Korean court, although paid in the name of the shipowner, Mitsui, could nonetheless be withdrawn by the party who actually provided the funds. Second, the appellant's counsel informed the court that the appellant was willing to leave the security in place but he had no instructions from his client to give an undertaking to the court that if the IMI were to be discharged unconditionally, the security would not be withdrawn.

The appeal

12 By the amended Notice of Appeal, the appellant effectively appealed against all the orders made by Ang J. While the appellant alleged that it was willing, pursuant to its obligation under the IMI, to furnish the security to obtain the release of the vessel, it objected to the grant of the IMI which it said had tarnished its reputation and undermined its integrity. The grant of the IMI implied that the appellant was an entity which was not good for its word.

13 The appellant contended that at the time the respondent applied for the IMI, the appellant was not in breach of cl 4 of the LOI. The respondent's demand to the appellant to post bail by way of cash deposit was only made on 27 November 2003 and that demand was only received by the appellant the next day, which was also the day on which the respondent applied for the *ex parte* interim relief. The appellant should have been given a reasonable time within which to comply with the demand and the appellant, in fact, furnished the security within a reasonable time, with the vessel being released from detention on 5 December 2003. The appellant asserted that the security it eventually furnished to the Korean court was not because of the IMI but because it had wanted, at all material times, to fulfil its obligations. The appellant had not breached its obligations under the LOI.

14 Relying on *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd* [1992] 2 SLR 729

("*Chuan Hong*") and *Singapore Press Holdings Ltd v Brown Noel Trading Pte Ltd* [1994] 3 SLR 151 ("*SPH Ltd*"), the appellant argued that Ang J, instead of adjourning the matter to the trial judge, should have undertaken a proper balancing exercise to determine whether, instead of issuing the IMI, awarding damages would have provided the respondent with an adequate remedy. Counsel contended that if such an exercise was undertaken by Ang J, she would have found that damages would have been an adequate remedy and thus it was improper, he said, for Ang J to adjourn everything to the trial judge.

Was there a breach of the LOI?

15 It would be recalled that the obligation of the appellant under the LOI was not merely to secure the release of the vessel after arrest but also to prevent its arrest. Thus, to determine whether there was a basis for the respondent to invoke the jurisdiction of the court, it was necessary to look at what transpired before the vessel was arrested by the two banks who held the original B/Ls, as well as shortly thereafter.

16 On 5 November 2003, Shin Han Bank advised the respondent that it was the holder of bill of lading no KAKR-001 and demanded payment or the delivery of the goods. It also informed the respondent that Petaco, to whom the goods were delivered, was in insolvency. The respondent forwarded this letter to the appellant for action pursuant to cl 4 of the LOI.

17 On 6 November 2003, the respondent received a similar letter from Cho Hung Bank with regard to bill of lading no DMEXP-A which the respondent again forwarded to the appellant, stating that "per your LOI … we hereby hold you fully responsible and liable for all loss or damages which may be incurred as a result".

18 On 17 November 2003, the shipowner, Mitsui, informed the respondent that the original B/Ls had not yet been surrendered and that Petaco had become insolvent. Mitsui also expressed its concern over the possibility of the holders of the B/Ls making claims against it. On the same day, the respondent enquired of the appellant as to the whereabouts of the four original B/Ls.

19 Two days later, on 19 November 2003, the appellant replied through brokers stating that it would soon revert with the information on the status of the B/Ls. It also added that it was "aware of the problem and … prepared to respond to what appear to be misguided attempts to recover losses resulting from the failure of a Korean company".

20 On 20 November 2003, Mitsui wrote to the respondent advising the latter that Mitsui had just been informed by its lawyers in Korea that "some Korean banks [were] preparing for arrest of vessels [relating to] cargo released to the collapsed PETACO". Following this advice, the respondent reminded the appellant that it was the latter's "contractual obligation to track down the … B/Ls and return [the] same to owners for the cancellation of the LOI". There was no response to this communication from the appellant.

21 On 21 November 2003, the respondent's solicitors, M/s Drew & Napier ("D&N") sent a fax to the appellant's Singapore office, the pertinent part of which reads:

> As per the terms of the Letters of Indemnity, we forward these latest correspondence from Mitsui OSK to you, so that you know that the abovecaptioned matter have [*sic*] now developed such that there appears to be an imminent arrest of the vessel "DYNAMIC EXPRESS".

> As you have not been responsive to our clients' queries and have not demonstrated any action to obtain the original B/Ls as you are obliged to do under the Letters of Indemnity, our clients have no comfort that their interests are being protected.
>
> We therefore hereby demand that you make good all your promises in your Letter of Indemnity. Without limiting the generality of the foregoing sentence, we require you to step forward to immediately produce all the original B/Ls (KAKR-001, DMP-01, DMEXP-A, DMEXP-B) and take all such other steps necessary to prevent an arrest of the vessel, including preparing the funds demanded from the Korean bank(s).
>
> In the event that an arrest of the vessel does take place, please advise how you intend to put up security.

22 M/s Kim & Chang were the Korean lawyers for Mitsui who had advised that the only way to lift the arrest of the vessel was to post a cash deposit equal to the value of the cargo plus an uplift of 30–50% for costs and interest. Therefore, by another fax from D&N also of 21 November 2003, the appellant was apprised of the risk of arrest of the vessel and what was needed to be done by the appellant to avert that possible eventuality. A demand was made that the appellant fulfil its obligations under the LOI.

23 On 24 November 2003, Kim & Chang informed D&N that the arrest of the vessel was underway. D&N followed this up by writing immediately to the appellant's Singapore office, stating, *inter alia*:

> You are once again strongly urged to step forward to produce the original B/Ls immediately. We reiterate our demands made in our letter of 21 November 2003.
>
> Take notice that you are further required under the Letters of Indemnity to hold our clients harmless in respect of any liability whatsoever and to provide such monies as to secure the release of the vessel. We are advised that under Korean law, only a cash deposit for the full value of the claim plus an uplift will secure the release of an arrested vessel.
>
> Our clients have also asked you for an account of the whereabouts of the original B/Ls, but you have remained silent. …
>
> If we do not hear from you by 5.30pm today, we shall be constrained to take all necessary steps by reason of your failure to meet your obligations under the Letters of Indemnity.

24 In the course of the day, an employee of the respondent, Mr Dennis Low, even spoke with the appellant's Singapore office as well as with Mr Robin Dukes of its London office. As by 5.30pm there was still no response, D&N wrote a letter again to the appellant's Singapore office, marked "TOP URGENT", to advise that the vessel was arrested that afternoon by the banks. D&N concluded by warning that legal proceedings for an injunction would be instituted against the appellant unless *steps were taken immediately* to have the vessel released from detention.

25 Later that day (Singapore time), the appellant's London office acknowledged receipt of the two communications of 24 November 2003. The appellant also stated that the letter of 21 November 2003 was received by its London office only on 24 November 2003. It quibbled about the amounts claimed by the two Korean banks. It ended by stating that the appellant would "comply with its contractual obligations under its LOI" and to this end had instructed M/s Norton Rose ("NR") to advise on the same.

26 The next day, 25 November 2003, NR replied, stating that in view of the limited documentation D&N had sent, "[they] failed to understand the basis of the arrest". They asked for the full arrest papers so that they would be able to assess the appellant's obligation under the LOI. D&N responded immediately, stating that they had no further documents and expressing disappointment that the appellant had not done anything either to ascertain the whereabouts of the B/Ls or to prevent the arrest of the vessel. D&N reminded NR that it was at the appellant's request, and against the LOI, that the cargo under the B/Ls was released without the production of the B/Ls. D&N reiterated that as the appellant had failed in its duty to prevent the arrest of the vessel, it was under an overriding duty to ensure that the vessel was released from arrest promptly and that this duty was:

> … regardless of whether the arrest is justified or not and regardless of whether in your clients' view the actual quantum claimed is in accordance with your clients' expectation …

NR were further reminded that the arrest, besides causing "tremendous detriment to many parties, not least [the respondent]", also gave rise to demurrage charges and other consequential losses. D&N gave notice of an application for an injunction which would be made the next day unless clear action was taken by then to obtain the release of the ship.

27 This brought an immediate response from NR who stated that the appellant would comply with its contractual obligations and that there would be no basis for the respondent to apply to court for an injunction. The appellant had appointed Korean solicitors to deal with the matter. NR also added that the time difference between London and Korea made it "very difficult to resolve this quickly".

28 The next day, 26 November 2003, D&N contacted and also wrote to the appellant's Korean lawyers, Sechang Law Offices, to ascertain what steps had been taken. D&N strongly urged Sechang Law Offices that concrete steps be taken in the course of the day to secure the release of the vessel, failing which proceedings for an injunction would be instituted. This communication was copied to NR. On the same day, D&N wrote two further letters to NR annotating what had transpired to date *vis-à-vis* the appellant and emphasising the need for speed in dealing with such matters, particularly as the vessel was already late for the next port of call.

29 There was further correspondence on 27 November 2003 which showed that the appellant had difficulties in reaching agreement with the banks on the wording of the guarantee to be issued in their favour, resulting in D&N suggesting that the appellant arrange immediately for a cash deposit to be placed into the Korean court. There were then some controversies as to what was the best course to take, with NR stating that if the appellant was required to put in a cash deposit, the funds would have to come from New York and that would not be possible until Monday, 1 December 2003, as that was a long Thanksgiving weekend in the United States.

Our analysis

30 The foregoing was the setting against which the respondent applied for the IMI. By the LOI, the appellant was under a clear duty to take all reasonable steps to prevent the arrest of the vessel, and if the vessel should have been arrested and detained, to take all necessary steps to obtain its release. It was thus incumbent upon the appellant to obtain the relevant B/Ls, either by paying up the B/L holders or making other arrangements with them to obtain the B/Ls. Only upon the surrender of the B/Ls to the respondent, who would in turn forward the same to the shipowner (pursuant to the respondent's own undertaking to Mitsui), would the appellant be able to discharge its obligations

under the LOI.

31 We have, in the above, gone into some detail in order to show that it was not correct for the appellant to say that it was only on 27 November 2003 that the appellant was asked to furnish a cash deposit to obtain the release of the vessel. At all times, it was the appellant's duty to take all reasonable steps to obtain the release of the vessel. On 24 November 2003, D&N had informed the appellant that the respondent had been advised that under Korean law, only a cash deposit for the full value of the claim, plus an uplift, would secure the release of the vessel.

32 Indeed, as early as 5 November 2003, the appellant was informed of the insolvency of Petaco. By 17 November 2003, Mitsui was alarmed and the appellant was asked to locate the B/Ls. It would appear that no steps were, in fact, taken to prevent the arrest of the vessel. In its reply of 19 November 2003, the appellant alleged that the claims "appear to be misguided attempts to recover losses resulting from the failure of a Korean company". It seemed to us that the appellant had overlooked the fact that under cl 4 of the LOI, the appellant's obligation to prevent the arrest, and/or obtain the release of the vessel, was unconditional and absolute, *ie*, "whether or not the [arrest or detention] may be justified". The obligation was not dependent on whether the claim or arrest was justified or otherwise. In any event, there was nothing to suggest that the claims of the two banks, as holders of the B/Ls, were not in order.

33 We turn next to the contention of the appellant that the judge was wrong in failing to undertake an exercise to determine whether the balance of convenience was against the granting of an IMI, for which reliance was placed on *Chuan Hong* and *SPH Ltd*.

34 *Chuan Hong* was a case where the court granted the respondent's application compelling the appellant to leave a petrol station which the latter was operating, and refused the appellant's corresponding application to restrain the respondent from evicting the former from the station. This court in the case stated at 743, [88], that a fundamental principle which governed the grant of interlocutory relief, whether prohibitory or mandatory, was that the court should take whichever course that:

> appears to carry the lower risk of injustice if it should turn out to have been wrong at trial in the sense of granting relief to a party who fails to establish his rights at the trial, or of failing to grant relief to a party who succeeds at the trial.

35 There, the court also explained that while in some cases the "high assurance" test was referred to, that was really only a factor, among others, which the court should take into consideration. It further added at 743, [89] that "[t]he stronger the case appears at this stage, the lesser the risk of [it] being proved wrong at the trial". More importantly, the court, relying on *Shepherd Homes Ltd v Sandham* [1971] Ch 340 and *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670 ("*Film Rover*"), emphasised that the strength of a party's case was "neither a necessary, nor … a sufficient, condition for the grant of a mandatory injunction" (at 743, [89]).

36 *Film Rover* is highly instructive of the applicable principle because there, the case put forward was no higher than an arguable case and yet Hoffmann J granted an IMI on the ground that the risk of injustice to the plaintiff was greater, if the injunction was withheld, than the risk of injustice suffered by the defendant, if the injunction was granted.

37 The pronouncement of the law made in *Chuan Hong* was reaffirmed by this court in *SPH Ltd*.

38 The facts of the present case as outlined above clearly showed that the respondent had at least, if not more than, an arguable case for the issue of an IMI. At this point we would not wish to prejudge the ultimate decision of the trial judge, namely, whether at the time the respondent applied for the IMI the appellant was in breach of its obligation under the LOI. Clearly, by 17 November 2003, the appellant would have known that, in view of the insolvency of Petaco and unless some arrangements were made by the appellant with the banks who were holding the B/Ls, the vessel faced a near certain prospect of being arrested. Yet, the appellant took a nonchalant attitude, instructing NR only on 24 November 2003.

39 In this case, we have no doubt where the balance of justice lay. The appellant would appear to have scant regard to the fact that its obligation was not only to indemnify the respondent for any actual loss, but also to prevent the arrest of the vessel by making the necessary arrangements with the holders of the B/Ls, and, if the vessel was arrested, to promptly furnish bail or other security to obtain its release. Thus, the issue of an IMI in such a case was *prima facie* in order: see *Tomongo Shipping Co Ltd v Heng Holdings SEA (Pte) Ltd* [1997] 2 SLR 550 ("*Tomongo*") at [21] and [22] and *McIntosh v Dalwood (No 4)* (1930) 30 SR (NSW) 415 at 418. The arrest and detention of the vessel would not only cause loss and damage to the shipowner, it would also cause loss and other consequential damage to all who had or would have had dealings with the vessel, including the owners of cargoes to be discharged from the vessel, and the owners of cargoes to be loaded onto the vessel, at the next port of call or subsequent ports. Thus, in our opinion, the considerations weighed clearly in favour of granting the IMI. There was certainly a lower risk of injustice if the IMI was granted.

40 However, the appellant contended that *Tomongo* was wrongly decided as it had failed to take into account the opinion of Megarry J in *Felton v Callis* [1969] 1 QB 200 at 219 that "the court should be most reluctant to make an order for the mere payment of a sum of money" and that the making of such an order would establish a "vigorous new jurisdiction" for which there was no basis. However, it is crucial to bear in mind the nature of the claim in *Felton v Callis*. There, the plaintiff and the defendant were business partners. They had agreed that money owing to a bank on a partnership account should be the joint responsibility of the plaintiff and the defendant up to £900 and any debt in excess of that amount would be paid by the defendant solely. The plaintiff sought a mandatory order requiring the defendant to pay to the bank a specific sum in excess of £900. The remarks of Megarry J were clearly made in the context of the case. He was not considering a letter of indemnity issued to a shipowner for the purpose of enabling goods to be delivered without the production of the relevant B/Ls. The security which the IMI compelled the appellant to furnish was precisely the obligation which the appellant had undertaken under the LOI. The payment was made as security in order to obtain the release of the vessel. This was totally different from the situation in *Felton v Callis*.

41 We would repeat that the obligation which the appellant had assumed under the LOI was not only to indemnify the respondent for losses already suffered by the latter but also to prevent the arrest of the vessel, or if the vessel was arrested, to furnish such bail or security as to obtain the release of the vessel. For such an obligation, the court would grant *quia timet* relief as was done in *Tomongo*.

42 Reverting to the point raised by the appellant that it was not in breach of the LOI when the IMI was applied for, we would say this. Looking at the facts which we have outlined above, it did not appear that the appellant took its obligations under the LOI sufficiently seriously. Perhaps there is an explanation for what appears to be tardiness. Let the trial judge hear it and decide. We do not wish to say more lest it should prejudge what would be a matter for the trial judge to determine.

43 As regards the condition imposed by Ang J in discharging the IMI, the following circumstances should be noted. On 5 December 2003, security was furnished by the appellant and the vessel released. By the time the discharge application came on for hearing before Ang J, the effect of the IMI was spent. Counsel submitted to the judge that the appellant would have furnished the security even without the IMI and it had done so because it wished to discharge its obligations under the LOI. However, counsel also requested the court to discharge the IMI subject to the condition that the security furnished in South Korea not be withdrawn. In these circumstances, we cannot see why any objection should later be taken to the imposition of this condition. The appellant should not be allowed to approbate and reprobate. This court must express its displeasure over such a volte-face. It is clear from the judge's Grounds of Decision that this condition was imposed in the light of what counsel said and out of abundance of caution as it was not absolutely clear that under Korean law, although the security was furnished in the name of the shipowner, the party who, in fact, furnished it, could nonetheless withdraw it.

44 In the exercise of her discretion, Ang J decided that the questions of the propriety in the grant of the IMI, and an order for an inquiry as to damages, be deferred until the trial of the action. There was nothing of grave urgency which required the immediate decision of the court. As pointed out above, there are factual issues which require closer scrutiny. Conflicts as to facts should not be resolved by affidavit evidence alone.

45 Thus, in our judgment, the present appeal was wholly without merit. The appellant would appear to have overlooked the object of the LOI, which is to take care of the situation of a "fast-arrived ship" and to facilitate commerce. Because such a situation often arises, clauses covering it are included in charterparties. The LOI is a stop-gap measure. In law, the shipowner should only deliver the goods against the relevant B/Ls: see *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] MLJ 200. It is implicit in the arrangement that the party giving the LOI will have to obtain the B/Ls and surrender them to the recipient of the LOI. Otherwise, the shipowner will run the risk of a claim by the B/L holder and the arrest of the vessel. This explains why the respondent here kept reminding the appellant to retrieve the B/Ls. Only upon the safe receipt of the B/Ls by the shipowner would the risk run by the shipowner in releasing cargo without the relevant B/Ls be eliminated. While cl 5 of the LOI only stipulated that the appellant should return the B/Ls to the respondent upon the appellant receiving them, it was implied that the appellant would make every effort to retrieve them, as only upon the return of the B/Ls would there be no risk of a claim being made by the B/L holders, with the attendant risk of the vessel being arrested.

46 In the result, the appeal was dismissed with costs, with the usual consequential orders.

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