THE CRIMINAL DISHONESTY TEST – A SEISMIC CHANGE OR A MERE TREMOR?

May 2020

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In *R v Barton & Booth*[1], a five member Court of Criminal Appeal: 1) emphatically endorsed the *Ivey*[2] test for dishonesty, firmly dismissing the previous two-stage test in *Ghosh*[3]; 2) affirmed that, in relation to conspiracy to defraud, there needed to be no requirement of an "aggravating feature" over and above a dishonest agreement which includes some unlawfulness in its object or means; and 3) rejected the suggestion that conspiracy to defraud, when properly particularised, falls foul of Article 7 of the ECHR.

We examine some of the implications of the decision, particularly in relation to corporate fraud and the effect on companies, small and large, including financial institutions.

One of the authors of this article, Mukul Chawla QC, was lead counsel instructed by the Serious Fraud Office in the LIBOR manipulation case of Tom Hayes, referred to in this article, where the elements of dishonesty were considered at length and ruled upon at trial and on appeal.

Dishonesty

Dishonesty is a key element in every offence under the Fraud Act 2006 and a myriad of other offences, including the common law offence of conspiracy to defraud.

The *Ghosh* test

The *Ivey* test replaced the test contained in *R v Ghosh* that had been used in the criminal courts since 1982. The *Ghosh* test contained both an objective and subjective element which had to be satisfied before dishonesty could be established. In *Ghosh* it was set out as follows:

> "... a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards that is the end of the matter and the prosecution fails.

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1 29 April 2020, [2020] EWCA Crim 575.

2 Ivey v Genting Casinos (UK) (trading as Cockfords Club) [2017] UKSC 67; [2018] AC 391.

3 [1982] Q.B. 1053.

> If it was dishonest by those standards then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. …"

That test had been the subject of much criticism in the 35 years of its existence. However, it had survived unscathed in the criminal courts and it took a civil case in the Supreme Court, involving an allegation of cheating a casino, to unravel it.

The *Ivey* test

Lord Hughes in *Ivey*, in a judgment with which all the other members of the court (including the then Lord Chief Justice, Lord Thomas) agreed, set out that there existed:

> "…convincing grounds for holding that the second leg of the test propounded in Ghosh [1982] QB 1053 does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and by Lord Hoffmann in *Barlow Clowes* [2006] 1 WLR 1476, para 10 […]. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was dishonest is to be determined by the factfinder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."[4]

These remarks were clearly *obiter* as they were not necessary for the decision of the court. Thus, they generated debate as to their effect in criminal cases which, strictly speaking, were still bound to follow the law as set out in *Ghosh*. In November 2017, the issue was addressed by Sir Brian Leveson P in *DPP v Patterson*[5], a decision of the High Court, where he set out[6]:

> "Given the terms of the unanimous observations of the Supreme Court expressed by Lord Hughes, who does not shy from asserting that Ghosh does not correctly represent the law, it is difficult to imagine the Court of Appeal preferring Ghosh to Ivey in the future."

While the criminal courts thereafter used (and the Crown Court Compendium was amended to reflect) the *Ivey* test, the debate about whether it was the correct test quietly rumbled on. So it was that the matter came before the Court of Appeal in *R v Barton & Booth* as it had been contended, at trial, that *Ivey* was the wrong test and that the jury should have been directed in accordance with the *Ghosh* test.

R v Barton & Booth

Barton was convicted of 10 counts. These consisted of four counts of conspiracy to defraud, contrary to common law, three counts of theft, one count of fraud, one count of false accounting and one count of transferring criminal property, contrary to section 327 Proceeds of Crime Act 2002. Booth was convicted of three counts of conspiracy to defraud.

The facts of the case make for depressing reading. In essence, while running a luxury nursing home in Southport Lancashire, Barton (with the assistance of Booth) over many years dishonestly targeted, befriended, and "groomed" wealthy and vulnerable (and childless) elderly

[4] Paragraph 74.

[5] [2017] EWHC 2820 (Admin); [2018] 1 Cr. App. R. 28.

[6] Paragraph 16.

residents of the home, in order to profit from them. Barton manipulated them and isolated them from their families, friends and advisers. A number of these residents made him the residuary beneficiary of their wills, usually within a short time of arriving at the home. They also allowed him to assume control of their finances, by making him next of kin, or granting him power of attorney, or by making him executor, and he used this control to enrich himself.

Following conviction, the Court of Appeal was invited to consider a number of grounds of appeal, including:

1) Dishonesty: in particular, does *Ivey* provide the correct approach to dishonesty and, if so, is it be followed in preference to the test described in *Ghosh*?

2) Conspiracy to defraud: did the judge err in his approach to the offence of conspiracy to defraud?

In its judgment, the Court concluded:

> "…the test of dishonesty formulated in *Ivey* remains a test of the defendant's state of mind – his or her knowledge or belief – to which the standards of ordinary decent people are applied. This results in dishonesty being assessed by reference to society's standards rather than the defendant's understanding of those standards[7]."

The Court amplified the observations of Lord Hughes in the Supreme Court when he referred to the first stage of the test:

> "…the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts… [that those facts mean] …all the circumstances known to the accused and not limiting consideration to past facts. All matters that lead an accused to act as he or she did will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard. That will include consideration, where relevant, of the experience and intelligence of an accused. In an example much used in debate on this issue, the visitor to London who fails to pay for a bus journey believing it to be free (as it is, for example, in Luxembourg) would be no more dishonest that the diner or shopper who genuinely forgets to pay before leaving a restaurant or shop. The Magistrates or jury in such cases would first establish the facts and then apply an objective standard of dishonesty to those facts, with those facts being judged by reference to the usual burden and standard of proof[8]."

The Effect of *Ivey* and *Barton*

Thus, the test of dishonesty now being applied across both the civil[9] and criminal jurisdictions, that the fact finding tribunal will need to consider, is the two stage (*Ivey*) test as follows:

(a) what was the person's actual state of knowledge or belief as to the facts; and

(b) was his conduct dishonest by the standards of ordinary decent people?

Critical within that test is that there is no requirement (as there had previously been under *Ghosh*) that the person must appreciate that what he has done is, by those standards, dishonest.

The *Ivey/Barton* test theoretically makes it easier to prove offences of dishonesty, although the reality is that such easing of the burden on the prosecution will apply to a very small number of

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[7] Paragraph 107.

[8] Paragraph 108.

[9] *Bilta (UK) Limited and ors v NatWest Markets plc* [2020] EWHC 546 (Ch) is a very recent example of the *Ivey* test being used in civil proceedings.

cases requiring proof of dishonesty. In the vast majority of cases it will simply not be necessary to provide any detailed description to a Jury in determining the issue of dishonesty.

In the Crown Court Compendium[10] (the Guide to Judges on how to manage criminal cases and to direct juries) the following general guidance is given:

> "…it will rarely be necessary to give a direction about dishonesty beyond referring to it as a requirement of the offence concerned.
>
> However it may, depending on the circumstances of the case, be necessary to add that:
>
> (1) "dishonesty" is a word in common use, and has no special legal meaning; and/or
>
> (2) the prosecution must prove that D was dishonest at the time of the alleged offence; and/or
>
> (3) when considering whether the prosecution have proved that D was dishonest, the jury should draw such conclusions as they think right from D's conduct and/or words before and/or at the time of and/or after the alleged offence."

Points (2) and (3) are no more than re-statements of the burden of proof and general intent respectively and add little or nothing to point (1).

Conspiracy to Defraud

Like the dishonesty test in *Ghosh*, the common law offence of conspiracy to defraud has been the subject of much debate and academic criticism. The controversy together with the ambit of the offence was set out by Davis LJ in the judgment of the Court of Appeal in *R v H*[11] at paragraphs 2 and 3 in the following terms:

> "The common law offence of conspiracy to defraud is controversial, as noted in Smith & Hogan's Criminal Law 13th edition at paragraph 13.3.5. It undoubtedly potentially has a very broad reach indeed, something which some would advance as a merit and others would advance as a vice. But Parliament has expressly preserved it by the provisions of section 5(2) of the Criminal Law Act 1977 and it continues to play a significant part in the criminal justice system in England and Wales.
>
> Nevertheless, and no doubt because of its potential width, the common law has imposed certain limitations. Thus conduct which may be commercially or morally reprehensible cannot necessarily be criminalised solely by invocation of the common law offence of conspiracy to defraud. By way of one example, participation in a secret price-fixing cartel is not necessarily to be taken as an offence under the common law: see *Norris v Government of the USA* [2008] AC 920. There needs in such circumstances to be what has been called an "aggravating factor". A further reflection of this approach is the general principle that an agreement to achieve a lawful object by lawful means is, at all events in the ordinary way, not capable of constituting a common law conspiracy to defraud: see, for example, *R v Evans* [2014] 1 WLR 2817."

Because of its broad reach, this offence is one that is embraced by prosecutors grappling with complex cases and reviled by defenders who have to deal with what may appear to be an elastic and sometimes elusive beast.

In *Barton*, it was argued by the appellants, first, whether there is a requirement of "unlawfulness" or "aggravating feature" over and above a dishonest agreement which includes an element of unlawfulness in its object or means in the description of the elements of the

[10] https://www.judiciary.uk/wp-content/uploads/2016/06/Crown-Court-Compendium-Part-I-December-2019-amended-19.02.20.pdf.

[11] [2015] EWCA Crim 46. This was the interlocutory appeal of Tom Hayes against rulings made, pre-trial, in the proceedings against him for LIBOR manipulation.

offence. Second, whether the offence meets the requirements of legal certainty at common law and under Article 7 of the European Convention on Human Rights ("**ECHR**") having regard to the test of dishonesty.

The Court rejected both of those submissions.

It held, first, that, while conspiracy to defraud does not extend to agreements to achieve a lawful object by lawful means, there was no requirement of "unlawfulness" or "aggravating feature" over and above a dishonest agreement which includes an element of unlawfulness in its object or means. It referred to the decision of the House of Lords *in R v Goldshield Group Plc and others*[12] in making clear that there is no requirement for additional unlawfulness or aggravating circumstances over and above any unlawful object or means.

Second, the Court held that the Indictment, as pleaded, revealed an offence on which the jury were entitled to convict and, therefore, rejected any suggestion that the offence lacked clarity such as to fall foul of Article 7, ECHR.

What difference does all of this make?

Conspiracy to defraud

The law in relation to conspiracy to defraud is unchanged in consequence of *Barton*. It will remain a powerful tool in the prosecutor's armoury and will be particularly apposite to complex cases and cases involving financial markets and products. It can have come as no surprise that it was extensively utilised in the SFO's LIBOR and EURIBOR prosecutions. It will remain of importance in any consideration of the prosecution of corporates as well as individuals.

Proving dishonesty as a critical element of the offence has been made simpler and easier in those cases where a detailed analysis of dishonesty is required.

As a general observation based on experience and without the benefit of any empirical evidence, those complex cases and those involving financial markets and products will be the ones that are most susceptible to a detailed direction on dishonesty. Thus, those cases are likely to be most affected by the removal of the subjective limb of the dishonesty test, such as to enable juries to conclude that dishonesty is established more readily than before.

Dishonesty

We have already pointed out that the *Ivey* test, theoretically, makes it easier to prove offences of dishonesty. However, this easing will apply to a very small number of cases requiring proof of dishonesty as, in the vast majority of cases, it will simply not be necessary to provide any detailed description to a Jury in determining the issue of dishonesty.

What is clear is that offences of dishonesty, in those rare cases where it is necessary for a jury to be directed on the precise meaning of the word *dishonesty*, will be easier to prove. One can see a ready example of that if one looks at the direction under *Ghosh* given to the jury in the trial of Tom Hayes and compares it to the probable direction that would be given if the trial were to take place today.

In 2015, Cooke J gave this direction to the Jury:

> "'*Dishonesty*' is a key element in the commission of fraud and it is the element on which much attention has been focussed throughout and in Counsels' closing speeches. It is the central issue in the trial.

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[12] [2008] UKHL 17; [2009] 1 Cr App R 33.

i) In order for you to be sure of Mr Hayes' guilt you need to be sure that he was acting dishonestly and that means that you have two questions to resolve:

   a) First, was what Mr Hayes agreed to do with others dishonest by the ordinary standards of reasonable and honest people? Not by the standards of the market in which he operated if different: not by the standards of his employers or colleagues if different: not by the standards of bankers or brokers in that market if different, even if many or even all regarded it as acceptable, nor by the standards of the BBA [British Bankers Association] or FXMMC [Foreign Exchange Money Markets Committee], but by the standards of reasonable, honest members of society. There are no different standards which apply to any particular group of society – whether as a result of market ethos or practice. You must form your own judgment as to what those standards are, in the light of all the arguments that have been put before you about such standards. If what he agreed to do was not dishonest by those standards, the prosecution fails.

   b) Second, must Mr Hayes have realised that what he agreed to do would be regarded as dishonest by those standards? It is dishonest for a person to act in a way which he knows ordinary reasonable and honest people consider to be dishonest even if he thinks he is justified in acting in the way he does, whether because he thinks that others in the market do it, or thinks that everyone tries to do it, or because his employers or others encourage him to do it or appear not to object to him doing it.

   c) In deciding this you must consider Mr Hayes' state of mind at the time of the events in question. If after taking into account all the evidence you are sure that the answer to both of these questions is "Yes", then the element of dishonesty is proved. If you are not sure of that, the element of dishonesty is not proved and Mr Hayes is not guilty of the offences charged.

ii) Mr Hayes maintains that what he did was not dishonest by the ordinary standards of reasonable and honest people. That is a matter for you to judge by the standards of reasonable and honest people, as I have already said.

iii) Mr Hayes also contends that he did not realise that what he was doing would be considered by honest and reasonable people as dishonest because he says that:

   a) He was never trained in the LIBOR process and in particular what was and was not a legitimate consideration for a submitter to take into account in making a LIBOR submission.

   b) He had no regulatory or compliance obligations imposed on him by either UBS or Citi when he was employed by them.

   c) He saw that other banks answered the LIBOR question in a manner favourable to their own commercial trading interests.

   d) He perceived that the activity of Panel Banks in making LIBOR submissions gave rise to an inherent conflict of interest as the banks would always have a commercial incentive to make submissions which inured to their commercial advantage.

   e) He considered that what he was doing was common practice in the banking industry at the time and it was regarded as legitimate by a significant number of submitters, traders and brokers, understanding

that banks as a matter of practice based submissions on their own commercial interests.

f) He was aware that banks were involved in the practice of "low-balling".

g) What he was doing was not only condoned but encouraged by his employers and he was instructed to act in the way he did.

h) There was a range of potential answers to the LIBOR question which could be justified as a subjective judgment of the panel bank's borrowing rate and Mr Hayes did not personally realise that the selection of any figure within that range by reference to a trader's or bank's trading advantage, even though it did not accord with the LIBOR definition nor properly answer the LIBOR question, was dishonest by the standards of ordinary reasonable and honest people."

That direction was reviewed in the Court of Appeal[13] in consequence of the argument raised by the defence that the trial judge had been wrong to rule that the majority of the matters identified under the subjective limb were irrelevant to the objective limb and that reference to those factual matters could only be for the purpose of diluting the recognised standard required to be applied by the jury. In particular, it was submitted that the judge was wrong to conclude that the evidence relating to the views and conduct of participants in the market was not relevant to the first limb of Ghosh. The defence contended that, in determining that standard, a necessary contextual factor was the standards of the relevant market at the time and how participants in that market operated. The judge, it was argued, should have directed the jury that it should have regard to all the evidence of market activity in deciding whether the conduct in context was dishonest by the standards of ordinary men.

The Court of Appeal emphatically rejected those arguments and, having reviewed previous authority concluded:

> "Not only is there is no authority for the proposition that objective standards of honesty are to be set by a market, but such a principle would gravely affect the proper conduct of business. The history of the markets have shown that, from time to time, markets adopt patterns of behaviour which are dishonest by the standards of honest and reasonable people; in such cases, the market has simply abandoned ordinary standards of honesty. Each of the members of this court has seen such cases and the damage caused when a market determines its own standards of honesty in this way. Therefore to depart from the view that standards of honesty are determined by the standards of ordinary reasonable and honest people is not only unsupported by authority, but would undermine the maintenance of ordinary standards of honesty and integrity that are essential to the conduct of business and markets."[14]

The Crown Court Compendium has helpfully prepared an example direction based upon Mr Hayes case, introducing it in the following way:

> "Where the questions of dishonesty has been addressed by reference to 'industry standards' in a particular market context it may be necessary to go on to give a *Hayes*-style direction reminding the jury that the standard to be applied is that of ordinary decent people and not those, if different, of operators or even regulators of that market sector."

Applying exactly the same factual considerations as arose in *Hayes,* the direction under *Ivey* might be as follows:

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[13] R v Hayes (Tom Alexander) [2018] 1 Cr. App. R. 10

[14] Paragraph 32.

"'*Dishonesty*' is a key element in the commission of fraud and it is the element on which much attention has been focussed throughout and in Counsels' closing speeches. It is the central issue in the trial.

i) In order for you to be sure of the defendant's guilt you need to be sure that he was acting dishonestly. You will consider the evidence about the culture and ethos of the market together with all other evidence, including that from the defendant himself, which may have a bearing on what the defendant knew or believed to be the factual situation in which he acted.

ii) Taking account of the defendant's understanding of the factual situation in which the behaviour occurred, you must ask yourselves this question: Was what the defendant agreed to do with others dishonest by the ordinary standards of reasonable and honest people? Not by the standards of the market in which he operated if different: not by the standards of his employers or colleagues if different: not by the standards of bankers or brokers in that market if different, even if many or even all regarded it as acceptable, nor by the standards of the BBA [British Bankers Association] or FXMMC [Foreign Exchange Money Markets Committee], but by the standards of reasonable, honest members of society. There are no different standards which apply to any particular group of society – whether as a result of market ethos or practice. You must form your own judgment as to what those standards are, in the light of all the arguments that have been put before you about such standards.

iii) If what he agreed to do was not dishonest by those standards, the prosecution fails."

Thus all of the subjective elements in relation to market practices which were important under the subjective limb of the *Ghosh* formulation have been relegated to background issues rather than issues that go directly to the critical question determining dishonesty. A conviction on that, or a similar, factual scenario appears considerably easier now than it did before *Ivey*.

Offences against individuals

Offences of dishonesty will be easier to prove and will be most visible in those complex cases involving individuals and particularly where the subject matter relates to financial markets and products. The subjective elements of market practice that previously would have been relied upon as the subject test under *Ghosh*, have been relegated to background evidence in the first limb of the *Ivey* test.

Offences against corporates

Because offences of dishonesty are easier to prove, this should mean than such offences against corporates are correspondingly easier to prove. In reality, however, this is more likely to create a greater chasm in the ability to prosecute companies depending on their size and structure.

There is already a gross distortion in the way that companies are treated under the criminal law for those offences where criminality is predicated on the actions of the directing mind and will of the company. In small companies, where that directing mind and will is readily established because there will only be a handful of directors or true decision makers, prosecution authorities have little difficulty in instigating criminal proceedings. The *Ivey* test will only fortify prosecutors in their resolve to prosecute such case.

However, in relation to large companies, which will include many financial institutions, where the directing mind and will may be far more difficult to identify and against whom criminal

actions may be difficult to ascribe, the difference created by the *Ivey* test will be insignificant. The real problem will remain satisfying the directing mind and will test. Thus far, in relation to large companies, that has been an almost impossible test to satisfy[15]. Unless and until that test is changed, large companies are likely to remain immune to the changes effected by *Ivey*.

Thus, the chasm between a prosecutor's ability to prosecute small and large companies has simply widened rather than narrowed. On any principled basis, this is an unfortunate development of the law.

Consequential issues for future cases

What about the minority of cases where, usually as a consequence of their complexity, a detailed description is required?

In *R v Barton & Booth*, having determined the issue on dishonesty by endorsing the *Ivey* test, the Court of Appeal observed, somewhat ominously that:

> "There is, no doubt, a range of consequential issues that will need to be decided following the decision in Ivey. Many of these have been usefully summarised by Professor David Ormerod QC and Karl Laird in their article in the UK Supreme Court Yearbook 2018 Volume 9 pages 1–24. They will be addressed as cases are tried."[16]

Ormerod and Laird's article (Ivey v Genting Casinos – Much Ado About Nothing?[17]) is, unsurprisingly, compelling reading. In it, the authors note that the trial judge found that as a matter of fact that although Mr Ivey was genuinely convinced that what he was doing was not cheating, he had, in fact and law, cheated. Thus his subjective view, genuinely held, was that he had not cheated. However, an objective analysis of his conduct demonstrated that was precisely what he had done. This has the effect of criminalising conduct by treating a defendant as dishonest even though he did not appreciate that ordinary decent people would consider that conduct as dishonest. That absence of appreciation is now irrelevant.

The authors further consider whether the shift from the subjective standpoint could impact more acutely in the context of conspiracy to defraud where dishonesty is the essential *mens rea* and where the conduct under examination may involve complex financial transactions far removed from the average juror's experience.

Additionally, are offences, in particular conspiracy to defraud, easier to prosecute against corporates now that there is no requirement to prove that the directing mind and will of the corporate realised that the conduct in question would be considered dishonest by the standards of ordinary, decent people?

Finally (at least for the purposes of this piece) does the removal of the subjective element mean that dishonesty is still an element of *mens rea* (as it clearly was under *Ghosh*)? If, on proper analysis of *Ivey,* and now *Barton*, it should now be more accurately categorised as part of the *actus reus* of the offence, does this mean that offences where dishonesty is the determining feature of the criminality alleged are become more akin to offences of strict liability?

None of these are straightforward questions and it is wholly unsurprising that the Court in *Barton* chose not to consider them but to defer these issues for future cases where the issue may arise. Of course, that approach does not assist is determining now the precise ambit of the offences of dishonesty.

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[15] The failed application by the Serious Fraud Office to prosecute Barclays Plc and Barclays Bank Plc [2018] EWHC 3055 (QB) is a recent example of the difficulty faced by prosecutors.

[16] Paragraph 109.

[17] https://ukscy.org.uk/doi/10.19152/ukscy.762.

Conclusions

The decision in *Barton* is wholly unsurprising. Offences, where a detailed examination of dishonesty is required, whether for statutory offences of theft or fraud or for conspiracy to defraud, will be easier to prove. Those cases will still be relatively rare. However, a substantial proportion of that minority of cases will be those that involve complex issues and/or relate to financial products and financial markets.

The *Ivey/Barton* test will, therefore, be of potential importance to all prosecutors and those subjected to investigation for complex offences or those involving particular market practices and products involving dishonesty.

Proving offences of dishonesty against individuals in complex cases will be easier and may have a potential significant impact for individual employees of both large and small companies.

The effects of the *Ivey/Barton* test for corporates are contradictory and unfortunate. For smaller companies, where the directing mind and will of the company is straightforward to establish and the linkage to criminal conduct is, therefore, also straightforward, a prosecution is rendered substantially easier. For large companies, overcoming the hurdle of linking criminality to the directing mind and will remain the real and, in many cases, insuperable challenge to prosecutors. Thus, it is unlikely, although not impossible, that the change of the dishonesty test will have any practical consequences for those large companies.

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