IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2018-485-215
[2018] NZHC 3290

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of a Decision by the Kapiti Coast District Council in regard to Proposed Plan Change 84 to the Kapiti Coast District Plan
BETWEEN	SHEFFIELD PROPERTIES LIMITED Plaintiff
AND	KAPITI COAST DISTRICT COUNCIL First Defendant
	KAPITI COAST AIRPORT HOLDINGS LIMITED Second Defendant
	NEW ZEALAND TRANSPORT AGENCY Third Defendant

Hearing:	6 August 2018
Counsel:	M McClelland QC and P D Tancock for the Plaintiff S M Bisley and P T Beverley for the First Defendant A R Galbraith QC and B S Carruthers for the Second Defendant No appearance for the Third Defendant
Judgment:	13 December 2018

JUDGMENT OF CHURCHMAN J

Introduction

[1] The Kapiti Coast's biggest town, Paraparaumu, is situated less than an hour's drive north of Wellington. It is serviced by the Kapiti Coast Airport and is home to Coastlands Shopping Centre (Coastlands), a mall with more than 50 stores.

[2] On 19 December 2017, the Kapiti Coast District Council (the Council) approved a private plan change known as "Private Plan Change 84 – Airport Zone" (PPC84), paving the way for Kapiti Coast Airport Holdings Ltd (KCAHL) to eventually seek resource consents for various developments in the Airport Zone.

[3] Having opposed PPC84, Sheffield Properties Ltd (Sheffield), the owner of Coastlands and other interests within the Paraparaumu Town Centre, now seeks judicial review of the Council's decision to approve it.

[4] Both KCAHL and the Council have applied to strike-out Sheffield's application.

Background

[5] The Proposed Kapiti Coast District Plan 2012 (the Proposed District Plan) was notified on 29 November 2012, carrying over from the Kapiti Coast District Plan 1999 (the Operative District Plan) four activities specified as prohibited in the Airport Zone. These activities were:

(a) noise sensitive activities not specifically provided for as a permitted activity;

(b) department stores;

(c) supermarkets; and

(d) more than one store of between 151m^2 and 1,500m^2 gross floor area that retails groceries or non-specified food lines.

[6] KCAHL is the owner and operator of the Kapiti Coast Airport and of Kapiti Landing, a mixed-use development in Paraparaumu on land within the Airport Zone. In July 2015, KCAHL, by PPC84, requested that those rules imposing prohibited activity status in the Operative District Plan be replaced with rules imposing:

(a) in the case of a single department store, non-complying activity status;

(b) in the case of a single supermarket, discretionary activity status;

(c) in the case of more than one supermarket, non-complying activity status; and

(d) in the case of more than one large retail store, discretionary activity status.

[7] The purpose of PPC84 was to "enable KCAHL to undertake master planning of [its] land currently owned in the Airport Zone, and so that resource consents [could] ultimately be sought in the future".

[8] In February 2016, the Council publicly notified KCAHL's request for PPC84, appointing an Independent Hearing Panel (the Panel) to:

(a) hear submissions on PPC84; and

(b) consider and make recommendations to the Council on whether PPC84 should be declined, approved or approved with amendments.

[9] Seven submissions were received, including some filed on behalf of Coastlands and Sheffield.

[10] On 3 May 2016, KCAHL applied for declarations under s 311 of the RMA that the submitters, apart from the New Zealand Transport Agency, were either trade competitors or surrogates of trade competitors of KCAHL and had, therefore, breached the RMA by submitting on PPC84 in circumstances where none were affected by effects which did not relate to trade competition.

[11] On 20 July 2016, the Environment Court issued an oral decision declaring that Sheffield and two other parties were trade competitors of KCAHL.[1] The Council subsequently wrote to those three parties, requesting confirmation as to:

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1 *Kapiti Coast Airport Holdings Ltd v Alpha Corp Ltd* [2016] NZEnvC 137.

(a) whether they considered their submissions on PPC84 as proposed in part or in whole met the requirements of cl 29(1B) of sch 1 of the RMA, and the reasons for that view; and

(b) the extent to which they intended to pursue the submission and the basis on which they wished to do so.

[12] On 23 August 2016, Sheffield confirmed that matters raised in its submissions were not trade competition effects and so were permissible in terms of cl 29(1B) of sch 1 of the RMA, but nonetheless provided an updated submission with some minor amendments.

[13] The Panel conducted a hearing on PPC84 on 13 and 15 February 2017 and 20 March 2017, with Sheffield providing written submissions and evidence, and making oral submissions. On 8 September 2017, the Panel issued its report to the Council (the Panel Report), recommending that PPC84, as amended in appendices to the Panel report, be approved. The Council did so on 19 October 2017, recording its decision in writing (the Decision) and publicly notifying the Decision on 25 October 2017.

[14] Time to appeal the Decision expired on 6 December 2017 with no appeals filed.

Application for judicial review

[15] Sheffield has applied for judicial review of the Decision on the grounds that:

(a) the Decision failed to determine whether prohibited activity status was the most appropriate activity status, applying the wrong legal test in relation to prohibited activity status, and as a result an error of law was made;

(b) changes were made to the Proposed District Plan which were not on PPC84 and were, therefore, out of scope; changes were made that were not consequential amendments; and irrelevant considerations were

taken into account, which meant that the Decision was made under an error or errors of law; and

(c) the Council failed to take into account a relevant consideration, namely the Wellington Regional Policy Statement.

[16] Both KCAHL and the Council have applied to strike-out Sheffield's application on the grounds that:

(a) judicial review is barred by s 296 of the Resource Management Act 1991 (RMA);

(b) the proceeding has been brought with undue and prejudicial delay; and

(c) by KCAHL, on the additional ground that it is an abuse of the Court's process.

Principles of strike-out

[17] Pursuant to High Court Rule 15.1, the Court may strike-out all or part of a pleading if it discloses no reasonable cause of action or defence, is likely to cause prejudice or delay, is frivolous or vexatious, or is otherwise an abuse of process.

[18] The established criteria for striking-out, which also apply to an application to strike-out a judicial review proceeding,[2] are as follows:[3]

(a) Pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.

(b) The cause of action or defence must be clearly untenable.

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2 *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA).

3 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267, and endorsed by the Supreme Court in *Couch v Attorney-General* [2008] NZSC 45 at [33].

(c) The jurisdiction is one to be exercised sparingly, and only in a clear case.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.

(e) The Court should be particularly slow to strike-out a claim in any developing area of the law.

Approach to evidence on strike-out applications

[19] The general approach to evidence on strike-out applications was outlined by the Court of Appeal in *Attorney-General v McVeagh* as follows:[4]

> The Court is entitled to receive affidavit evidence on a striking-out application, and will do so in a proper case. It will not attempt to resolve genuinely disputed issues of fact and therefore will generally limit evidence to that which is undisputed. Normally it will not consider evidence inconsistent with the pleading, for a striking-out application is dealt with on the footing that the pleaded facts can be proved ... But there may be a case where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.

[20] KCAHL submitted that one principle that is relevant to these applications is the extent to which the Court should look beyond the pleaded facts to establish the factual position. It argued that, consistent with the approach in *Attorney-General v McVeagh*, the evidence of Mr Donnelly, the General Manager of Resource Management at Todd Property Group Limited, the parent company of KCAHL, is relevant to establish incontrovertible and undisputed facts that are germane to these proceedings. The Court of Appeal in *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* held that it is important to preserve this possibility where proceedings are used as "a vehicle to promote causes, thus giving rise to greater risks of abuse of procedure", which KCAHL submitted is the situation here.[5]

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4 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566 (citations omitted).
5 *Southern Ocean Trawlers*, above n 2, at 63.

[21] Sheffield, however, argued that the justice of the case does not require the Court to go beyond the pleadings and agreed facts to determine the strike-out proceeding and submitted that KCAHL's suggestion that the Court should go beyond the pleadings to make findings of fact should be resisted, noting that in *Southern Ocean Trawlers* the Court of Appeal went on to say:[6]

> In the end the course taken must depend on the justice of the particular case, the Court always being alert not to preclude a party from the opportunity of trial and interlocutory procedures … if real prospects of success cannot be excluded.

[22] It is my view that, while the affidavit evidence of Mr Donnelly does not appear to enter into disputed territory, and the Court would, therefore, be entitled to consider this evidence in its determination of the strike-out application, it is not necessary to do so.

Is Sheffield barred by s 296 of the RMA from making the application?

[23] The right to appeal in relation to hearings concerning requests for changes to plans of local authorities is limited to the person who made the request, and any person who made submissions on the plan or change, and any such persons may appeal the decision of the local authority to the Environment Court.[7]

[24] Section 274 of the RMA provides that a trade competitor may be a party to any proceedings before the Environment Court. That right is, however, limited, as Part 11A of the RMA provides that the Act is not to be used to oppose trade competitors, and that Person A must not bring an appeal for any of the following purposes:[8]

(a) protecting Person A from trade competition;

(b) preventing Person B from engaging in trade competition;

(c) deterring Person B from engaging in trade competition.

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6 At 63.
7 Sch 1, cl 29(6) Resource Management Act 1991.
8 Section 308D.

[25] The purpose of Part 11A is to require trade competitors to show more than an interest equivalent to that which a member of the general public could raise in a submission before they can participate.[9] As was said at the time it was introduced, the explicit intent of Part 11A was to place "restrictions on anti-competitive appeals motivated by trade competition" and provide for a "streamlining of planning processes", thereby limiting the "delay, uncertainty, frustration, and avoidable costs" associated with anti-competitive behaviour.[10]

[26] Similarly, while sch 1, cl 29(1A) RMA provides that any person may make a submission in relation to a plan change, under cl 29(1B), a trade competitor may make a submission only if directly affected by an effect of the plan or change that:

(a) adversely affects the environment; and

(b) does not relate to trade competition or the effects of trade competition.

[27] Having confirmed that the matters raised in its submissions were not trade competition effects, Sheffield was able to pursue its submission before the Panel. Therefore, Sheffield would have been able to appeal the Decision to the Environment Court, but elected not to do so, instead filing an application for judicial review.

[28] Under the RMA, however, a party cannot apply for judicial review unless its right of appeal has been exercised, with s 296 providing as follows:

> **296 No review of decisions unless right of appeal or reference to inquiry exercised**
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> If there is a right to refer any matter for inquiry to the Environment Court or to appeal to the court against a decision of a local authority, consent authority or any person under this Act or under any other Act or regulation—
>
> (a) no application for review under the Judicial Review Procedure Act 2016 may be made; and
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> (b) no proceedings seeking a writ of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or injunction in relation to that decision, may be heard by the High Court—

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9 Section 308C.
10 (19 February 2009) 652 NZPD 1486.

> unless the right has been exercised by the applicant in the proceedings and the court has made a decision.

[29] The Council submitted that Sheffield made submissions in opposition to the plan change (many of which mirror those advanced in this judicial review application) and so had a right of appeal to the Environment Court. It is, therefore, subject to the s 296 bar. If, however, Sheffield was barred from appealing because its submissions were on trade competition issues or were motivated by a desire to obtain a competitive advantage, then it has no genuine interest in the Council's decision and, as a result, lacks standing to bring this proceeding.

[30] Sheffield argued that as a trade competitor it did not have an appeal right. Section 308D expressly prohibits a trade competitor from being a party to an appeal for the purposes of protecting itself from competition or preventing and deterring another party from engaging in competition. No provision in Part 11A enables a trade competitor to appeal a private plan change initiated by a trade competitor and so, it was submitted, Sheffield had not fallen foul of s 296 of the RMA. Sheffield argued that it has public law concerns that, as a trade competitor, it would have been unable to raise in an appeal.

[31] In his oral submissions, Mr McClelland QC, counsel for Sheffield, developed the argument that, having been found to be a trade competitor by the Environment Court, Sheffield was deprived of a right of appeal and was therefore able to bring judicial review proceedings. He submitted that there was no finding of the Panel as to what effects raised by Sheffield went further than trade competition effects.

[32] However, this argument overlooks the finding of the Panel:[11]

> In the end we concluded that the Plan Change did have the potential to give rise to effects that could extend beyond trade competition effects. These effects included traffic effects on the overall amenity of other centres, including, and in particular the Paraparaumu Town Centre.

[33] Finally, Sheffield, relying upon the Privy Council's decision in *McGuire v Hastings District Council*, submitted that despite s 296, the Court's ability to hear and

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[11] Report and Recommendations of Hearing Panel to Kapiti Coast District Council, 8 September 2017 at [3.17].

determine judicial review is "naturally not totally excluded" by s 296, and there remains "very much a residual" jurisdiction to entertain judicial review proceedings.[12]

[34] The relevant paragraph from *McGuire* is as follows:[13]

> Provisions of significance in this case are to be found in s 296. In summary that section stipulates that, where there is a right of appeal to the Environment Court from a decision, no application for judicial review may be made and no proceedings for a prerogative writ or a declaration or injunction may be heard by the High Court unless that right of appeal has been exercised and the Environment Court has made a decision. Thus the administrative law jurisdiction of the High Court (or the Court of Appeal on appeal), though naturally not totally excluded, is intended by the legislature to be very much a residual one. The RMA code is envisaged as ordinarily comprehensive.

[35] While I am prepared to accept that the High Court's jurisdiction to hear an appeal may be not totally excluded, it was very much intended to be a residual jurisdiction and it is my view that this application does not raise issues warranting the exercise of that jurisdiction. It was the legislature's intention that the RMA not be used to further a trade competitor's interests over its rivals and the judicial review procedure should not be used in an attempt to circumvent that.

[36] I accept the Council's admissions. Sheffield had the opportunity to appeal the Council's decision under sch 1, cl 29(6) RMA, but elected not to do so. As this right of appeal was not exercised, Sheffield is thereby precluded from applying for judicial review under s 296 of the RMA.

[37] However, in the event that I am wrong in that view, I will go on to consider the other grounds put forward to support striking out Sheffield's application.

Does Sheffield's delay in bringing the application mean it should be struck out?

[38] KCAHL submitted that the delay in this case is part of a wider strategy of improper conduct on the part of Sheffield and that Sheffield's delay in bringing the application for judicial review means that it should be struck out because:

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12 *McGuire v Hastings District Council* [2002] 2 NZLR 577.
13 At [25].

(1) as a consequence of both the way the pleading is drafted, and the delay in filing, it is likely to cause delay and prejudice to KCAHL and the Council, and it should be struck out under HCR 15.1(b); and

(2) the consequences of delay in these circumstances add weight to KCAHL's submissions that this application is an abuse of the Court's process and should be struck out under HCR 15.1(d).

[39] KCAHL submitted that, if the relief sought was granted, it would likely hold up the final planning outcome for the Airport land for an indeterminate amount of time and this uncertainty would be prejudicial to KCAHL, impacting on both its master-planning and its appetite for seeking consent while the provisions are under challenge.

[40] Sheffield submitted that the delay was only of 26 working days from the date PPC84 became operative on 16 February 2018 and this length of time does not constitute delay. It submitted that it was appropriate for it to await the Council's decision on the Proposed District Plan and any appeals against it because the Proposed District Plan's provisions would totally replace the Operative Plan which included PPC84. Sheffield also submitted that, in any case, delay (if any) more appropriately goes to the Court's discretion whether to grant relief on judicial review and should not result in the striking out of the proceeding.

[41] KCAHL submitted that there is no justifiable reason for the delay in bringing this proceeding, pointing out that it was Sheffield's sister company, Coastlands, that lodged an appeal against the Council's decisions on the Proposed District Plan seeking, amongst other things, to reinstate prohibited activity status for retail activities within the Airport Zone. This appeal means that the rules relating to retail in the Airport Zone are not treated as operative until that appeal has been determined and, as a result, the provisions of PPC84 remain in force until the appeals are resolved, when they would otherwise have fallen away. KCAHL argued that this is an appropriate case to pierce the corporate veil as Sheffield and Coastlands share the same directing mind and will, and it is therefore artificial for Sheffield to say that it had to wait until after appeals on the Proposed District Plan closed as it would have known that Coastlands would be lodging an appeal against the equivalent provisions of the

Proposed District Plan. It submitted that the behaviour of the two companies is the type of sharp practice to which the principle in *Salomon* is not intended to apply.[14]

[42] KCAHL also submitted that, although Sheffield argued that there was no prejudice to KCAHL because it commenced master-planning of its landholdings with full knowledge that judicial review proceedings would soon be on foot, as PPC84 is now operative and applications for consent can be lodged, there is a risk that the market will not engage with KCAHL while the threat of judicial review remains.

[43] While I accept that delay alone would not be sufficient to justify striking out the proceedings, it is my view that it, along with other considerations, points to a pattern of behaviour on the part of Sheffield of attempting to interfere with the development of a trade competitor. The delay is, therefore, a relevant consideration in determining whether it is appropriate to strike-out the application.

Is the application an abuse of the Court's process?

[44] KCAHL submitted that the application for judicial review is an abuse of the Court's processes and has been brought for an ulterior purpose, namely trade competition. It noted the Court of Appeal's decision in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* where it was said that use of the Court's processes for an improper purpose or as an attempt to obtain a collateral advantage is unlawful, and that proceedings should not be permitted to be a means of "oppressive conduct" against opposing parties. [15] KACHL submitted that the improper purpose need not be the sole purpose, as long as it is the predominant purpose, and that actions or proceedings issued for a "tactical purpose" can be considered an improper purpose.[16]

[45] KCAHL submitted that these proceedings are part of a calculated and long-standing strategy by Sheffield and its related entities to delay the development of the

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14 *McNamara v Malcolm J Lusby Ltd* HC Auckland CIV-2006-404-2967, 18 August 2009 at [38], referring to *Salomon v A Salomon & Co Ltd* [1897] AC 22.

15 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53 at [87] and [89].

16 *Air National Corporate Ltd v Aiveo Holdings Ltd* [2012] NZHC 602 at [32] and [49].

airport land for retail purposes. It submits that Sheffield's application is an attempt to avoid the constraints which the RMA imposes on trade competitors.

[46] Sheffield submitted that its application is not for ulterior purposes but rather so that the Court corrects errors of law in the Decision and thus ensures that the Council acts lawfully.

[47] Sheffield argued that there is nothing inherently improper – or novel – about the Court allowing an application for judicial review to be brought by a trade competitor, relying on the High Court's decision in *Kawarau Jet Services Holding Ltd v Queenstown Lakes District Council* to grant judicial review in relation to a non-notification decision.[17] In *Kawarau Jet*, the Court quashed the decision, holding it unlawful, despite the submission that Kawarau Jet was said to be a trade competitor motivated by commercial or competitive concerns. The Court held that such a consideration is not "of itself sufficient to justify withholding a remedy in circumstances where the proven unlawfulness is serious".[18]

[48] Sheffield submitted that the guiding consideration is that errors of law by decision-makers should be corrected. As put by the High Court in *Oggi Advertising v Auckland City Council*:[19]

> Eyespy's status as a commercial competitor is irrelevant; relationships of this nature have accounted for many of the leading cases in judicial review. Where an applicant makes out a substantive ground to challenge the legality of a decision, the Court does not abstain from exercising its jurisdiction in reliance upon outmoded technical rules about status. There is an overriding public interest in judicial action to remedy an error by a local authority in applying its bylaws. Oggi appears to be the only party with an interest in proving Council's error.

[49] Sheffield noted that the Court of Appeal has said, albeit in regard to a statutory right of appeal rather than judicial review, that a "competitor may … advance the public interest along with its commercial interests" and the fact that an appellant is "a competitor does not diminish the significance of the issues which it raises".[20]

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17 *Kawarau Jet Services Holding Ltd v Queenstown Lakes District Council* HC Invercargill CIV-2008-425-518, 9 March 2009.

18 At [59].

19 *Oggi Advertising v Auckland City Council* [2005] NZAR 451 (HC) at [13] (citations omitted).

20 *Ancare New Zealand Ltd v Wyeth (New Zealand) Ltd* [2009] NZCA 211 at [44(b)].

Sheffield submitted that the same is true in judicial review, certainly when the ground raised is one of error of law.

[50] It is my conclusion, based on the findings set out above in relation to the failure to appeal the Panel decision and the delay in filing this judicial review application that Sheffield brought this proceeding not to raise legitimate public law concerns with the process followed by the Council but with the predominant ulterior purpose of protecting its commercial interests and stifling the development of KCAHL's land holdings. This ulterior motive is an abuse of process and the application should accordingly be struck out.[21]

Hearing of substantive proceeding

[51] Sheffield submitted that it would be in the interests of justice that the Court hear and determine the substantive judicial review proceeding at the same time as it determined the application to strike-out the proceeding, arguing that hearing both the substantive proceeding and the interlocutory application together would avoid duplication of resources and arguments, fulfilling the purposes of judicial review as a relatively simple, untechnical and prompt procedure.[22]

[52] The Council, however, noted that Sheffield agreed to directions setting this application down for a hearing and has not applied to amend those directions, despite counsel for the Council explaining that an application to that effect would be necessary if Sheffield wished to advance this argument. The Council had not filed evidence or submissions in relation to the substantive merits and submitted that it could not have done so, given the tight page limit for submissions in interlocutory applications and that Sheffield's intention was only signalled after the Council's evidence had been filed. The Council therefore submitted that it would not be in the interests of justice, or consistent with natural justice, to adopt the course proposed by Sheffield.

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21 There is no doubt that, in an appropriate case, the Court can strike-out an application for judicial review. See *Te Whakakitenga o Waikato Inc v Martin* [2016] NZCA 548 and *Ngāti Tama ki Te Waipounamu Trust v Tasman District Council* [2018] NZHC 2166.

22 Relying on *Russell v Commissioner of Inland Revenue* [2015] NZHC 754 at [13].

[53] I accept Council's submissions on this issue. While there is merit in Sheffield's argument that hearing both the substantive proceeding and the interlocutory application together would avoid wasting judicial resources, if Sheffield had wanted this to happen, it should have applied to do so. This has not been done. In the event of these proceedings not being struck out, both parties would have needed adequate time to prepare submissions and evidence, and to present arguments on the judicial review application.

Conclusion

[54] It is my view that, for the reasons given above, Sheffield's application for judicial review is barred by s 296 of the RMA, has been brought with undue and prejudicial delay, and is an abuse of the Court's process. While this jurisdiction is to be used sparingly, this in an appropriate case in which to strike-out Sheffield's application.

[55] Accordingly, these proceedings are struck out.

[56] I invite the parties to agree costs but, if no agreement is reached, the respondents are to file submissions, no greater than five pages in length within 14 days of the date of this decision, with the applicant having 14 days to reply.

Churchman J

Solicitors:
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