[2012] FWA 9029

FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.365—General protections

Matt Dain
v
Sam Bradley & Robert Grant
(C2012/4332)

DEPUTY PRESIDENT BOOTH — SYDNEY, 29 OCTOBER 2012

General protections - application for costs.

[1] In this matter Mr Sam Bradley and Mr Robert Grant (the Respondents) seek an order for costs amounting to $15,521.00 against Mr Matt Dain (the Applicant) pursuant to s.611(2) of the *Fair Work Act 2009* (the Act).

Background

[2] On 28 August 2012 I made a decision[1] in relation to this matter in which I declined to exercise my discretion under s.366 of the Act to grant an extension of time in relation to the lodgement of an application by Mr Dain pursuant to s.365 of the Act concerning his dismissal from employment.

[3] The Respondents indicated that they wished to be heard on the question of costs and I issued a timetable for the filing of submissions from the Respondents and the Applicant.

[4] The Respondents' initial submissions were filed on 7 September 2012. The Applicant's initial submissions were filed on 25 September 2012.

[5] On 27 September 2012 the Respondents' solicitor wrote to my Chambers in the following terms:

> "We anticipate that there will be a level of argument between the parties on this matter and for this reason we respectfully request that on the issue of costs the tribunal list the matter firstly for Directions and then for Hearing for the purpose of allowing oral argument and reply."

[6] I declined this request and in the alternative gave the Respondents until 16 October to file submissions in response to the Applicant's submissions in relation to costs. I indicated that I considered that it would be a perverse outcome to incur more costs of appearance in an

argument in relation to costs, in circumstances where the Respondents' and Applicant's submissions can be properly considered and determined on the papers.

[7] The Respondents' response to the Applicant's submissions were duly received within the timeframe sought and were commented upon by the Applicant by email on 18 October. In this email the Applicant objected to the admission of new material not put to him in cross-examination. I agree with his grounds of objection and have not taken it into consideration in coming to my decision.

[8] I have taken into account all of the above in coming to my decision below.

[9] It is necessary to address a submission made by the Applicant in relation to my continuing to sit in this matter before I address the matter of costs.

Reasonable apprehension of bias

[10] The Applicant objects to my continuing to sit in relation to this matter "on the basis that certain observations made in the decision published on 28th August give rise to a reasonable apprehension of bias"[2]. He requests that the application for costs be referred to another Member of Fair Work Australia (FWA) for determination.

[11] It falls to me to determine this matter as a threshold issue. I take guidance from the judgement of Mason, Murphy, Brennan, Deane and Dawson JJ in *Livesey v New South Wales Bar Association*[3] where they say:

> "7. It was common ground between the parties to the present appeal that the principle to be applied in a case such as the present is that laid down in the majority judgement in *Reg. v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248, at pp258-263. That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. That principle has subsequently been applied in this Court (see, e.g., *Re Judge Leckie; Ex parte Felman* (1977) 52 ALJR 155, at p.158; *Reg. v Shaw; Ex parte Shaw* (1980) 55 ALJR 12, at pp 14, 16) and in the Supreme Court of New South Wales (see, e.g., *Barton v Walker* (1979) 2 NSWLR 740, at pp748-749.
>
> 8. In a case such as the present where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartially on the evidence should refrain from sitting because of a suggestion that the views which he has expressed in his judgement in some previous case may result in an appearance of pre-judgement can be a difficult one involving matters 'of degree and particular circumstances may strike different minds in different ways' (per Aickin J in *Shaw* (1980) 55 ALJR at p.16). If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgement or bias, he should, of course, refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of pre-judgement or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the

> hearing of the case had been entrusted by the ordinary procedures and practice of the particular court."

[12] The origins of this principle were discussed in *Ebner v Official Trustee in Bankruptcy*[4] in the judgement of Gleeson, McHugh, Gummow and Hayne JJ at paragraph 3:

> "Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal. Perhaps the deepest historical roots of this principle can be traced to *Magna Carta* (with its declaration that right and justice shall not be sold) and the *Act of Settlement 1700* (with its provisions for the better securing in England of judicial independence). It is a principle which could be seen to be behind the confrontation in 1607 between Chief Justice Coke and King James about the supremacy of law. It could be seen to be applied when Bacon was stripped of office and punished for taking bribes from litigants. Many other examples could be drawn from history. It is unnecessary, however, to explore the historical origins of the principle. It is fundamental to the Australian judicial system."

[13] It is clear that this principle applies to this Tribunal. In the same judgment Their Honours state:

> "The principle has been applied not only to the judicial system but also, by extension, to many other kinds of decision making and decision maker. Most often it now finds its reflection and application in the body of learning that has developed about procedural fairness."

[14] A contemporary expression of the principle can be found in the judgement of Heydon, Kiefel and Bell JJ in *British American Tobacco Australia Services Limited v Laurie*[5]. At paragraph 104 they say:

> "The rule requires that a judge not sit to hear a case if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question that the judge is required to decide. The apprehension here raised is of pre-judgement; it is an apprehension that, having determined the existence of the policy in the earlier proceeding, Judge Curtis might not be open to persuasion towards a different conclusion in Mrs Laurie's proceeding."

[15] And at paragraph 139:

> "It is fundamental to the administration of justice that the judge be neutral. It is for this reason that the appearance of departure from neutrality is a ground for disqualification. Because the rule is concerned with the appearance of bias, and not the actuality, it is the perception of the hypothetical observer that provides the yardstick. It is the public's perception of neutrality with which the rule is concerned. In *Livesey* it was recognised that the lay observer might reasonably apprehend that a judge who has found a state of affairs to exist, or who has come to a clear view about the credit of a witness, may not be inclined to depart from that view in a subsequent case. It is a recognition of human nature."

[16] Relevantly, this principle has been considered by FWA recently. In a decision on 21 March 2012 Lawler VP considered the application of this principle to an application for

disqualification on the basis of the contents of a decision. In *RMIT v National Tertiary Education Industry Union*[6] he said:

> "**[5]** I accept (the) applicability and correctness of the principles that are set out in paragraphs 2 to 4 of that written submission, and I note that those principles have most recently been restated in a major decision of the High Court in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337. However, it should be noted that judicial officers have a duty not to accede too readily to a disqualification application. In *Re J.R.L. Ex parte C.J.L.*, Mason J, in an oft-quoted passage, stated:
>
>> 'It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases as *Watson* and *Livesey* has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be "firmly established": *Reg. v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group; Watson; Re Lusink; Ex parte Shaw.* Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.'
>
> **[6]** If a judge or judicial officer reaches a conclusion that the test for disqualification is satisfied they must disqualify themselves. If they reach a conclusion that the test is not satisfied, their duty is to continue sitting."

[17] The effect of the Applicant's submission is that comments in my decision would cause a fair-minded lay observer to reasonably apprehend that I might not bring an impartial mind to the resolution of the question of costs in this matter. The Applicant states:

> "In particular, the description of the Applicant's conduct as '*reprehensible*' (at [41]), after having disagreed with a submission that '*There's nothing in the Act that precludes the granting of leave in circumstances where the respondent believes that proceedings are brought vexatiously'*. In that context, her Honour observed (my emphasis) '<u>*This*</u> [apparently a reference to the proceedings being brought vexatiously]

is not an irrelevant factor in drawing conclusions about the prejudice that would be visited upon the employer should I grant his application for an extension of time', noting her Honour over paragraphs [42] and [43] concludes the "employer", noteably not the two Respondents in these proceedings, would be "prejudiced", apparently financially, because the Applicant sought to ventilate rights protected by the FW Act (where the FW Act itself gives the costs protection said to create the "prejudice").

[18] The extracts of my decision relied upon by the Applicant to advance this submission pertained to my consideration of whether there would be prejudice to the employer (including prejudice caused by delay) if I granted his application for an extension of time. Counsel for the Applicant submitted that the Applicant's conduct in writing a series of what could be described as threatening emails to the Respondents was not relevant to my extension of time decision. It was this contention with which I disagreed in paragraph 41 which reads as follows:

> "I disagree. Whilst I conclude that Mr Dain does want to have his day in court with Mr Bradley and Mr Grant, I regard his conduct as reprehensible. This is not an irrelevant factor in drawing conclusions about the prejudice that would be visited upon the employer should I grant his application for an extension of time."[7]

[19] I did not find that the Applicant had made his application vexatiously. The term "vexatiously" was introduced by the Applicant's Counsel and was never used by me. I disagreed with the Applicant's Counsel that his conduct, which I described as reprehensible, was not relevant to my consideration of whether there would be prejudice to the employer if I granted his application for an extension of time.

[20] It is inevitable in any costs application that it follows an adverse finding about the unsuccessful party's case. This is such a matter. Furthermore as indicated above I believe that the applicant's submission is founded upon a misunderstanding of my decision. Accordingly I do not consider that a fair-minded observer with an understanding of my initial decision and the nature of the costs application would hold a reasonable apprehension that I will not decide the case impartially or without prejudice. I reject the application and will now consider the question of costs in this matter.

The relevant statutory framework

[21] I am asked to exercise my discretion in relation to s.611 of the Act which reads as follows:

> "**611 Costs**
>
> (1) A person must bear the person's own costs in relation to a matter before FWA.
>
> (2) However, FWA may order a person (the *first person*) to bear some or all of the costs of another person in relation to an application to FWA if:
>
> (a) FWA is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or

> (b) FWA is satisfied that it should have been reasonably apparent to the first person that the first person's application, or the first person's response to the application, had no reasonable prospect of success.
>
> Note: FWA can also order costs under sections 376, 401 and 780.
>
> (3) A person to whom an order for costs applies must not contravene a term of the order.
>
> Note: This subsection is a civil remedy provision (see Part 4-1)."

[22] The statute anticipates that in general parties to proceedings before this Tribunal will pay their own costs. However it provides the Tribunal with discretion to make an exception to this general rule in certain circumstances:

> Firstly, if the Tribunal is satisfied that the first person made the application, or the first person responded to the application, *vexatiously*, it may order a person to bear some or all of the costs of another person, or; (my italics)
>
> Secondly, if the Tribunal is satisfied that the first person made the application, or the first person responded to the application, *without reasonable cause*, it may order a person to bear some or all of the costs of the other person, or; (my italics)
>
> Thirdly, if the Tribunal is satisfied that it *should have been reasonably apparent* to the first person that the first person's application, or the first person's response to the application, had *no reasonable prospect of success*, it may order a person to bear some or all of the costs of another person. (my italics)

[23] The statute refers in s.611(1) to "a matter before FWA" and in s.611(2) to "an application". There are two applications to consider in this case. There is the application for extension of time and the underlying application against the Respondents pursuant to s.365 of the Act that the extension of time application pertains to. The application for costs is in relation to the extension of time application. That is the only matter that was argued before me and it is the only matter upon which I adjudicated. The relevance of the substantive application, that is, the s.365 application, to this matter is at least two-fold. It was the impetus for the extension of time application, for without success in that application the substantive application could not proceed, and, in coming to a conclusion about the extension of time application I was required by s.366(2) to take into account the merits of the substantive application. I did so to the extent possible given the submissions and evidence before me.

[24] In coming to my decision in relation to the Respondents' application for costs I am required to consider whether the Applicant's extension of time application and by implication, his s.365 application, were made vexatiously or without reasonable cause, or whether it should have been reasonably apparent to the Applicant that his applications had no reasonable prospects of success.

Meaning of "vexatiously"

[25] The Respondents' submissions cited the decision of Roden J in *Attorney General v Wentworth*[8], where His Honour approved the High Court decision in *General Steel Industries Inc v Commissioner for Railways*[9]. His Honour noted that litigation may be regarded as vexatious on objective or subjective grounds and the requirements could be expressed as follows:

> "Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought;
>
> They are vexatious if they are brought for collateral purposes, and not for the purpose of having the Court adjudicate on the issues to which they give rise;
>
> They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless..."

[26] A recent Full Bench decision of this Tribunal provides guidance on the meaning of this term as it is used in the Act. In *Lisa Holland v Nude Pty Ltd T/A Nude Delicafe* and *Tony Holland v Nude Pty Ltd T/A Nude Delicafe*[10] the Full Bench adopted the approach of North J in *Nilsen v Loyal Orange Trust*[11]:

> "The approach generally taken by members of the Tribunal as to the meaning to be ascribed to the word 'vexatiously' in s.611(2)(a) is to adopt the comments of Justice North in *Nilsen v Loyal Orange Trust (Nilsen).* The Commissioner referenced this case in her reasons for decision. *Nilsen* was decided in 1997 when the then *Workplace Relations Act 1996* applied however the relevant provision considered by His Honour was in terms similar to s.611(2)(a) being whether an applicant 'instituted the proceeding vexatiously or without reasonable cause'. About this provision His Honour said:
>
> > 'The next question is whether the proceeding was instituted vexatiously. This looks to the motive of the applicant in instituting the proceeding. It is an alternative ground to the ground based on a lack of reasonable cause. It therefore may apply where there is a reasonable basis for instituting the proceeding. This context requires the context to be narrowly construed. A proceeding will be instituted vexatiously where the predominant purpose in instituting the proceeding is to harass or embarrass the other party, or to gain an collateral advantage: see *Attorney General v Wentworth* (1988) 14 NSWLR 481 at 491. The approach of the High Court in an application for a permanent stay of criminal proceedings on the ground of abuse of process constituted by improper purpose is instructive. In *Williams v Spautz* [1992] HCA 34, (1992) 174 CLR 509, at 522, Mason CJ, Dawson, Toohey and McHugh JJ said:
> >
> > > "Bridge LJ identified one difficulty when he said ([1977] 1 WLR, at p503; [1977] 2 All ER, at p586):
> > >
> > > 'What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired byproduct of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it.'

> So would we. But his Lordship, by implication, evidently sees no difficulty with the case in which the plaintiff does not wish to pursue his or her cause of action to a conclusion because he or she intends to use the proceedings for a collateral and improper purpose.'

Consideration

[27] It seems to me that the key question is whether the Applicant instituted the proceeding for an extension of time, in order to progress his substantive application against the Respondents for the predominant purpose of harassing or embarrassing them or to gain a collateral advantage. It is necessary to look beneath the extension of time application to the motive in making the substantive application and if I conclude that the substantive application was instituted vexatiously then it follows that the extension of time application (as the enabler of the substantive application) is itself vexatious. If I conclude that the substantive application was not instituted vexatiously, since it is possible for an extension of time application itself to be vexatious, I must also consider this separately.

[28] The Respondents say that the emails sent that were in evidence before me reveal that these proceedings were instituted by the Applicant with the intention of annoying and embarrassing the Respondents and that the proceedings were instituted for collateral purposes and not for the purpose of having the Tribunal adjudicate the issue before me, that is an application for an extension of time to pursue the substantive application.

[29] I do not consider that the motivation for the substantive application meets the test of the application being made vexatiously. On the evidence before me I found that Mr Dain's conduct in communicating with the Respondents in the manner he did was reprehensible, however I did not conclude, and upon review have not now formed the view that he made the application for a collateral reason. I found that he "wanted his day in court" with the Respondents. I now conclude that he was primarily motivated by a desire to be vindicated and to hold the Respondents personally to account for his dismissal. I conclude that his reprehensible conduct in sending them threatening emails displayed his anger about his treatment and revealed a desire to cause them and Mark Group Australia Pty Ltd pain and distress. It may also have been intended to improve his chances of an improved financial settlement of his case. I also conclude that he made his extension of time application for the primary purpose of being able to prosecute his substantive application before the Federal Magistrates Court (FMC). The timing of his application after the FMC refused his application to join Mr Bradley and Mr Grant to his first application against his employer supports this finding. Accordingly I do not believe the test in *Nilsen v Loyal Orange Trust* is made out in relation to either application. The predominant purpose in instituting both proceedings was not to harass or embarrass or to gain a collateral advantage.

Meaning of "without reasonable cause"

[30] In the case of *Brian Clothier v Ngaanyatjarra Media*[12] a Full Bench of FWA considered the meaning of the phrase "without reasonable cause". They cited *Kanan v Australian Postal and Telecommunications Union*[13] as follows:

> "**[16]** On the question of what constitutes 'without reasonable cause', Justice Wilcox in *Kanan v Australian and Postal Telecommunications Union* said that:

> 'It seems to me that one way of testing whether a proceeding is instituted "without reasonable cause" is to ask whether, upon the facts apparent to the applicant at the time of instituting the proceeding, there was no substantial prospect of success. If success depends upon the resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding as being "without reasonable cause". But where it appears that, on the applicant's own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks a reasonable cause.'

[17] This test of what constitutes 'without reasonable cause' has been adopted by FWA in several cases."

Consideration

[31] The circumstances of this case are similar to those described by Wilcox J when he said "if success depends upon the resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding as being 'without reasonable cause'". Counsel for the Applicant submitted that all that was required for the application to show merit for the purposes of the extension of time application was a prima facie case that the Respondents were involved in the adverse action taken against the Applicant, that is, the dismissal. Counsel for the Respondents submitted that this was insufficient to demonstrate the merit of the application and the Applicant ought to have shown how it was that s.550 of the Act would be invoked by demonstrating accessorial knowledge and conduct. I agreed with the Respondents. This does not mean that the point of law was not arguable. Further the underlying application for which the extension of time application was being made would have provided the Applicant with the opportunity to mount the case to invoke s.550. Counsel for the Applicant made this very point when she said:

> "Now, on the actual final determination of the proceedings, there may not be sufficient evidence to warrant a finding of their accessorial involvement or accessorial knowledge, but that has to wait until a hearing and the full extent of the evidence to be put on in relation (to) those issues before such a determination can be made..."[14]

[32] It is reasonable to draw the inference that this submission discloses an intention to do just that.

[33] In my decision I stated at paragraph 53:

> "I have to form a view about the merit of the second application and that can only mean I have to be persuaded that there is evidence to support an allegation that accessorial knowledge and conduct was present in Mr Bradley and Mr Grant. I cannot do so on the material before me."[15]

[34] The Respondents contend that this finding supports the submission that the substantive application was instituted without reasonable cause. The context of my finding was in relation to my obligation pursuant to s.366(2) of the Act to take into account the merits of the case. The effect of my finding was that I could not, on the submissions and evidence before me, regard the case as having merit, because the necessary submissions and evidence had not been

led. This is quite different from forming a definitive view about the application being made without reasonable cause. I was not, and am not now, in a position to make a finding to that effect.

[35] The extension of time application itself could not be regarded as being instituted without reasonable cause. In coming to a decision in relation to this application I was required to consider whether there were exceptional circumstances pertaining to the late lodgement of the Applicant's substantive application. As well as considering the merits of the application I was required to consider the circumstances against other criteria set out in the Act, including the reason for delay.

[36] The reasons advanced by the Applicant included lack of knowledge of the time limitation and the passage of the proceedings before the Federal Magistrates Court in relation to his s.365 application against Mark Group Australia Pty Ltd. I concluded that his reasons were insufficient to justify the grant of an extension of time however his case was arguable and I cannot conclude that this application was made without reasonable cause.

Meaning of "should have been reasonably apparent" and "had no reasonable prospect of success"

[37] In the case of *Brian Clothier v Ngaanyatjarra Media*, cited above, the Full Bench also considered the meaning of the phrases "should have been reasonably apparent" and "had no reasonable prospect of success". They cited *Baker v Salva Resources Pty Ltd* favourably as follows:

> "**[15]** In *Baker v Salva Resources Pty Ltd*, a Full Bench of FWA summarised the approach to be taken in relation to subsection 611(2)(b) of the Act as follows:
>
> > '**[10]** The concepts within s.611(2)(b) "should have been reasonably apparent" and "had no reasonable prospect of success" have been well traversed:
> >
> > > "should have been reasonably apparent" must be objectively determined. It imports an objective test, directed to a belief formed on an objective basis, rather than a subjective test; and
> > >
> > > a conclusion that an application "had no reasonable prospect of success" should only be reached with extreme caution in circumstances where the application is manifestly untenable or groundless or so lacking in merit or substance as to be not reasonably arguable.'"[16]

Consideration

[38] The Respondents appear to regard my finding that there was no evidence to support an allegation that accessorial knowledge and conduct was present as supporting the conclusion that the Applicant's substantive case was obviously untenable and manifestly groundless.[17]

[39] I think that is going too far. I did not, as I said above, regard the case as having merit, because the necessary submissions and evidence were not put to me. Further, although I was not persuaded that the reasons advanced for the delay in lodging his application warranted an extension of time, it does not follow that his reasons for delay were not reasonably arguable.

Accordingly, I am not able to conclude that his applications were "manifestly untenable or so lacking in merit or substance as to be not reasonably arguable".[18]

Conclusion

[40] In the circumstances of the present matter I do not consider that it would be appropriate to make an order pursuant to s.611 that the Applicant bear some or all of the costs in relation to the application for extension of time. The application is dismissed and the orders sought by the Respondents are denied.

DEPUTY PRESIDENT

Final written submissions:

18 October 2012

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[1] [2012] FWA 7276

[2] Applicant's Outline of Submissions Re Costs at [1]

[3] *Livesey v New South Wales Bar Association* 151 CLR 288

[4] *Ebner v Official Trustee in Bankruptcy* 205 CLR 337

[5] *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2

[6] [2012] FWA 2418

[7] [2012] FWA 7276 at [41]

[8] (1988) 14 NSWLR 481

[9] [1964] HCA 69

[10] [2012] FWAFB 6508

[11] [1997] 76 IR 180

[12] [2012] FWAFB 6323

[13] (1992) 43 IR 257 at 264-5

[14] Transcript PN44

[15] [2012] FWA 7276 at [53]

[16] [2012] FWAFB 6323 at [15]

[17] Respondents' Submissions to Costs Application at [7]

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[18] op.cit.