

**IN THE MATTER OF THE REGULATORY COMMISSION
OF THE FOOTBALL ASSOCIATION**

Before: William Norris QC
Francis Duku
Alan Hardy

B E T W E E N:-

THE FOOTBALL ASSOCIATION

-and-

WAYNE HENNESSEY

DECISION OF THE REGULATORY COMMISSION

Introduction and Summary

1. On 4th April 2019, the Regulatory Commission met to consider a charge against Wayne Hennessey, a first team goalkeeper and Welsh International who plays for Crystal Palace Football Club. The misconduct alleged was breaches of FA Rule E3 (1) and (2) arising out of a gesture made at the Bagatelle (London) Restaurant in Mayfair on Saturday, 5th January 2019.
2. The FA's case was that the gesture (which was captured in a photograph posted on the Instagram account of another Crystal Palace player, Max Meyer, who was also present that evening) was abusive and/or insulting and/or improper and/or brought the game into disrepute, contrary to Rule E3(1) and, further, that it constituted what is known as a

“*aggravated breach*” of that Rule (as defined in Rule E3(2)) because it included a reference to ethnic origin and/or race and/or religion and/or belief.

3. Reduced to its simplest terms, the FA’s case was that the photograph posted on Mr Meyer’s Instagram account showed Mr Hennessey giving a “*Sieg Heil*” / “*Heil Hitler*” (hereafter ‘Nazi’) salute. At the risk of stating the obvious, if that was the meaning of the gesture and if that is the only way in which the image shown in the photograph can reasonably be understood, then we would find that it was offensive even if done only in jest. In short, we would find the charge proved.
4. However, how far proof of Mr Hennessey’s subjective intention as to what he meant by the gesture and whether that is a necessary (or even material) ingredient of the charge he faced was a major issue in the case. We shall consider it in further detail below.
5. The factual issue as regards Mr Hennessey’s possible intention depends on deciding between only two possible explanations for the gesture in question. The first is that this was intended as a Nazi salute. To understand the basis for that, one should look at the photograph on page 44 of our bundle and the blow-up of it at page 15: it is easy to see how anyone might think it shows Mr Hennessey with right arm raised at an angle of 45 degrees or so, hand outstretched, and with left hand held across his mouth as a ‘mock’ moustache: that is, might see it as a Nazi salute.
6. Mr Hennessey denies absolutely that was what he intended or meant by the gesture. From the very beginning, he has said that he was simply raising his right arm to attract the attention of the waiter taking the photograph whilst at the same time cupping his left

hand around his mouth to make his voice carry as he shouted to the photographer to get on with it.

7. We shall say a little more about some of the other photographs taken that evening and the surrounding circumstances in due course. At this stage, however, it is sufficient to record that Mr Hennessey was able to corroborate his explanation by reference to a series of photographs or screen-shots from footage of matches which show him on the pitch with right or left arm raised at a similar angle (presumably to attract the attention of the defence in front of him). These were found by the Club, we are told, after Mr Hennessey had explained that the sort of gesture which had been captured in the image posted by Mr Meyer was similar to gestures he often makes on the field of play.
8. In one such picture in particular (at page 47 of our bundle, with a blow up at page 9, taken from a match earlier this season) he does indeed appear to have both his right arm raised and his (gloved) left hand across his mouth cupped (or practically cupped) in a similar way to the ‘offending’ photograph (as we shall term it) which was taken at the dinner. He told us this was so as to make his voice carry in just the same – or a very similar – way to the reason he gave for what we can see in the offending photograph taken on the night.
9. Without studying those two photographs and recognising the similarities between them, no reader of this decision or other commentator will properly understand why the FA investigated and brought this case and why a majority of this Commission reached the decision we did, after a full day’s hearing, which was to dismiss the charge.

10. Save where it is indicated otherwise, all references to our findings hereafter reflect that majority view.

Preliminary Matters

11. The Charge Letter was sent on 23rd January 2019. By then, the incident had been widely discussed in the media and Mr Hennessey's club, Crystal Palace, had already concluded an internal inquiry into the matter, the upshot of which was (as recorded in a letter of 18th January 2019) that they accepted his "*explanation that [he was] making an innocent gesture to attract the attention of the photographer*".
12. Consistently with that finding, Mr Hennessey's legal representatives filed a Reply Form on 13th February 2019.
13. Apart from that document and various written submissions on behalf of the player (and responses thereto from the FA), the player's legal representatives served witness statements from several other people present at the dinner, as well as from Jordan Bussolini, who was the waiter who actually took the photograph in question.
14. There was a series of exchanges between Mr Hennessey's representatives and the FA about various preliminary matters, none of which need be recorded here since it became and remains common ground that the hearing on 4th April 2019 should proceed to determine the issue of "*liability*" only. We think that was sensible. It meant that we would first decide what the gesture was (taking account of the fact that the parties disagree whether it would be material to decide Mr Hennessey's intention when making

the gesture). In the light of that finding, we would go on to consider whether Mr Hennessey was in breach of the provisions alleged.

15. At one stage it seemed there might be an issue as to whether a gesture made in private might be treated differently from one made in public and, if so, whether that evening should be regarded as a private or a public occasion.
16. In the event, no such alternative defence was pursued by Mr De Marco QC, acting for the player – a sensible course, in our view, since this was clearly a public restaurant (albeit where the group was sitting was regarded as a ‘private’ area). Further, members of the public had been present in the same area during the earlier part of the evening, there was ready access to the bar area (which was not closed off) and, in any case, the waiter was not one of the ‘private party’ (if such it was); in addition, it must have been foreseeable by all present that any photograph taken might find its way into public view via social media.
17. It follows that in this hearing we did not have to decide whether the incident in question happened in public or in private and, if so, whether that matters. Nor did we have to decide a further issue canvassed in advance of the hearing which was whether for the FA to bring a charge in these circumstances would constitute a departure from the FA’s previous practice with regard to prosecuting comparable breaches of these particular rules.
18. A related matter concerns what is referred to as the ‘social media’ exception (relevant because an aggravated breach may depend on it being witnessed by more than one person). Here it might be that it was only seen because it was posted on social media

but, in the light of our findings as summarised above, that issue does not need to be determined.

19. The parties also agreed that the present hearing would not determine any issue of sanction in the event that we found that Mr Hennessey's gesture constituted a breach of the Rules and that such breach (if proved) was one that the FA could properly have brought in the circumstances.

The composition of the Commission

20. A further, discrete, issue which arose concerned the composition of the Commission. In an email of 27th March 2019, Mr Fletcher, the player's solicitor, suggested that the Chairman nominated (William Norris QC) should recuse himself from this hearing because he, like the FA's Leading Counsel, Kate Gallafent QC, are "*both specialist legal members of the Sport Resolution's National Anti-Doping Panel*".
21. Various exchanges followed between Ms Gallafent QC and Mr De Marco QC, Leading Counsel for the Player. The upshot was that Mr Norris QC, as nominated Chairman of this Panel, advised the parties that he could "*see no good reason to recuse myself from chairing this hearing. Nevertheless, I recognise that so far I have only considered summaries of the parties' respective positions*", noting also that "*Mr Fletcher's email cited no authority in support of his submission, notwithstanding the wealth of recent case law in this field*". As a consequence, it was indicated that the Chairman's "*provisional view*" was that there was no good reason to recuse himself and invited the Player, if wishing to pursue that application, to do so at the beginning of this hearing as

a preliminary issue, providing “a written submission to that effect with citation of appropriate authority no later than 12 noon on Tuesday, 2nd April”.

22. Mr Fletcher responded by email of 1st April 2019, in the following terms:

“As previously stated, the Player is keen to have this matter resolved as soon as possible. If he were to make and succeed in a Recusal Application at the hearing, it would inevitably cause the hearing to be adjourned and for further delay. In the circumstances, and given Mr Norris QC’s provisional view that no grounds for recusal exist, no Application for Recusal shall be made by the Player, though he does, of course, reserve all his rights.”

23. At the beginning of the hearing, Mr De Marco QC indicated he would not pursue any such recusal application at this stage. Nevertheless, he said that he might still advance such a contention on appeal albeit recognising that the FA might respond by saying that he had and did not take the opportunity to pursue a full and properly argued application at the present stage.

The way the case was put by the FA

24. As will be apparent from the foregoing, the parties were represented by, respectively, Ms Gallafent QC (for the FA) and by Mr De Marco QC (for Mr Hennessey).

25. The only oral evidence called by Ms Gallafent QC was from Mr Neil Pugh, the FA’s Integrity Investigator who gave two witness statements, one on 17th January 2019 and an additional witness statement on 21st March 2019. In the latter, Mr Pugh described attending the Bagatelle restaurant on 6th March 2019 which enabled him to explain some matters of geography. He also discovered that footage from CCTV cameras

which might have captured some of the relevant events had been deleted 30 days after the incident in question and so was not available.

26. Ms Gallafent QC contended that the photograph in question spoke for itself. As she put it at paragraph 11 of a Note dated 13th March 2019, the FA did not accept Mr Hennessey's innocent explanation for the events, because it "*takes the view that it is inherently incredible that the Player would have made the gesture shown in the Photograph for the purpose of calling to, and trying to attract the attention of, the waiter*".
27. It is common ground – and trite law - that the burden of proving a breach of this charge is upon the FA which brings it. In the absence of any direct evidence from those present that evening to the effect that they interpreted the gesture or gestures made by Mr Hennessey in the way in which the FA says we should interpret them – and there is no such evidence – it follows that the FA seeks to discharge the burden of proof only on that basis.
28. Put in its simplest terms, therefore, the FA's case is that the only reasonable (the 'irresistible') inference to be drawn from the photograph is that Mr Hennessey was indeed giving a Nazi salute so that, at least on a balance of probabilities, we must find that was the meaning (that is, only reasonable interpretation) of the gesture.
29. If we accepted that was indeed the only inference to be drawn as to the interpretation of the gesture and rejected any contradictory explanation then we consider that would be a sufficient evidential basis for finding the charge proved.

30. As we have said, Ms Gallafent QC contended that it was, as a matter of law, irrelevant for us to take account of what Mr Hennessey intended (and/or what others understood at the time) to be the meaning of any gesture because the test of meaning was wholly objective. We return to this issue of the ‘subjective versus objective’ analysis after a discussion of the evidence heard which follows.

Evidence from and in support of the Player

31. We heard evidence in person from Mr Hennessey, from the waiter/photographer, Mr Bussolini, and evidence by video-link from the Player Liaison Officer, Danny Young and from other players, Connor Wickham and Max Meyer. We read a statement from Andros Townsend, which was not formally agreed but was read because an injury prevented him giving evidence in person, and statements from Roy Hodgson (the Manager who spoke of Mr Hennessey’s good character) and from players present that evening, namely James McArthur, Julian Speroni, Martin Kelly and Wilfried Zaha.

32. Christine Dowdeswell (Club Secretary) gave oral evidence mainly about the Club’s internal investigation (an investigation which did not impress us). We heard also from Jonathan Barnett, business partner of David Manasseh, Mr Hennessey’s agent, who gave what we thought was powerful evidence as to his belief and trust in Mr Hennessey’s good character.

The events of that evening

33. In the light of that evidence, we find the facts as follows.

34. The evening in question (Saturday, 5th January 2019) was a party attended by around 20 people, including Mr Hennessey and Mr Young who was the only non-player. It was by way of a seasonal celebration and followed Crystal Palace's FA Cup, 4th Round, victory over Grimsby earlier that day.
35. The weight of the evidence was to the effect that this was a relatively restrained occasion which did not (for example) involve significant quantities of alcohol. In any case, it is not challenged that Mr Hennessey (who was driving) was not drinking any alcohol at all. That is relevant to counter any suggestion or implication that Mr Hennessey might have been behaving in an unusually boisterous manner that evening or behaving out of character.
36. It is also relevant, in our view, that no-one else recalls Mr Hennessey playing the fool or trying to amuse (still less trying to offend) by what he did or said. Indeed, we know he went straight home after the meal which had, by all accounts, been a happy (and, as we say, restrained) evening involving various team members who came from a variety of cultural backgrounds. We also bear in mind that the person taking the picture was a French national and that there is no reason whatsoever why a Nazi salute would have been directed at him, nor any reason why it might have been given to amuse (or offend) the culturally disparate group of people present.
37. We also note that none of those present were looking in Mr Hennessey's direction at the moment when the offending photograph was taken and no-one has said this was an occasion when anyone was doing anything stupid or offensive. In that case, since it must have been foreseeable that these pictures would find their way into social media, the inference the FA must be asking us to draw is that if Mr Hennessey was not

directing a Nazi salute at anyone in the room, then it must have been for the camera. That seems to us fundamentally improbable in all the circumstances.

38. There was reliable evidence that the restaurant was a noisy place with loud music and so we accept that, when it came to asking the waiter to take a photograph, anyone at Mr Hennessey's (far) end of the table might well have had to shout to make himself heard, as others may also have done. As an aside, it was not challenged that Mr Hennessey does have rather a loud voice and tends to be impatient and it is not surprising that he sometimes raises his voice to shout, as goalkeepers (we comment) are known to do. Other witnesses confirm that people were shouting and trying to get the photographer to hurry up and we accept that Mr Hennessey was one of them.
39. Mr Bussolini, the waiter, took several photographs, probably with two or three camera phones. On one version of events he held the camera(s) above his head; on another, he stood on a chair. It matters little which it was because, in both cases, the only relevance is that it affects the angle of view towards Mr Hennessey's (far) end of the table.
40. We accept that this process occupied some time and it may well be that someone in the position of Mr Hennessey could have grown impatient. In trying to attract attention, it could not be said to be unlikely that he might shout in the way he says he did. Indeed, we accept his evidence about that.
41. We were shown several, though possibly not all, the photographs taken at that time. We remind ourselves that one of the dangers of interpreting single snapshots is that you can get a distorted image if concentrating on a single moment, frozen in time as it is.

42. We cannot be sure as to the exact sequence in which the photos were taken but it is, we think, material that other images of Mr Hennessey that night show him in various postures. One shows him with right arm raised with a water glass (photograph on page 41), another with the same arm raised without the glass (page 42), another shows his right arm down with left hand across his mouth (page 43) as well as the offending photograph at pages 44/15. That seems to us to be important since it must be the FA's case that raising an arm alone (page 42) is an innocent gesture, as is holding a hand in the area of the mouth (page 43), whereas a combination of those gestures (page 44) has to be interpreted as a Nazi salute. That seems to us to be inherently inconsistent.
43. Some or all of those images were shared on a players' WhatsApp group and were downloaded by them. One of those images - the offending photograph as we have called it, was downloaded by Max Meyer (though it had been taken on someone else's camera) and he posted it on Instagram probably half an hour after midnight by which time he had got home.
44. That is not only Mr Meyer's evidence but it also follows from the evidence of another player, Connor Wickham, who had been driven home by Mr Hennessey. To his credit, Mr Wickham noticed that the offending photograph did not look good and immediately rang Mr Young to tell him to get the player who had posted it to take it down. As far as we know, the photograph had not at that stage attracted any adverse comment on social media.
45. Mr Hennessey told us that on the following day – Sunday 6th January – he realised that there was trouble brewing and so, after discussing matters with his agent (David

Manasseh) he posted a corrective/explanatory message on both his Instagram and Twitter accounts (pages 50, 51). He did that late in the evening, as 23:38.

How does Mr Hennessey explain that gesture?

46. Mr Hennessey categorically denied that he was giving a Nazi salute. Indeed, from the outset he said that he did not even know what one was (see page 52). Improbable as that may seem to those of us of an older generation, we do not reject that assertion as untrue. In fact, when cross-examined about this Mr Hennessey displayed a very considerable – one might even say lamentable - degree of ignorance about anything to do with Hitler, Fascism and the Nazi regime.
47. Regrettable though it may be that anyone should be unaware of so important a part of our own and world history, we do not feel we should therefore find he was not telling the truth about this. All we would say (at the risk of sounding patronising) is that Mr Hennessey would be well advised to familiarise himself with events which continue to have great significance to those who live in a free country.
48. We think it probable that Mr Hennessey was not intending to give any form of Nazi salute. Whilst it is perfectly understandable that a viewer without access to the wider context might interpret that gesture as such a salute, our starting point is that it is equally plausible that he was, as he says, raising his arm to attract the waiter's attention and waving his hand (though it is, of course, motionless in the single image) and cupping his hand over his mouth in order to communicate more effectively (by shouting loudly) to encourage the waiter to hurry up with taking the photograph.

49. His explanation is corroborated in a number of ways, many of which we have already discussed. In particular, no-one else present says that he was aware of any such salute at the time, yet if Mr Hennessey was giving such a salute to amuse, and yet no-one was aware of it, that would be surprising. Of course, it is conceivable that those present that evening were well aware what he had actually done and later put their heads together in a damage limitation exercise but that would involve us deciding that a number of witnesses were engaged in a conspiracy to lie and we do not think they were.
50. We also bear in mind that it was Max Meyer, a German national, who originally posted the picture. He would hardly be likely to have done that had he known what it is now said to show, let alone if he and the other players had realised at the time that Mr Hennessey had been giving a Nazi salute even in jest. As we said, we heard from Mr Meyer and found nothing in his evidence which contradicts that analysis although, perhaps because of the language difficulties, it may not have been entirely clear whether, when or to what extent he may have been ‘hurt’ by what he saw. In our view, whatever he may have felt or now feels about the picture (which we find is unclear given the exchanges of which the parties and transcribers have an imperfect record and recollection) is not material.
51. Most significantly, in the view of this Commission, is the point with which we began which is that there is at least one other photograph of Mr Hennessey in which he is clearly making a more or less identical gesture (or adopting an identical posture) to the one in the offending photograph. In that other picture taken on the field of play, he can be seen with right arm raised and left hand across his mouth, which we accept was because he was there seeking to communicate with (and better organise) the defence in front of him. In other pictures taken from film of other matches, he also has one arm

raised high which, without context and explanation, could be said to resemble a Nazi salute.

52. The next most significant sequence of pictures are the other ones taken that night which show Mr Hennessey with hand or arm raised in slightly different but comparable postures (albeit not at the same time). At its lowest, that demonstrates he was raising his hand/arm and trying to attract the attention of the photographer. If that was innocent, we think it likely the offending photograph can be explained in the same way
53. The final point is that there is a strong body of evidence (such as from Mr Wickham and, significantly, from Mr Hodgson and Mr Barnett) to the effect that, whatever may have been Mr Hennessey's unfamiliarity with important parts of 20th century history and events of continuing and fundamental significance, he is nevertheless a good person with no tendency to discriminate or to do or say offensive and inappropriate things. We accept that evidence.

A subjective or an objective analysis? Discussion

54. Whether or not words used or a gesture made amount to a breach of Rule E.3 because they are 'abusive', 'insulting' or 'improper' is to be decided objectively – see FA v Luis Suarez (FA Regulatory Commission, 30th December 2011), FA v Nicolas Anelka (FA Regulatory Commission, 24th/25th February 2014) and FA v Jay Rodriguez (FA Regulatory Commission 11th April 2018).
55. In those cases players were alleged to have used words ('*negro*', '*black*') or made a gesture (the '*quenelle*') which, in context, had only one meaning. Whether,

subjectively, the players intended the words or that gesture to be insulting or offensive was therefore irrelevant to interpreting the actual meaning of what they had said or done.

56. That is not the same as the situation in this case nor is it close to it. The ‘*quenelle*’ gesture in Anelka is probably the most useful comparison. Critically, Mr Anelka accepted that he was indeed making that gesture – see paragraphs 67 to 79 of the decision – but said (we paraphrase) that he meant no harm and intended it only as an anti-establishment dedication to its originator. However, the Regulatory Commission found that this was no defence because the gesture was strongly associated with Anti-Semitism and people would be likely to interpret it as such. In that case, as the Regulatory Commission explained at paragraph 95 of its decision “*it was thereby insulting and abusive and it was improper for him to make that gesture*”.
57. Transposing that analysis to the present case, if it were the case that the only possible explanation for what Mr Hennessey was doing with his hands was that he was making a Nazi salute then whatever he might have said about his motivation would not amount to a defence. Equally, if he was making a gesture which was open to more than one interpretation but which he said he meant to be taken as a Nazi salute then that would amount to good evidence that it was in fact an insulting/abusive/improper gesture. Again, it would be no defence that he might have meant no harm by it or intended it as a joke.
58. Those examples illustrate how in some circumstances the objective test necessarily involves taking account of a subjective element. This is not in relation to the maker’s motivation but so as to understand the meaning of a gesture made. What a player

intended will be irrelevant if the words used or gesture made can only have one possible meaning or explanation. But intention may be very important if the meaning is open to any doubt.

59. That this must be correct can be demonstrated by at least three scenarios. First, consider the example we just gave of a player who makes an equivocal gesture where the only reliable evidence as to its meaning comes from the player himself who says it was a Nazi salute but that he meant no harm by it. If, as we understood Ms Gallafent QC to be submitting, his subjective intention is entirely irrelevant then, presumably, since the gesture itself was equivocal, this would not be a breach of the rules because we would have to disregard his own explanation of its meaning. That would be a very strange outcome.
60. Our second example is – or might be - the current case. We asked Ms Gallafent QC whether we should find Mr Hennessey in breach of this rule even if we accepted that he was not intending to give such a salute, had no idea that is how his gesture might be interpreted and even if no-one else in the room took it as such a salute. She answered in the affirmative.
61. Obviously, it would be different were there to be no other plausible explanation for the gesture Mr Hennessey made. But in circumstances in which, as we have found, there is or could be another possible explanation than the player's evidence as to what he meant by the words spoken or gesture made is a legitimate – indeed it may be a valuable, even decisive – element of the analysis. Any other outcome would, in our view, be wholly unjust.

62. The third example of how an unjust outcome might result if Ms Gallafent QC's analysis were correct would arise in the situation of Max Meyer. If the gesture made by Mr Hennessey – in a photograph which Mr Meyer posted despite being unaware of its contents or potential for misinterpretation - were objectively offensive then Mr Meyer himself would presumably also be potentially in breach (and we note he was written to in relation to a possible disciplinary charge on 7th January 2019 albeit no further action was taken). Again, that could not possibly be fair.
63. In the end, it comes down to this: we must interpret what the gesture was that Mr Hennessey made. The picture might speak entirely for itself and be capable of only one interpretation. If it were so, his motivation in making it would not be a defence. That is, in effect, the FA's case (see the written submission at paragraph 11 on page 117) but we do not agree with it. We consider that the player's explanation, the photographs of him playing and the other photographs of that evening taken together with the other evidence about the events of that evening and the evidence of his character are all relevant factors in our objective assessment of what the gesture actually was. That is so because we consider that Mr Hennessey's explanation of its meaning, corroborated as we have set out above, is equally plausible and, after hearing all the evidence, the majority view is that we accept it is probably correct.

Conclusions

64. It is common ground that the FA must prove the charge it brings and must therefore prove that the meaning of this gesture was that it was a Nazi salute. It must do that on a balance of probabilities and, in circumstances in which so serious a charge is brought, we bear in mind the injunction of the courts in many cases (such as R. (N) v Mental

Health H.R.Tribunal [2006] Q.B 468) that “*the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on a balance of probabilities*” (see paragraph 62 of the judgment of the Court in that case).

65. For reasons that we have already given, we find, albeit by a majority, that the FA has not discharged that burden of proof. Rather than giving a Nazi salute, we think it more likely that Mr Hennessey was, as he says, trying to shout at and to catch the attention of the waiter. That someone later misinterpreted the gesture may illustrate the perils of social media and the need for people to be careful to avoid such a situation. It has certainly also revealed a disappointing ignorance on the part of Mr Hennessey with important parts of our culture and history. But that does not amount to proof that he has committed what would otherwise be a serious breach of Rule E 3(1) and would probably have amounted to an “*aggravated breach*”, as provided for in Rule E 3(2).
66. As we noted at the beginning, this is a majority rather than the unanimous decision of the Commission. One member of this Commission considered that the only plausible explanation for the gesture Mr Hennessey made was that it was a Nazi salute as alleged. On that basis, he would not have dismissed the charge.
67. We conclude by observing that we all consider that the FA was entirely justified in investigating and bringing this case. As Crystal Palace reminded Mr Hennessey after its own internal investigation, players must not only be aware of the rules but should also realise that, with a high public profile, there is always a danger that words heard or gestures used may be misinterpreted or taken out of context.

68. Nevertheless, for the reasons we have given, the majority of this Commission considers it more likely than not that the photograph posted on Mr Meyer's Instagram account has been misinterpreted here. That is why we dismiss the charges against him.

WILLIAM NORRIS Q.C.
(Chair)

FRANCIS DUKU
(Independent Football Panel Member)

ALAN HARDY
(Independent Football Panel Member)

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