The criminal, the civil, the environmental and planning liability!

An exploration of environmental and planning liabilities (including *Doonin* and *Dawson*) in an insolvency scenario

Preliminary

1. In the last six months, each of us has had occasion to consider the interplay between environmental and planning liabilities on the one hand, and insolvency law on the other hand. The issues which arise in such scenarios are, all at the same time, interesting, novel and (inevitably) legally complex. As the title of our talk makes clear, the sort of issues that arise have also been the subject of a few recent reported cases, which are touched upon below.

2. It seemed to us that the most effective way of drawing out what we think are the most important issues (indeed, there are more issues that can arise in these situations than there is time in our slot on the day to cover) was to construct a factual case scenario by reference to which we could distil the key points, and our views on them.

The scenario

3. We have been approached by Wesley, Arbuthnot, Snelling, Travers & Eastman LLP to advise in the following scenario:

    3.1. Diversified Dairy Farm Ltd ("**DDF**") is an English limited company that owned and operated a dairy farming business.

    3.2. In the last few years, and owing to the significant downward trend in milk prices, and although the company was financially stable (and in fact profitable) Mr Trotter, the company's sole director, shareholder, and all round milk farmer *extraordinaire* greedily took the momentous decision to diversify the business.

    3.3. Mr Trotter was aware that, on the land which DDF leased (from Mr Trotter), there was an old, disused, quarry.

    3.4. He decided that DDF should begin accepting contaminated waste (any type would do; the more contaminated the better: higher prices could be charged) onto DDF's land to be 'stored' in the quarry.

    3.5. Unfortunately, it didn't, at any stage, occur to Mr Trotter that he should obtain any form of permission or permit from the local authority or the Environment Agency.

    3.6. DDF then unexpectedly fell out with its major supplier of milk bottles over a disagreement over contractual terms and pricing. The supplier alleged a substantial debt, which DDF didn't have the necessary resources to pay, and moreover was advised it might be 'on the hook' for.

    3.7. Mr Trotter approached our clients, Messrs Smith, of Smith & Smith, a firm of insolvency practitioners. They advised that the company was insolvent, but that if it went into administration, a better result for creditors could be achieved than if it first went into liquidation (the milk business, which was inherently profitable) could be sold, possibly in a pre-pack.

    3.8. By 30 April 2019, the relevant steps to place DDF in administration under Schedule B1 of the Insolvency Act 1986 had been completed, and Messrs Smith were appointed.

3.9. It isn't clear whether, prior to their appointment, Messrs Smith were *au fait* with the existence of the quarry on DDF's land (and which had been operated by DDF).

3.10. By now, the position as regards the quarry is borderline catastrophic:

3.10.1. The site poses a significant number of potential health risks;

3.10.2. There are ongoing hazards to members of the public using a nearby public right of way from asbestos contaminated material located in the quarry;

3.10.3. There is a possible ongoing threat to a nearby aquifer from heavy metal and hydrocarbons which could reach into and contaminate the watercourse.

3.11. It is just before noon on day 1 – the 1st May 2019 – and Messrs Smith's office has received several disturbing calls this morning from the local authority and the Environment Agency mentioning the service of 'minded to' letters and then various notices under a variety of Acts of Parliament on Messrs Smith (or DFF) it isn't clear. Figures running into £millions have been mentioned in relation to clean-up costs.

3.12. What are the potential liabilities of the administrators?

Criminal liability

4. It is open to the Health and Safety Executive, or the Environment Agency, to initiate a prosecution in relation to DDF's activities. If that were to occur, these issues would arise:

4.1. Is there any form of immunity from prosecution under s. 78X of the Environmental Protection Act 1990? That section provides (in material part):

> "(3) A person acting in a relevant capacity–
>
> (a) shall not thereby be personally liable, under this Part, to bear the whole or any part of the cost of doing anything by way of remediation, unless that thing is to any extent referable to substances whose presence in, on or under the contaminated land in question is a result of any act done or omission made by him which it was unreasonable for a person acting in that capacity to do or make; and
>
> (b) shall not thereby be guilty of an offence under or by virtue of section 78M [failure to comply with remediation notice] above unless the requirement which has not been complied with is a requirement to do some particular thing for which he is personally liable to bear the whole or any part of the cost."

4.2. What about the impact of the Environmental Permitting (England and Wales) Regulations 2016 (SI 2016/1154) or s. 33 of the Environmental Protection Act 1990 (prohibition on unauthorised or harmful deposit, treatment or disposal of waste)?

4.3. What if the person acting in a relevant capacity makes omissions that are unreasonable?

4.4. Of course, administrators could rely on para. 43(6) of Schedule B1 to the Insolvency Act 1986, although note *Rhondda Waste Disposal Limited* [2000] 3 WLR 1304.

4.5. It is important to be aware of the impact of s. 172 of the Town and Country Planning Act 1990:

> "(1) The local planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them—
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> (a) that there has been a breach of planning control; and
>
> (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.
>
> (2) A copy of an enforcement notice shall be served—
>
> (a) on the owner and on the occupier of the land to which it relates; and
>
> (b) on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice."

4.6. The Act also provides for personal liability: s. 331.

Civil liability

5. As regards potential civil liability arising from DDF's acts, there are two issues principal issues: (i) does any liability fall on DDF or its officers (and thus potentially the administrators personally), and (ii) if any liability falls on DDF, and it is a monetary liability, where does it rank in the insolvency waterfall.

Is it DDF's liability or the administrators'?

6. This is a question to which there is not a generic or simple answer; whether or not an office holder in this sort of scenario has rendered themselves personally liable under Environmental legislation will, it seems to us, turn on (a) the specific environmental legislation which is 'in play', and (b) what act(s) the relevant officeholder has performed, and whether those acts are enough to trigger personal liability.

7. To illustrate the breadth of possible 'risk areas' for an officeholder under (a), below are a selection of sections which provide the Environment Agency with relevant powers which might apply in this sort of scenario:

> s. 59 of the Environmental Protection Act 1990
>
> (1) If any controlled waste or extractive waste is deposited in or on any land in the area of a waste regulation authority or waste collection authority in contravention of section 33(1) above or regulation 12 of the Environmental Permitting Regulations, the authority may, by notice served on him, require the occupier to do either or both of the following, that is—
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> (a) to remove the waste from the land within a specified period not less than a period of twenty-one days beginning with the service of the notice;
>
> (b) to take within such a period specified steps with a view to eliminating or reducing the consequences of the deposit of the waste.

(6) Where a person on whom a requirement has been imposed under subsection (1) above by an authority fails to comply with the requirement the authority may do what that person was required to do and may recover from him any expenses reasonably incurred by the authority in doing it.

s. 78F of the Environmental Protection Act 1990 (determination of the appropriate person to bear responsibility for remediation)

(2) Subject to the following provisions of this section, any person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land is an appropriate person.

s. 161A of the Water Resources Act 1991

(1) Where it appears to the Agency that—

(a) any poisonous, noxious or polluting matter or any waste matter is or has been present in, or is likely to enter, any controlled waters (so that section 161 applies), or

(b) any controlled waters are being or have been harmed, or are likely to be harmed, by any event, process or other source of potential harm (so that section 161ZA applies),

the Agency shall be entitled to serve a works notice on any responsible person.

s. 161D of the Water Resources Act 1991

"(3) If a person on whom a works notice has been served fails to comply with any of the requirements of the notice, the Agency may do what that person was required to do and may recover from him any costs or expenses reasonably incurred by the Agency in doing it."

s. 161 of the Water Resources Act 1991

(6) In this section "responsible person" means a person who has caused or knowingly permitted the matter—

(a) to be present in the controlled waters; or

(b) to be at a place from which it was likely, in the opinion of the Agency, to enter the controlled waters"

8. It can safely be assumed that the following elements would feature in the reasoning to determine whether the administrators are personally liable in respect of the situation that DDF finds itself in:

8.1. By paragraph 69 of Schedule B1, an administrator of a company usually acts as an agent of the company – that gives a strong indication that personal liability of the relevant officeholder is not intended. Paragraph 69, however, doesn't enact an absolute rule: see, e.g. *Wright Hassall LLP v Morris* [2012] EWCA Civ 1472 [2013] BCC 192. It is possible that administrators will, in a contractual case, contract on terms that make them personally

liable. It is, nonetheless, a reasonable starting point to assume that an administrator wouldn't be personally liable.

8.2. In this case it is very much early days, and it doesn't appear as though the administrators have actually taken any steps at all. They are not occupiers (s. 59). Could it be said that they had knowingly permitted the relevant substances to be in quarry (s. 78F and s. 161A)? That seems a tall order: by the time of their appointment, the substances were already on the land, in the quarry. It could be said that the administrators might, in due course, permit the substances to remain on the land if they take no action; however, being responsible for the substance remaining on the land appears a different test to permitting the substance to be on the land in the first place. There would be good arguments for saying that Messrs Smith are not, at this stage, personally liable.

Insolvency waterfall: expense or unsecured claim?

9. Assuming for these purposes that any liability will fall on DDF, how is any such liability to be treated in the insolvency waterfall?

10. A company's provable debts for the purposes of administration are those which come within rr. 14.1(3) and 14.2(1) of the Insolvency (England and Wales) Rules 2016:

> 14.1
> "(3) "Debt", in relation to winding up and administration, means (subject to the next paragraph) any of the following—
>
> (a) any debt or liability to which the company is subject at the relevant date;
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> (b) any debt or liability to which the company may become subject after the relevant date by reason of any obligation incurred before that date;
>
> (c) any interest provable as mentioned in rule 14.23"
>
> 14.2
> "(1) All claims by creditors except as provided in this rule, are provable as debts against the company or bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages."

11. As for the expenses of a company in administration, the relevant rules are now rr. 3.50 and 3.51 of the Insolvency (England and Wales) Rules 2016. They provide (in material part) as follows:

> 3.50
> "(1) All fees, costs, charges and other expenses incurred in the course of the administration are to be treated as expenses of the administration.
>
> (2) The expenses associated with the prescribed part must be paid out of the prescribed part.
>
> (3) The cost of the security required by section 390(3) for the proper performance of the administrator's functions is an expense of the administration.

(4) For the purposes of paragraph 99 of Schedule B1, a former administrator's remuneration and expenses comprise all the items in rule 3.51(2).

3.51

"(1) Where there is a former administrator, the items in paragraph 99 of Schedule B1 are payable in priority to the expenses in this rule.

(2) Subject to paragraph (1) and to any court order under paragraph (3) the expenses of the administration are payable in the following order of priority—

(a) expenses properly incurred by the administrator in performing the administrator's functions…

(g) any necessary disbursements by the administrator in the course of the administration (including any [costs referred to in Articles 30 or 59 of the EU Regulation and] expenses incurred by members of the creditors' committee or their representatives and allowed for by the administrator under rule 17.24, but not including any payment of corporation tax in circumstances referred to in sub-paragraph (j) below;

(h) the remuneration or emoluments of any person who has been employed by the administrator to perform any services for the company, as required or authorised under the Act or these Rules;

(i) the administrator's remuneration the basis of which has been fixed under Part 18 and unpaid pre-administration costs approved under rule 3.52…"

12. The interplay between debts and expenses in a corporate insolvency was considered by the Supreme Court in a now seminal case which was actually on pensions liabilities: *Nortel Networks (UK) Limited* [2013] UKSC 52.

13. There are two pertinent passages from the judgment of Lord Neuberger which merit inclusion in this paper on the question of what is a debt (of course, the references therein to the rules are to the 1986 rules; there are no material changes in the substance of the rules though). They are:

"[77] ... However, I would suggest that, at least normally, in order for a company to have incurred a relevant "obligation" under rule 13.12(1)(b) , it must have taken, or been subjected to, some step or combination of steps which (a) had some legal effect (such as putting it under some legal duty or into some legal relationship), and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If these two requirements are satisfied, it is also, I think, relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under rule 13.12(1)(b)."

"[85]… As to the second requirement, by the date they went into administration, the group concerned included either a service company with a pension scheme, or an insufficiently resourced company with a pension scheme, and that had been the position for more than two years. Accordingly, the Target companies were precisely the type of

entities who were intended to be rendered liable under the FSD regime. Given that the group in each case was in very serious financial difficulties at the time the Target companies went into administration, this point is particularly telling. In other words, the Target companies were not in the sunlight, free of the FSD regime, but were well inside the penumbra of the regime, even though they were not in the full shadow of the receipt of a FSD, let alone in the darkness of the receipt of a CN."

14. Lord Neuberger also considered, in *Nortel*, whether the relevant liabilities in that case could be expenses. He said this:

> "100 While it would be dangerous to treat any formulation as an absolute rule, it seems to me, at any rate subject to closer examination of the authorities and counter-arguments, a disbursement falls within rule 2.67(1)(f) if it arises out of something done in the administration (normally by the administrator or on the administrator's behalf), or if it is imposed by a statute whose terms render it clear that the liability to make the disbursement falls on an administrator as part of the administration—either because of the nature of the liability or because of the terms of the statute."

> "101 Thus, if an administrator, on behalf of the company, enters into a transaction which gives rise to tax, or starts (or adopts) proceedings which give rise to a liability for costs, that tax or those costs would fall within the rule, as they arise from his actions as administrator during the administration…."

> "103 The latter rationale seems to me to represent the current state of the law: see per Lord Hoffmann in In re Toshoku Finance [2002] 1 WLR 671, para 34 and per David Richards J in the Exeter City Council case [2007] Bus LR 813, paras 15-19. In my view, therefore, the fact that the liability for rates falling due after an insolvency event on property retained by the liquidator ranks as an expense of the liquidation, is based on the proposition that, as a matter of interpretation, the rating (and community charge) legislation imposes such a liability on the liquidator (and the same logic must apply in an administration). This is consistent with the fact that liability for rates (and community charge), arises from day to day, and the liability is treated as an expense only in respect of the company's occupation of property during the liquidation."

> "105 Adopting the approach I have suggested, it appears to me that a potential liability under a FSD or a liability under a CN does not fall within the scope of expenses of an administration within rule 12.2 or rule 2.67(1)(f). First, there is no question of such a liability resulting from any act or decision taken by or on behalf of the administrator or any act or decision taken during the administration. The liability self-evidently arises out of events which occurred before the insolvency event."

> "106 Secondly, I do not consider that the terms of the 2004 Act, properly interpreted, mean that a liability under a CN would be an expense of the administration, if it was not a provable debt under rule 13.12. It is true that the effect of a CN under section 49(3) of the 2004 Act is that it gives rise to a debt payable by the target once it is issued, but it does not seem to me that that can be sufficient to render the

> payment of the debt a "necessary disbursement … by the administrator in the course of the administration". The mere fact that an event occurs during the administration of a company which a statute provides gives rise to a debt on the part of the company cannot, of itself, be enough to render payment of the debt an expense of the administration. It would be a debt payable "during the period of" the administration, but it would not be "part of" the administration, or a payment which was one of the "natural incidents connected with" the administration, to use the language of Lord Dunedin in the Davidson case [1918] AC 304, 324."

15. The issue of expenses came up again in the Court of Appeal in *Jervis v Pillar Denton Ltd* [2014] EWCA Civ 180 [2015] Ch 87 (a case on liability for rent; the *Lundy Granite* salvage principle):

> "101 The true extent of the principle, in my judgment, is that the office holder must make payments at the rate of the rent for the duration of any period during which he retains possession of the demised property for the benefit of the winding up or administration (as the case may be). The rent will be treated as accruing from day to day. Those payments are payable as expenses of the winding up or administration. The duration of the period is a question of fact and is not determined merely by reference to which rent days occur before, during or after that period. This, in my judgment, is the way that James LJ formulated the underlying principle in *In re Lundy Granite Co* LR 6 Ch App 462 itself."

16. Closer to the issue at hand, the Scottish Court of Session (Outer House) considered these very issues in two cases last year: *Dawson Int* [2018] CSOH 52 (30 May 2018) and *Doonin Plant* [2018] CSOH 89 (August 2018).

17. *Dawson* was an application by the administrators of Dawson International Plc heard by Lord Clark. The company was the holding company in a group which owned a factory in Berwick-upon-Tweed which was used in the manufacture of knitwear. Another company in the group had used a toxic solvent which had penetrated into the ground; prosecutions followed. A pump system was in place to the treat the contamination, and the administrators had acquiesced in that by granting a license allowing for its use. There was a potential liability to the Environment Agency under a combination of the Environmental Protection Act 1990 or the Water Resources Act 1991, although it wasn't clear whether the Environment Agency would actually make a claim.

18. The administrator applied for directions. He had assets available to distribute to creditors of around £3.2 million, and by far the largest creditor was the Pension Protection Fund (circa £10 million). If, however, there was a liability to the Environment Agency, and if that liability fell to be treated as an expense, there would be little left for the PPF. The Environment Agency had suggested, in correspondence, that the administrator (personally) had a responsibility to ensure the pump system was operational and operating (something which the administrator's environmental consultant pointed out was very likely not doing any good). It was made clear though that any liability to the Environment Agency might not crystallise for years. In those circumstances, the administrator applied for directions under paragraph 63 of Schedule B1.

19. Lord Clark's conclusions on whether the liability was an expense, or an unsecured claim are contained in the following passages (he didn't it seems, resolve the question of whether the administrator was personally liable):

> "[78] Applying these principles, and taking the first respondent's averments *pro veritate*, the companies had taken "some step or combination of steps": they had assumed control of knowingly contaminated subjects, failed to take reasonable measures to remediate the contamination at the site and thus knowingly permitted the continued contamination. As noted above, under the 1990 Act, the

> first respondent can, if and when the land is designated as contaminated and as a special site, serve a notice requiring remediation. Under the 1991 Act, the first respondent can issue a works notice. The steps taken by the companies therefore had "some legal effect" and put them under "some legal duty or into some legal relationship" which resulted in them being "vulnerable to the specific liability in question". I do not consider that, in relation to the 1990 Act, there can be no legal duty owed to, or legal relationship with, the first respondent until the conditions for enforcement are met. The first respondent is identified in the statute as the person responsible for enforcement and that is, in my opinion, sufficient for the existence of a duty or a relationship. Moreover, under the 1991 Act the first respondent is able to serve the notice. There is plainly a real prospect of liability being incurred. The steps which the companies had taken were sufficient to commit them to a contingent liability. It is consistent with the regime under the legislation to conclude that these steps gave rise to an obligation from which a contingent liability arose. Otherwise, a company could knowingly cause contamination and any liability could be avoided by entering into insolvency prior to enforcement becoming possible. To use the words of Lord Drummond Young in *Liquidator of Ben Line Steamers Ltd* at 543C–D, there existed, prior to the administration, as a result of what the companies had done or failed to do (according to the first respondent's averments) an obligation whose enforceability is dependent on the occurrence of future events (the designations of the site as contaminated land and as a special site and the issuing of the relevant notices) which may or may not occur. Therefore, there is a contingent liability.

20. *Doonin* is a decision of Lord Doherty of 28 August 2018. Like *Dawson*, *Doonin* was an application by insolvency officeholders (joint liquidators) of Doonin Plant Limited. The sole respondent to the application was the Scottish Environment Protection Agency. The company went into liquidation on 8 January 2015. Prior to its liquidation, the company carried on a waste management business at a number of sites including a former colliery in Armadale. The relevant SEPA license for that site was suspended in 2006. It was alleged that, between 2010 and 2015, the company deposited (unlawfully) controlled waste at the site. Criminal convictions for the company and one of its directors followed in September 2012. After liquidation, the liquidators did not carry out any waste management activities.

21. The next material events was that, on 12 December 2012, the SEPA issued a first s.59(1) of the Environmental Protection Act 1990 notice on the company (obliging the company to remove unlawful waste); the company appealed. In December 2015 (after liquidation), SEPA issued a second s. 59(1) notice on the company (again, obliging the company to remove the unlawful waste). By the time of the hearing before Lord Doherty, the company had not undertaken any of the works under either notice. By s. 59(6) of the Act, that enable the SEPA to undertake the work, and then recharge the company. Those powers hadn't been exercised though.

22. By the time of the applications, the liquidators had realised all of the Company's assets; they held funds of around £630,000. The anticipated remediation costs fell between £2.3 million and £3.7 million. It is obvious, therefore, that the remediation costs would exhaust the available funds. The applications before the court were for directions; in short, were the company's liabilities under either s.59(1) or (in the future) under s.59(6) an unsecured claim in the liquidation, or an expense of the liquidation. It appears that there was no suggestion that the liquidators may personally be liable.

23. Lord Doherty first considered whether the company's liability gave rise to a contingent unsecured debt. After having referred to *Liquidator of Ben Line Steamers Ltd* 2011 SLT 535 and *Nortel*, he said this, in concluding that the liability did not give rise to an unsecured debt:

> "[54] So far as part (a) of the test is concerned, the unauthorised deposit of waste by the company had very significant legal effects. By doing what it did the company placed itself very firmly within the regime in Part II of the EPA, and, in particular, sections 33 and 59.
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> [55] Satisfaction of part (b) of the test is much more problematic. SEPA had limited resources. Its policy was that the polluter should pay. The company was insolvent and if SEPA were to do the remedial work it was highly unlikely that it would be reimbursed by the company. In my opinion, on any common sense view of the circumstances at the liquidation date there was not a real prospect of SEPA carrying out the necessary remedial work in the future. There was not a real prospect of the company becoming liable to reimburse SEPA.
>
> [56] Moreover, in my view part (c) of the test is not satisfied. It was not consistent with the section 59 regime that section 59(6) should give rise to a contingent debt in the circumstances. On the contrary, as I shall explain later, in my opinion the section 59 regime envisages that sums expended by a company in liquidation on section 59(1) remedial costs should be a liquidation expense."

24. What is interesting about Lord Doherty's analysis at para. 55, is that he decided to apply a 'real prospect of success' test to part of the exercise. On the facts, his conclusion appears to be supported by the relevant evidence. He then turned to consider whether the company's liabilities could properly be classed as expenses. He concluded that they could:

> "[62] I agree with Mr Sellar that the language of section 59(1) of the EPA does not make it clear that the liability to comply with a notice is a company obligation which the liquidator requires to meet as part of the liquidation, and that the expenditure involved is to be a liquidation expense…"
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> "[63] Accordingly, the critical issue here is whether the nature of the liability imposed by a section 59(1) notice is such that it must reasonably have been intended by the legislature that expenditure by a liquidator complying with a notice should be a litigation expense (which would therefore rank ahead of provable debts)."
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> "[65] … Viewing the nature of the liability imposed by a section 59(1) notice through the prism of the directive which Part II of the EPA was intended to implement, I conclude that it must reasonably have been intended by the legislature that expenditure by a liquidator complying with a section 59(1) notice should be a litigation expense. Otherwise it is very likely that polluters who become insolvent would frequently escape paying for the damage to the environment which their conduct has caused. I am not persuaded that the legislature intended that provable debts should have priority over expenditure by a liquidator to comply with section 59(1) notice obligations."

25. Plainly, the *Doonin* decision is unhelpful to insolvency officeholders. It also contradicts (to some extent – it is fair to say that the underlying facts are somewhat different) the earlier *Dawson* decision and doesn't entirely accord with the Court of Appeal's decision in *Re Celtic Extraction Ltd (in liquidation)* [2001] Ch 475 (albeit, the issues in *Celtic* were whether a waste management license was property, and whether it could be disclaimed. Nonetheless, Morritt LJ did express the view that it should not be the unsecured creditors paying a clean-up cost). It is also possible that it will not be applied in England and Wales, (it is technically not binding). However, for the

purposes of Messrs Smith, the prudent course is to work on the basis that any liability arising from the waste in the quarry might in future be classified as an expense.

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