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[22/12/2003;High Court (Family Division) (Northern Ireland);First Instance]
Re G. and A. (Abduction: Consent) [2003] NIFam 16

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**Re G and A (Abduction: Consent) [2003] NIFam 16, (Transcript)**

**High Court - Family Division**

**22 December 2003**

**Gillen J.**

**Introduction and background**

**[1] This is an application under the Child Abduction and Custody Act 1985 and the Hague Convention on the Civil Aspects of International Child Abduction 1980 for the return to Australia of two children, namely G and A. Their father alleges they have been wrongfully abducted to Northern Ireland by E, the mother of the children.**

**[2] The father, who is an Australian by birth, married the mother, who was born in Northern Ireland, on 30 December 1995. The couple initially resided in Northern Ireland. G was born in Belfast on 24 August 1997 when the parties were living in Northern Ireland. In August 1998 the couple moved to England, where the second child A was born in York on 22 December 1998.**

**[3] In the summer of 2002 it was agreed between the parties that the mother and the children should travel to Australia, albeit that they returned to England after a couple of months. Unhappy differences between the parties surfaced during their stay in England but eventually it seems that the couple decided to make a fresh start, and the two of them with their family moved to Australia on 3 December 2002. They set up home in Australia and a business was purchased there. The children were enrolled in an Australian school in January 2003. The mother claims that she continued to have some reservations and kept all her family ties within Northern Ireland. However, the children did become Australian citizens.**

**[4] The unhappy differences continued whilst the parties were in Australia, leading to court proceedings. A residence order was made in favour of the mother for both children, an order for contact was made in favour of the father and an order was made dated 29 April 2003 restraining the removal of the minors from Australia.**

**[5] Thereafter discussions continued between the parents of the children on a personal level and also through their solicitors. I shall turn later in this judgment to some of the correspondence passing between them. In any event the outcome was that a consent order was made in the Family Court of Australia at Dandenong on 11 June 2003, discharging the earlier orders, and in particular ordering that the Australian Federal Police remove the names of G and A from the airport watch list in force at all points of arrival and departure in Australia ("the consent order").**

**[6] The circumstances in which that consent order was made provide a central issue in this case. The mother argues that she had sought agreement from the father that she was free to leave Australia with the children at any time without restriction and that an undertaking to that effect was provided by the father. It is her case that the agreement of the Plaintiff was not conditional on any matter. She goes on to make the case that her efforts for the sake of the children to effect a reconciliation failed due to the father making her position untenable in Australia and in her view pointed towards an attempt to force her to leave. Accordingly she left Australia on 19 June 2003 with the children and returned to Northern Ireland, having confirmed with her lawyer that she was free to leave Australia. The father makes the case that he did not give consent. Whilst he concedes he had agreed to sign a letter stating he would not raise objection or institute further proceedings to prevent her and the children leaving Australia, he did this simply as a measure of his good faith and in a bid to encourage and facilitate reconciliation. He goes on to argue that he believed that the mother was sincere in her representations that she genuinely sought reconciliation, and it was only on that basis that he agreed to the orders being discharged and signed the letter referred to.**

**[7] Upon coming to Northern Ireland the mother successfully applied to Master Hall in the Family Division of the Office of Care and Protection in Northern Ireland, and the children were made wards of court. On 10 November 2003 a residence order was granted in her favour, together with a contact order in favour of the father for such reasonable contact as might be agreed.**

**[8] Thereafter the present proceedings were instituted by originating summons dated 17 November 2003.**

**[9] I intend to approach the difficult issues raised by this case in the following way:**

**(i) By setting out the respective cases of the father and mother as to acquiescence and consent, stating my findings of fact;**

**(ii) By stating the law on consent and acquiescence under the Hague Convention as I understand it to be; and**

**(iii) By applying the law to the facts as I have found them to be.**

**The argument in this case essentially surrounds interpretation of art 13 of the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention"). Article 13(a) where relevant reads as follows:**

**"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -**

**(a) The person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention or had consented to or subsequently acquiesced in the removal or retention . . ."**

**The father's case on consent and acquiescence**

**I have read all the affidavits filed in this matter by the father and the careful arguments of Ms Dinsmore QC who appeared on behalf of him with Ms McBride. The thrust of the father's case can be summarised as follows:**

**(i) There is no clear or compelling evidence of a positive consent on his part to the removal of either of the children from the jurisdiction of their habitual residence in Australia. He asserts that he did not subjectively intend to or give unconditional consent to their removal. Recognising that the test of consent (and indeed acquiescence) is a subjective one, he argues that there is no evidence at all that he positively and unequivocally consented.**

**(ii) He argues that prior to the consent order of 11 June 2003, which I shall deal with in some detail, his aim, and he believed that of his wife, had been to reconcile with his wife. To this end he draws my attention to a number of documents including:**

**(a) A memorandum of 8 June 2003 with his lawyer in Australia which records that his wife had contacted him to discuss reconciliation and that he thought that she was genuine. He told his lawyer that if there was no reconciliation he wanted the children in Australia and that his wife seemed to want that too.**

**(b) A further memorandum of 10 June 2003 records again his belief that his wife was making a genuine attempt. In that memorandum it is noted that he recognises that he is taking a risk if he removes the order which would prevent the children leaving Australia, but that his wife seemed to him to be making a joint decision and that he believed she wanted to be in Australia. The note concludes with him advising his solicitor that he and his wife had agreed to vacate the previous orders and "the removal of all applications".**

**It must be noted however at this stage that there was also before me a letter from the Plaintiff's solicitors written to him dated 10 June 2003 which contained the following extract:**

**"We enclose for your consideration a copy of Orders it is proposed to put before the Family Court tomorrow, Wednesday 11 June 2003.**

**The effect of these proposed Orders is that the current restraint and watch Orders preventing [E] and the children leaving Australia will be lifted. They will therefore be free to leave at any time [E] chooses to go back to the United Kingdom.**

**The Orders of Justice Morgan made on 16 May 2003 providing you with a regime of contact with your children will likewise be lifted. This means that there will be no court approved regime for contact and you will be reliant on [E's] good will to give you contact with your children.**

**On the other side of the ledger there will be no Orders in place giving [E] sole use and occupation of the former matrimonial home, that you pay her $500 per week, or that you provide her with a motor vehicle.**

**If you decide to change any of these arrangements, either now or in the future, and this upsets [E], she may decide to depart for the United Kingdom without further consultation with you. It might be a situation where you come home from work one night and find they have left and are half-way round the world. They may well be too far away to do anything about it.**

**We have explained these risks to you and you have, after due consideration, decided it is the appropriate way for you to proceed in this matter.**

**We also enclose a copy of the covering letter from [E's] solicitors to us dated 10 June 2003. We draw your attention to the third paragraph of that letter which provides that you agree**

**to provide [E] with a letter agreeing to [E] and the children leaving Australia at any time without any restrictions."**

**Ms Dinsmore described this letter as a "keep yourself right lawyer's letter" on the part of the Plaintiff's lawyer. She argues that it does not show the subjective intention of the Plaintiff. However, the draft consent orders were forwarded to the father's solicitors by the mother's lawyers by facsimile under cover of a letter dated 10 June 2003 which stated, inter alia:**

**"Re [M] - Matrimonial Matters**

**We refer to our telephone conversation earlier today and now enclose minutes of consent orders for your perusal and comment.**

**We are instructed to confirm that these consent orders are being entered into by our client on the basis that the parties are attempting a reconciliation and that our client's consent to these orders is specifically based upon her achieving an unrestricted ability to leave Australia with the children at any time hence.**

**We confirm we are instructed to require that you let us have a letter on behalf of your client confirming that your client agrees to let our client and the children leave Australia at any time hence without any restriction."**

**That letter from the wife's solicitors, namely Dunemann Sutherland, simply indicates, according to the father, that the father was prepared to do anything to get the reconciliation effected.**

**The consent orders of 11 June 2003 before the Honourable Justice Carter recorded as follows:**

**"By consent it is ordered**

**1. That the amended application of the husband filed on 13 May 2003 and the response of the wife filed on 12 May 2003 be dismissed.**

**2. That the order contained in paragraph 2 of the orders of the Honourable Justice Watt made on 29 April 2003 be discharged AND IT IS FURTHER ORDERED that the Australian Federal Police remove the names of [G] born 24 August 1997 and [A] born 22 December 1998 from the Airport Watch List in force at all points of arrival and departure in the Commonwealth of Australia.**

**3. That otherwise all extant orders in this proceeding be discharged."**

**[10] The father's case is that the mother deliberately deceived him as to her intentions. He had genuinely believed that his wife was prepared to make a bona fide attempt to reconcile. A memorandum of 10 June 2003 between the two solicitors on behalf of the parties records the wife's solicitor indicating that his client wanted "to give it her best go". An attendance note made by the Plaintiff's solicitor of the attendance at court on 11 June 2003 records that the parties had discussions in recent days and had agreed to try marriage guidance "to see if that might produce an outcome whereby the matter is accommodated to the satisfaction of all concerned".**

**[11] The Plaintiff thereafter relies upon a number of facts which he suggests indicates that the wife never intended to engage in reconciliation and that her intentions were neither honourable nor sincere at any time. In particular Ms Dinsmore points to the following:**

**(a) A memorandum of her own solicitor of 6 June 2003 notes, inter alia, that even at that stage she is indicating that economically she would be better off in Northern Ireland with support from her family, that it would be easier to get a job in Northern Ireland, that she was socially isolated with few friends in Australia, that she had her parents and other friends in Northern Ireland.**

**(b) A memorandum of 10 June 2003 made by the Plaintiff's solicitor records his belief that the parties had reconciled and that the husband would agree to lift a restraint.**

**(c) A letter of 13 June 2003 from the wife's solicitors to her on the contrary however confirms to the Defendant that she can leave on foot of the consent orders. The father argues that this response from the solicitor is clearly in answer to a query from the wife.**

**(d) A memorandum of 16 June 2003 from the wife's solicitor records an instruction from her to get the orders as soon as possible, the clear implication being, argues the father, that she wishes to clear the way for a return to Northern Ireland.**

**(e) A letter of 18 June 2003 from the wife's solicitor to the Australian Federal Police seeks an amendment of the records to have removed the names of the children from any watch list that might be maintained.**

**(f) A letter of 19 June 2003 to the Australian Federal Police from the wife's solicitor outlines the wife's intention to leave Australia via Melbourne that very day.**

**[12] It is the Plaintiff's case therefore that all discussions were conditional upon the Defendant remaining in Australia with the children. It is his case that she deceived him into a situation where he believed that she was seeking a reconciliation. Ms Dinsmore emphasises the contents of para 41 of the wife's affidavit of 26 November 2003 where she says:**

**"I was made aware on 9 June 2003 that the Plaintiff may have intended to withdraw all his proceedings before the court as he phoned me that morning to discuss matters directly for the first time since any of the proceedings had been issued. I was going out with friends that day so I agreed to speak to him later as he indicated that he would do anything to make me want to stay in Australia and accepted that it would not necessarily entail the relationship resuming." (My underlining.)**

**[13] The father argues that he was not informed at all of the Plaintiff's intention to leave and that the clandestine nature of her leaving, without informing anyone, indicates that she knew that he would not give consent. Moreover it was clear that a friend of hers had been making some enquiries about the possibility of obtaining airline tickets to Northern Ireland within a very short time after the consent orders had been made.**

**[14] The Plaintiff denies that, subsequent to the Defendant's return to Australia, he subjectively intended to or did acquiesce in the retention of the children in Northern Ireland. It is common case that, subsequent to the return to Northern Ireland, the mother applied to the High Court in Northern Ireland on 4 July 2003 for the children to be made Wards of Court. This was notified to the Plaintiff's solicitors in Australia on 4 July 2003 by fax, together with copies of the pleadings and orders being forwarded to the Plaintiff personally and to his solicitor by post. That faxed letter includes the following paragraphs:**

**"Our client would propose that the children reside with her here in Northern Ireland and that as much contact as is practicable be arranged with your client, comprising both direct and indirect contact and to include holiday contact.**

**The children have been enrolled initially at [B] Primary School near [B] but our client would be happy to enter into discussions regarding the children's schooling."**

**[15] Those proceedings were concluded on 10 November 2003 when a Residence Order was granted in favour of the Defendant and a Contact Order was granted in favour of the Plaintiff for such reasonable contact as might be agreed. The husband meets the thrust of this argument at para 33 of his affidavit of 5 December 2003 when he records:**

**"Given the Defendant's previous behaviour in leaving and returning I was hoping that she would change her mind and return on a voluntary basis. I understood the wardship proceedings were a holding mechanism and therefore they did not prevent a voluntary return by the Defendant. It was only on 21 August 2003 when I received an email from the Defendant that I was convinced her position was intractable and that there was no reasonable prospect of a voluntary return."**

**[16] In his original affidavit he had said:**

**"On receiving telephone advice from my solicitor on Friday 10 June 2003 of the news that the Defendant had fled Australia, I was in a state of shock and disbelief. I was devastated. For some weeks following I continued to be in a state of shock and had difficulty coping with the ordinary day-to-day personal and business activities.**

**In conjunction with my parents we attempted to open lines of communication with the Defendant and her parents to see if common sense could prevail, thereby leading to a negotiated and voluntary return of the Defendant and the children."**

**[17] It is the Plaintiff's case, as set out in Ms Dinsmore's helpful speaking notes in her opening submissions, that he felt it would have been inappropriate to have taken part in wardship or residence proceedings within Northern Ireland, as to do so would have given rise to the potential argument that such conduct amounted to acquiescence. She points to a letter of 7 July 2003 from his lawyers in Australia to the mother's solicitors in Lisburn making it clear that he awaited the children's return to Australia. She adds further weight to this argument by relying on para 19 of the wife's affidavit of 3 July 2003, wherein she states:**

**"I seek the assistance of the court in securing the children's residence with me to preserve the status quo while negotiations with the Respondent take place."**

**[18] During the period that the children were in Northern Ireland subsequent to their return, the Plaintiff relies on emails that he sent to the maternal grandparents asking after the children, asserting that what had been done was illegal and immoral, including for example an email of 6 July 2003 to the children indicating that their school places in Australia were still open for them. In terms the Plaintiff asserts that this is evidence that he has never consented to their leaving and certainly did not acquiesce in their retention in Northern Ireland.**

**[19] Finally the Plaintiff argues that even if the court does conclude that he did consent to the children coming to Northern Ireland, the court still should exercise its discretion and honour the spirit of the Hague Convention by returning these children summarily to Australia.**

**The mother's case on consent and acquiescence**

**(1) The Defendant, whilst accepting that the burden of proving consent is on her, asserts that the unequivocal terms of the court order, the correspondence dated 10 June 2003 between the parties' respective Australian lawyers to, which I have already adverted, and the clear terms of the Plaintiff's own solicitor's advice to him on 10 June 2003 as to the consequences of what he was doing, all make it perfectly clear that the Plaintiff subjectively intended to and did give unconditional consent to the removal of these children. She argues through Mr Toner QC, who appeared on her behalf with Miss Murphy, that his consent was not only positive and unequivocal but fully informed given the advice that had been tendered to him. There is absolutely no hint of any duress in the course of that correspondence with his own solicitor, or any suggestion that the consent is conditional upon reconciliation.**

**(2) In so far the Plaintiff does rely on any matter related to attempted reconciliation, the Defendant argues that the Plaintiff's own actions show that he did not himself intend any reconciliation in a meaningful way. If there was any obligation, either human or legal, for the Defendant to engage in reconciliation, the Plaintiff's own actions released her from that obligation. She relies on the following facts:**

**(a) Shortly after the consent order, the Plaintiff unilaterally reduced the Defendant's maintenance from us500 to us270 per week. The Plaintiff initially denied this emphatically in his earlier affidavits, but subsequently retracted that, indicating that his bank manager had mistaken a discussion about such a topic for an instruction, and that accordingly in error, and unknown to the Plaintiff, the reduction had been made. The Defendant argues that this is simply implausible and is indicative of the Plaintiff's own actions which destroyed any chance of reconciliation.**

**(b) The Plaintiff demanded an immediate commencement of cohabitation with the Defendant, which she rejected and which she alleges was "antithetical to a meaningful reconciliation process" as set out in counsel's skeleton arguments.**

**(c) The Plaintiff arranged for estate agents to visit the Defendant's matrimonial home in order to sell the property. She argues that this is at odds with a genuine attempt to affect a reconciliation since she had no other arrangements as to where she was to live.**

**(d) She asserts, although this is strongly contested, that he also threatened to cut off the utilities of the family home if the Defendant did not have them transferred into her sole name.**

**[20] It is the Defendant's case that she had tried to make an effort with the Plaintiff for the sake of the children, but these actions set out above on the part of the Plaintiff made her position untenable in Australia. She argues that his behaviour pointed towards an attempt to get her to leave, as he would have been aware that his actions made it extremely difficult for her to continue living in Australia. It was therefore her conclusion that, since her position was that she was free to leave Australia, she proceeded to make arrangements with the assistance of a friend and her solicitor to purchase airline tickets to travel back to the UK and in particular to Northern Ireland.**

**[21] The Defendant and her children left Australia on 19 June 2003. It is the Defendant's case that the Plaintiff knew this from 20 June 2003. Wardship proceedings were issued on 4 July 2003 and as indicated above the Plaintiff was informed. The Defendant argues that the Plaintiff took part thereafter in the proceedings in Northern Ireland despite it being made patently clear to him that it was the Defendant's intention to stay here in Northern Ireland with the children. It is argued that the bundle of emails put before me makes it clear that the**

**last contact with the children was 4 July 2003, despite his awareness of the proceedings in Northern Ireland and his own assertion that by 21 August 2003 he was aware of her settled intention. Even then he delayed until 13 October 2003, when the application for the Hague Convention was made. Mr Toner submits that he was aware that no negotiations in the real sense of a return were taking place at any time after her return to Northern Ireland other than declarations by the mother that she wished him to contact the children and that she would afford ample contact to him. It is therefore argued that the Plaintiff acquiesced in their retention in Northern Ireland even if he did not consent to their removal.**

**[22] Finally it is argued by Mr Toner that if it is concluded that the Plaintiff did consent, the court should not exercise it discretion to return the children because they had become settled in Northern Ireland and it would not be in their interests now to uproot them and return them after this time.**

**Legal principles**

**[23] Counsel directed me with meticulous care to previous decisions from which I can distil the relevant principles that apply in this case as follows:**

**(1) The existence or otherwise of consent to a removal or retention falls to be decided under art 13 of Hague Convention which expressly refers to the issue of consent rather than under art 3. (See T v T (Abduction: consent) [1999] 2 FLR 912, [1999] 2 FCR 2). Thus, as in this case, if the very fact of consent is an issue, then the matter will come within art 13. If the non-removing parent accepts that, on the face of it, consent was given, but seeks to show that his consent was not a true consent, then it is arguable that the matter may fall to be dealt with under art 3 (whether there has been a breach of custody rights and therefore a wrongful removal) (see Re O (Abduction: consent and acquiescence) [1997] 1 FLR 924, [1998] 2 FCR 61, [1997] Fam Law 469 although this was a position rejected by Denham J in BB v JB 28 July 1997, Transcript (Lexis), Irish Supreme Court).**

**(2) The burden of proving consent or acquiescence is on the Defendant. She must establish that the father subjectively intended to and did give unconditional consent to the removal of the child (see P v P [1998] 2 FLR 835, [1998] 3 FCR 550, [1998] Fam Law 512 and Re K (Abduction: consent) [1997] 2 FLR 212, [1998] FCR 311. A similar test applies for acquiescence.**

**(3) Whilst there must be positive and unequivocal giving of consent, it need not be given in writing. Parents do not necessarily expect to reduce agreements about their children to writing and the court will consider the parents overall conduct. (See Re C (Abduction: consent) [1996] 1 FLR 414, [1996] Fam Law 266, and Re K (Abduction: consent) [1997] 2 FLR 212, [1998] FCR 311).**

**(4) Any consent must be real, in the sense that it is not based on a misunderstanding or non-disclosure of a type that would vitiate any apparent consent. (See T v T (Abduction: consent) [1999] 2 FLR 912, [1999] 2 FCR 2). Accordingly there must be no fraud or deceit eliciting the consent. (See Re B [1994] 2 FLR 249, [1994] Fam Law 606.)**

**(5) The difference between acquiescence and consent has been identified as one of timing. In Re A and another (minors) (Abduction: acquiescence) [1992] 1 All ER 929, [1992] Fam 106, 123, Lord Donaldson described it as follows: "Consent, if it occurs, precedes the wrongful taking or retention. Acquiescence, if it occurs, follows it."**

**Thus the test regarding consent and acquiescence are the same tests in essence. Acquiescence for the purpose of the Hague Convention however must amount to an acceptance of the post-**

**abduction situation. If an applicant fails to act expeditiously he or she will be prevented from securing the automatic return of a prima facia wrongfully removed or retained child. The rationale is self-evident; the longer a child is allowed to remain unopposed in its new place of residence, the greater the ties that will develop and the more integrated it will become. In such circumstances a summary return could merely replicate the deleterious effects of the initial removal or retention. However it is important to remember that it will depend on the circumstances in each case how long a period will elapse before the court will infer from such activity whether the aggrieved party had accepted or acquiesced in the removal or retention (see Re A (minors) (Abduction: custody rights) [1992] 1 All ER 929, [1992] Fam 106, 119. The courts have been reluctant to lay down a minimum time period which would indicate acquiescence, and I do not propose to venture any suggestion as to a minimum period in this instance. Each case must be determined on its own merits.**

**(6) The leading case on the meaning of acquiescence is the House of Lords decision in Re H (minors) (Abduction: acquiescence) [1998] AC 72, [1997] 2 All ER 225, [1997] 1 FLR 872. Acquiescence under art 13 involves the court looking to the subjective state of mind of the wronged parent and asking "has he in fact consented to the continued presence of the child in the jurisdiction to which he has been abducted". The court must determine whether in all the circumstances the wronged parent has, in fact, gone along with the wrongful abduction. Accordingly acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions. It is a pure question of fact for the judge in the material before him. Once again the burden of proof is upon the abducting parent to establish that acquiescence has occurred.**

**(7) There will be exceptional cases where the court finds that the wronged parent did not in fact acquiesce or consent, but his outward behaviour demonstrates the contrary. In such cases, where the words or actions of the wronged parent clearly and unequivocally show, and have led the other parent to believe, that the wronged parent is not asserting or going to assert his right to the summary return of the child, and are inconsistent with that return, justice requires that the wronged parent be held to have acquiesced or consent. In Re H (minors) (Abduction: acquiescence) [1998] AC 72, [1997] 1 FLR 872, Lord Brown-Wilkinson at p 883 said:**

**"It follows that there may be cases in which the wronged parent has so conducted himself as to leave the abducting parent to believe that the wronged parent is not going to insist on the summary return of the child. Thus the wronged parent may sign a formal agreement that the child is to remain in the country to which he has been abducted. Again he may take an active part in proceedings in the country to which the child has been abducted to determine the long-term future of the child. No developed system of justice would permit the wronged parent in such circumstances to go back on the stance which he has, to the knowledge of the other parent, unequivocally adopted. To do so would be unjust . . . However in my judgment these will be strictly exceptional cases. In the ordinary case behaviour of that kind will be likely to lead the judge to a finding that the actual intention of the wronged parent was indeed to acquiesce in the wrongful removal. It is only in cases where the judge is satisfied that the wronged parent did not, in fact, acquiesce but his outward behaviour demonstrated to the contrary that the exceptional case arises."**

**(8) Where the court holds that consent or acquiescence is established, then it has a discretion whether or not to order the child's summary return to the jurisdiction of habitual residence. Only once one of the exceptions under art 13 is established eg acquiescence or consent, should the court consider matters relating to the interests of the child in deciding whether or not to order the child's return. The child's welfare is not the court's paramount consideration. The court must balance the welfare of the child against the fundamental**

**purpose of the Convention, which is that wrongfully removed children should normally be returned to their state of habitual residence. (See Re K (Abduction: consent: forum conveniens) [1995] 2 FLR 211, [1995] 3 FCR 697, [195] Fam Law 534. When exercising its discretion the court may take account of any delay there may have been in issuing the Convention application, particularly where such delay runs contrary to the philosophy of the Convention, which is to ensure the swift return of a child who has been wrongfully removed (see Re S (Child abduction: delay) [1998] 1 FLR 651, [1998] 1 FCR 17, [1998] Fam Law 129.**

**[23] On these legal principles, there was not much issue between counsel. Where there was, legal dispute arose in the context of discussion as to whether or not a consent was valid when it was conditional upon the alleged abducting party undertaking to engage in a process of reconciliation. Could this amount to the clear and compelling evidence of a positive consent which the law requires if the reconciliation failed. The Scottish case of Zenel v Haddow [1993] SC 612 at 616 raised the issue of whether consent for the purposes of art 13(1)(a) is restricted to a specific act or if it may persist to cover a future removal or retention. The central argument in that case surrounded the question of whether the mother had returned to Australia from Scotland as part of an attempted reconciliation, on the understanding that if things did not work out she and the children could leave. On appeal, the Inner House, by a majority, held that consent could properly be given to an act occurring at an undefined moment in the future. That decision has been the subject of some academic criticism, and the issue remains one yet to be determined. Because of the factual conclusions that I have arrived at in this case, I have not found it necessary to determine this issue but I pause only to observe that a powerful argument in favour of the decision of the Inner House majority is that the spirit of the Convention should favour genuine attempts at reconciliation, untrammelled by a consideration that such a consent is invalid.**

**Conclusions**

**[24] Applying the legal principles to the facts of this case, I have come to the following conclusions:**

**(1) The Defendant in this case has convinced me on the balance of probabilities that the Plaintiff did subjectively intend to and did give unconditional consent to the removal of these children. The terms of the court order of 11 June 2003, the correspondence passing between the lawyers of the parties and the letter of 10 June 2003 from the Plaintiff's own solicitor to him make it absolutely clear to me that this Plaintiff fully intended to unconditionally consent to these children returning to Northern Ireland with their mother. I recognise that he may have given this consent at a time when he was hoping for a reconciliation. Nonetheless he had ample opportunity to have made that consent conditional, but in the event he chose not to. I do not believe there was any fraud, deceit, non-disclosure or misunderstanding on the part of the wife. It is probable that her heart may not have been as fully attuned to reconciliation as that of her husband, but nonetheless I find that she was prepared to make a genuine effort despite her misgivings. I do not believe that the Plaintiff has approached this matter with unreserved candour. I find implausible his explanation that he was unaware that the maintenance had been very substantially reduced (at the very least he must have been aware of this by even a cursory glance at his bank statements). Moreover his moves to sell the matrimonial home seem similarly inapposite for a man sensitively approaching reconciliation. On the contrary I consider that his early good intentions soon descended into self-defeating self-indulgence where he sought to impose his approach on an unwilling wife. He attempted to rush her into a new setting in Australia and thereby triggered the very circumstances that he purported to wish to avoid. Rather than dampen her doubts, his behaviour aroused all her old fears. It is clear to me that this man has too**

**lofty a faith in his own opinions, irrespective of the advice or the views of others. He not only refused to listen to the good advice of his solicitor but, more importantly, was insensitive to the reasonable wishes and views of his wife. On the facts, therefore, I consider that he did unequivocally subjectively consent to the children leaving, and his behaviour thereafter served to precipitate that very circumstance. I do not consider there is the slightest evidence of any duress or undue pressure on him which would vitiate the consent which he gave.**

**[25] In any event, even had I not considered that he had consented, I would have concluded that his subsequent behaviour amounted to acquiescence. He has chosen to delay inordinately between his wife leaving in June 2003 and issuing the Hague Convention proceedings in November 2003 at a time when he realised that the children were taking up a position in a school and settling into Northern Ireland. Moreover he did not contact them after early June despite the hurt that he must have realised this would occasion them. I do not believe that he refrained from engaging in the proceedings in Northern Ireland because of any fear that this would constitute an active participation in proceedings in Northern Ireland to determine the long-term future of the child. On the contrary I consider that his explanations for delay - including ill health, not wanting to engage in proceedings - are all disingenuous and rather portray an unexplained activity and inaction which would amount to acquiescence even had he withheld his consent initially.**

**[26] Having found that this Plaintiff did consent, I turn now to consider the exercise of my discretion. I am satisfied that these children have become settled in Northern Ireland over the past six months and that his delay has contributed to this. I have looked at the principles set out in Re K (Abduction: consent) [1987] 2 FLR 212. I have taken into account the welfare of the children which, although not of paramount consideration in a Hague Convention, case is a relevant one. Having settled with their mother in Northern Ireland, a summary return would prove disruptive to them. The effect of a summary return at this stage to Australia therefore has to be borne in mind. It would send them back to a contentious and uncertain atmosphere, particularly in the circumstances where their father has not contacted them for several months. I must of course weigh in the balance the purpose of the Convention. That is something to which the courts attach the greatest possible importance. Children should be returned as soon as possible to the place from which they have been wrongfully removed. However, I borrow from Hale J the views she expressed in Re K at p 220d:**

**"However, I have to bear in mind in particular that that factor has a different weight in a case in which consent to the removal or retention has been established. Indeed, in cases of consent, all of those factors carry a rather different weight. But if it has been agreed between parents that a mother may bring her child to another country and, if she so chooses, remain here with the child, then frustrating these two purposes of the Convention scarcely come into question."**

**[27] Weighing all these factors up I have reached the conclusion that it would not be appropriate for me to exercise my discretion to order a return. Therefore the application is dismissed.**

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**For questions about this website please contact : The Permanent Bureau of the Hague Conference on Private International Law**