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IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2012-425-000145
[2012] NZHC 1292

BETWEEN	RCL Appellant
AND	APBL Respondent

Hearing: 28 May 2012
(Heard at Dunedin)

Counsel: L A Anderson for appellant
G Collin and L Harrison for respondent

Judgment: 11 June 2012

RESERVED JUDGMENT OF GENDALL J

Contents

[1] This is an appeal against a decision of District Court Judge S J Coyle in the Family Court at Queenstown (heard at Alexandra) ordering that the two children of the appellant and respondent be returned to the United Kingdom pursuant to s 105 of the Care of Children Act 2004 (the Act) and the Hague Convention.

Background

[2] The parties (to be described as mother and father) are the parents of two boys born in the United Kingdom on 31 May 2006 and 4 November 2007. They were aged five and four at the time of the hearing in the Family Court. The parents were originally from New Zealand and moved to live in the United Kingdom in mid 2001, and were married in August 2002. The marriage broke down and the parties were divorced on 23 March 2010.

[3] On 14 May 2010, the parents, in the course of mediation, reached an agreement relating to custody and care of the children in the United Kingdom, but as part of which agreed that the mother could make a trip to New Zealand via South Africa from August 2010, to return to the United Kingdom in March 2011. It was agreed that then the children would be in the care of each of the parents on a shared and equal basis. Consequently on 28 August 2010, the mother left the United Kingdom with the children and arrived in New Zealand.

[4] Within three weeks, the mother advised the father that she would not be returning to the United Kingdom. The father did not agree to the children staying in New Zealand. The mother naturally wished the children to remain with her, but she indicated to the father that he could come to New Zealand and collect the children to return to the United Kingdom. She believed it was unlikely that he would come (although this was not actually stated until the proceedings were well in train). So although there was a wish the children remain in New Zealand, the mother did not say that she would refuse to yield them up and appeared to accept that the children could be collected by their father in March 2011.

[5] The father's position was that, through emails and other communications, the mother had led him to believe that he could travel to New Zealand to collect the children in March 2011 as had been agreed. The father, on 1 December 2010, said:

> … I still struggle to come to grips with the fact that you were taking the boys to NZ for a 6 month holiday and within a month of getting to NZ you decided to stay, even though the agreement at mediation was for this not to happen. Whilst not legally binding, I took your word on the fact that you would be back and also that we had set up co-parenting arrangements which we both wanted and you seemed genuinely happy with.

[6] And on 2 December 2010:

> Clearly very upset and angry that you have in effect abducted my children away from me …

[7] Later, on 9 January 2011, the mother and father had a further electronic communication in which they agreed that the children could remain in New Zealand until the youngest boy was due to start school – he turns five on 4 November 2012. So the father's understanding was that the children would remain living in New Zealand for some time until November 2012. Thereafter they would live and go to school in the United Kingdom and practical childcare arrangements would be looked at or "revisited". The father and his partner travelled to New Zealand in late February/early March 2011 to see the children.

[8] On 29 May 2011, the mother and the children went from New Zealand to the United Kingdom for an 18 day holiday, intended to be until 16 June 2011. In his judgment, the subject of appeal, Judge Coyle said:

> What is unclear is why [the father] did not, with the children in the jurisdiction of United Kingdom Courts, apply for an order preventing [the boys] being removed from the United Kingdom at that point in time. The reality however is that he did not.

[9] One explanation might be that the father believed there was an agreement that the children would be returned to the United Kingdom in November 2012.

[10] At about 4pm on Sunday, 12 June 2011, the mother and father met at a café and she then informed him that she would not be returning the children to the United Kingdom in November 2012, or ever, and the children would live with her thereafter

in New Zealand. The mother left the United Kingdom with the children on their return flight to New Zealand on Thursday, 16 June 2011. The father sought legal advice and made an application to the United Kingdom Central Authority for return of the children on 31 August 2011.

[11] On 14 November 2011, the father's application for return of the children to the United Kingdom was filed in the Family Court in Queenstown.

Applicable legislation

[12] Section 105 of the Act provides for the New Zealand Family Court to deal with applications for the return of children "abducted to New Zealand". This is to facilitate the provisions of the Hague Convention to which New Zealand and the United Kingdom are parties, which governs the removal of children from one contracting state to another.

[13] It is well known that the aim of the Hague Convention is that children should not be removed from, or retained outside, their country of habitual residence, without both parents' consent. If that happens they should be returned as soon as possible to the country of their habitual residence to enable the court of that country to determine any disputes around child custody/access/care arrangements.

[14] Article 3 of the Hague Convention provides:

> The removal or the retention of a child is to be considered wrongful where –
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention
>
> …

[15] Section 105 provides the jurisdiction under which the Family Court in New Zealand deals with these applications:

105 Application to Court for return of child abducted to New Zealand

(1) An application for an order for the return of a child may be made to a Court having jurisdiction under this subpart by, or on behalf of, a person who claims—

(a) that the child is present in New Zealand; and

(b) that the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and

(c) that at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and

(d) that the child was habitually resident in that other Contracting State immediately before the removal.

(2) Subject to section 106, a Court must make an order that the child in respect of whom the application is made be returned promptly to the person or country specified in the order if—

(a) an application under subsection (1) is made to the Court; and

(b) the Court is satisfied that the grounds of the application are made out.

(3) A Court hearing an application made under subsection (1) in relation to the removal of a child from a Contracting State to New Zealand may request the applicant to obtain an order from a court of that State, or a decision of a competent authority of that State, declaring that the removal was wrongful within the meaning of Article 3 of the Convention as it applies in that State, and may adjourn the proceedings for that purpose.

(4) A Court may dismiss an application made to it under subsection (1) in respect of a child or adjourn the proceedings if the Court—

(a) is not satisfied that the child is in New Zealand; or

(b) is satisfied that the child has been taken out of New Zealand to another country.

[16] Section 106 provides:

106 Grounds for refusal of order for return of child

(1) If an application under section 105(1) is made to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under section 105(2) for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court—

(a) that the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or

(b) that the person by whom or on whose behalf the application is made—

(i) was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the Court that those custody rights would have been exercised if the child had not been removed; or

(ii) consented to, or later acquiesced in, the removal; or

(c) that there is a grave risk that the child's return—

(i) would expose the child to physical or psychological harm; or

(ii) would otherwise place the child in an intolerable situation; or

(d) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate, in addition to taking them into account in accordance with section 6(2)(b), also to give weight to the child's views; or

(e) that the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.

(2) In determining whether subsection (1)(e) applies in respect of an application made under section 105(1) in respect of a child, the Court may consider, among other things,—

(a) whether the return of the child would be inconsistent with any rights that the child, or any other person, has under the law of New Zealand relating to refugees or protected persons:

(b) whether the return of the child would be likely to result in discrimination against the child or any other person on any of the grounds on which discrimination is not permitted by the United Nations International Covenants on Human Rights.

(3) On hearing an application made under section 105(1) in respect of a child, a Court must not refuse to make an order under section 105(2) in respect of the child just because there is in force or enforceable in New Zealand an order about the role of providing day-to-day care for that child, but the Court may have regard to the reasons for the making of that order.

[17] In the Family Court, the mother advanced defences based upon s 106(1)(a), (b)(ii) and (c). That is:

- the father's application was made more than one year after removal of the children from the United Kingdom on 28 August 2010;

- the father consented to the removal of the children, or to their remaining in New Zealand; and

- return of the children to the United Kingdom would place them in an intolerable situation (although that ground was withdrawn at the outset of the hearing in the Family Court).

[18] In the course of submissions to Judge Coyle, counsel modified those grounds, asserting that the children were not wrongfully removed from the United Kingdom on 28 August 2010 as they left pursuant to a mediation agreement. Further, counsel submitted that the mother, whilst indicating that she would not return to the United Kingdom, did not at any stage indicate that she would refuse to return the boys[1] – that is, there was no intent to retain them. Whilst counsel had originally asserted in the Family Court that the return of the children would not be in their best interests or welfare, that was not a statutory defence available to the mother. A further pleaded defence was that the children's views should have been taken into account, but no evidence was adduced as to the "child objection defence" and counsel withdrew that ground.

[19] So the only remaining two defences pursued were the limitation point under s 106(1)(a) and that the father consented to, or later acquiesced in, the removal pursuant to s 106(1)(b)(ii).

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[1] Present counsel, Mr Anderson, contended that the mother in fact claimed in the Family Court that she had told the father of her intention.

The Family Court Judge's decision

[20] Judge Coyle delivered an oral judgment on 1 March 2012 at the conclusion of the hearing. He found that the criteria in s 105 had been established, no statutory defences had been made out, and he was required to order return of the children. The Judge delivered detailed reasons in his reserved judgment on 12 March 2012. He noted what the father had to prove pursuant to s 105 and that if none of the defences identified in s 106 were established, then the children had to be promptly returned to their country of habitual residence: *Secretary for Justice v HJ*.[2] It had been accepted by the mother (through her counsel's concessions):[3]

> …that the children are currently present in New Zealand, that the boys were habitually resident in the United Kingdom prior to removal and that Mr [L] was exercising rights of custody prior to the boys' removal. Mrs [L] does not accept, however, that the boys were removed from the United Kingdom in breach of Mr [L]'s rights of custody.

[21] Judge Coyle rejected counsel's submission that removal from the United Kingdom occurred on 28 August 2010 when the children left with their mother for the agreed visit to South Africa and New Zealand. Judge Coyle said:[4]

> On the facts of this case therefore this is clearly not a case of wrongful removal but of wrongful retention. There was an entirely lawful removal on 28 August 2010 as [the boys] travelled to New Zealand with [their mother] with the express consent of [their father]. A wrongful retention occurred as a consequence of the initial decision by [their mother] in September 2010 that she and the boys would not be returning to the United Kingdom. That wrongful removal was "cured" by the subsequent agreement on 9 January 2011 that the agreement was to be varied and that the children could further remain in New Zealand until on or about September/November 2011 when it was [the father's] intention that the children return to the United Kingdom to be raised by him and schooled in the United Kingdom.

[22] When the mother and father met late in the afternoon of Sunday, 12 June 2011, the mother's evidence was that she did not express the intention that she would not return the boys, but clearly said she "wanted" the boys to remain in New Zealand. In her affidavit dated 15 February 2012, she said:[5]

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2 *Secretary for Justice v HJ* [2007] 2 NZLR 289, [2006] NZSC 97.
3 *AL v RCL* [2012] NZFC 1549 at [17].
4 At [24].
5 At [34]-[35].

> On 29 May 2011 the boys and I also returned to the UK for a holiday. The boys spent two weeks with [the father].
>
> During the May 2011-June 2011 visit to the UK [the father] and I agreed to meet to discuss care arrangements. We meet [sic] on 12 June 2011. [The father] was clear he wanted the boys to return to the UK for [the youngest] to start school when he turns five. I was clear I wanted the boys and I to remain in New Zealand. The discussion became an argument and I left without any resolution.

[23] The father's evidence was that she said:

> ….that she would not be returning the children to the UK and that as far as she was concerned the children would be living with her from this point on and they would not be coming to live in the UK.

[24] The father's evidence was that:

> It was not until June 2011 that [the mother] informed me that she was going to retain the children in New Zealand …

[25] Judge Coyle said that he accepted and preferred the evidence of the father, concluding that the mother's statement that the children would not be returning to the United Kingdom in September/November as agreed was a unilateral intention to not comply with the agreement, constituting what the Judge described as an "anticipatory breach of the agreement".

[26] Judge Coyle referred to the contention made that in January 2011 there had been consent by the father for the children to remain indefinitely, because all that was to occur in September/November was a further reconsideration of arrangements – that is, there had only been an agreement to reach an agreement. Counsel for the mother had referred to a portion of the father's affidavit in which he agreed the boys would remain until the youngest child was due to start school and prior to that:

> …we will revisit the childcare arrangements with the intention that both [boys] will move to the United Kingdom where I will raise them and they will attend school here in the United Kingdom.

[27] Judge Coyle rejected the submission of counsel that that was vague and provided for no defined return dates. He found that submission was inconsistent

with the wider evidence which needed to be taken in its totality and in the context of all the communications. The Judge found that:[6]

> It is quite clear that it was intended that the boys would return to the United Kingdom, at the latest, in November 2012.

[28] And the Judge said:[7]

> Thus [the father] consented to the boys remaining in New Zealand only to the extent that he had varied the original mediated agreement to provide for the boys to remain until 2012. The evidence simply does not substantiate a view that [he] consented to the boys remaining permanently in New Zealand, and indeed the evidence in its totality compels me to a conclusion that he has consistently, throughout the proceedings, maintained that the boys should be returned to the United Kingdom to live.

[29] Having found, as he said, an anticipatory breach of the varied agreement, the Judge found:[8]

> … that the boys were unlawfully removed (in that they were unlawfully retained) to New Zealand in breach of [the father's] rights of custody. [The father] has, on an evidential basis, established that there has been an unlawful retention of the boys in New Zealand by [the mother] on 12 June 2011. The children must therefore be returned to the United Kingdom unless [the mother] establishes a defence under s 106 and the Court then exercises its discretion to allow the children to remain.

[30] The Judge rejected the limitation defence because the father's application was filed with the United Kingdom Central Authority in August 2011 and with the New Zealand Court in November 2011 and, assuming wrongful retention on 12 June 2011, the application had not been made more than one year after removal or retention.

[31] The Judge then dealt with the defence of the father consenting to removal of the children or their remaining in New Zealand. He found that on the totality of the evidence, the father had consistently maintained the position that the children should be returned and that he did not consent to them remaining in New Zealand beyond, at the latest, November 2012.

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6 At [48].
7 At [49].
8 At [37].

[32] As I have said, the Judge found that the parties' clear intention was that the boys would return to the United Kingdom then, and the evidence did not substantiate the view that there was consent to the boys remaining permanently in New Zealand.

[33] The Judge then dealt with the issue of acquiescence. He referred to the established authority of *Re H*, which says that the test of determining whether someone acquiesces or not is a subjective one, namely whether the actual intention of the wronged person was to accept the situation and not to insist on summary return. This depended upon the state of mind of the parent who is said to have acquiesced.[9] The Judge said that whilst it was arguable that the father, in agreeing to the children returning with their mother to New Zealand in June 2011 [referred to as "July"] in the knowledge that she was not going to return them, could be seen to be "acquiescing", the totality of the evidence satisfied Judge Coyle that the father had not acquiesced to the boys not being returned in November 2012.

[34] The Judge referred to an email of 1 September 2011 when the father communicated with the mother his views as to practical arrangements for the boys and "give it six months minimum to a year and see what happens". That email was sent one day after the father filed his application to the United Kingdom Central Authority for return of the boys. The Judge noted that the time frame is consistent with a view that return was scheduled and expected for November 2012 at the latest.

[35] The Judge said that guardians should be able to exercise guardianship rights pending return so as to be involved in the children's lives without fear that such action would constitute acquiescence. Judge Coyle said that those two emails could not be taken in isolation to reach the point that the father clearly and unequivocally was showing to the mother that he was not asserting, or going to assert, his right to have the children returned. The Judge said:[10]

> Rather the totality of the evidence compels me to the view that at no stage could it ever have been inferred by [the mother] that [the father] accepted the situation and that he was going to do anything other than insist on the return of the boys to the United Kingdom.

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9 *Re H* [1997] 2 All ER 225.

10 At [54].

[36] Accordingly, the Judge found the second defence not to be made out and, in line with clear authority that the Court then has no discretion, an order for prompt return was made.

The appeal to this Court

[37] Counsel for the appellant, who was not counsel in the Family Court, advanced five grounds on behalf of his client. Several of these are new, having not been relied upon in the Family Court (and indeed some seem to be inconsistent with those made to the Family Court). Nevertheless, an appeal in matters such as this is by way of rehearing and the Court must consider all submissions advanced. Whilst a judgment in the Family Court involves an evaluation of factual matters, it may also involve the exercise of a discretion under s 106(1). However, that exercise of discretion will only arise if the person who opposes the making of the order establishes any of the positive defences. That was not the case here.

[38] It is quite clear that, in line with the principles contained in *Austin, Nichols & Co Inc v Stichting Lodestar*,[11] this Court is, in reconsidering the judgment of the Family Court, free to substitute its own views on questions of fact and evaluation if satisfied the Family Court decision was wrong. This is because, as is usually the case, there was no cross-examination of the parties on their affidavits, I recognise that the Family Court Judge was in no better position than an appellate Judge in determining issues of credibility and fact. So, I consider the matter afresh.

[39] In summary, Mr Anderson contended that the Family Court was wrong to order the return of the children to the United Kingdom because:

- There was no proper basis for Judge Coyle finding there was an agreement that the mother would return the children to the United Kingdom.

[11] *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103; [2008] 2 NZLR 141.

- There was no wrongful retention of the children in New Zealand on 12 June 2011 because on that date they were in the United Kingdom and there was no breach of the January 2011 agreement.

- The "removal"/taking of the children by the mother from the United Kingdom on 16 June 2011 was with the consent of the father because he knew the mother did not intend to return the children in 2012.

- The children's habitual residence on 12 June 2011 was New Zealand so no jurisdiction existed for the Family Court to entertain the application.

- Even if there was unlawful removal or retention on 12 June 2011, the father had acquiesced to the children travelling back to and staying in New Zealand.

[40] Counsel for the appellant did not pursue the argument advanced and rejected in the Family Court that the mother had never contended that she would not return the children, so that there was no breach of any agreement by her. Rather, Mr Anderson contends that the mother made it clear that she was not going to return the children and the acts of the father throughout "signalled" acquiescence to this. The limitation argument was not pursued.

[41] I turn to deal with each of the grounds now advanced.

Was there an agreement that the mother would return the children to the United Kingdom?

[42] Whether such agreement existed, and its essential terms, depends upon an analysis of the dealings between the parties as they related to the children, viewed in the total context over the 10 month period between August 2010 and June 2011. The initial agreement made in August 2010 arising out of the mediation was clear. It enabled the mother to take the boys to New Zealand, with them to be returned to the United Kingdom in March 2011. Because the mother, at an early stage thereafter,

indicated that she wished to remain in New Zealand, and would be reluctant to return, the father, in a series of emails, made it clear that he did not consent to the boys staying in New Zealand. His email of 30 December 2010 could hardly have been clearer, when he advised her that he had spoken to a lawyer and:

> I have … been advised to inform you that if the children stay in NZ past March, when the agreement was that they would be brought back to the UK to start in school, this would be classified as child abduction …
>
> The children are classified as UK citizens and also habitual residents in the UK. The agreement that was reached at mediation was that the boys were to go to New Zealand for a holiday and come back in March. I am sure that you have noted that this is not a legally binding agreement, however, my permission for the boys to leave the country was based on their return in March. NZ is a Hague Convention country and as such the authorities in NZ would have to fulfil the requirements of the convention should they not be returned to the UK.

[43] In her reply, the mother said:

> If however you want the boys to live with you in England then I will be in agreement with this. I only asked that you come out and pick them up so that you could share in their New Zealand adventure…

[44] The later Skype communication between the parties (in which the father took notes and confirmed the agreement by email on 9 January 2011) records, in part:

> Given that I cannot afford to look after the boys without your contribution to child support, we have made the decision that the boys will remain in New Zealand with you until [the youngest] is due to start school (age 5), which is approximately 1.5 years away.
>
> Prior to [him] starting school we will revisit the child care arrangements with the intention that both [boys] will move to the UK where I will raise them and they will attend school here in the UK.
>
> It was agreed that [the boys'] welfare where [sic] the priority in making these decisions.
>
> …

[45] The father's position is that the agreement was a variation or extension of the time limits of the mediated agreement, and that the children would be returned to him when the youngest boy was to start school at the age of five in November 2012. The mother's argument was, and remains, that this was not an agreement of

sufficient precision, being no more than an agreement to agree, as childcare arrangements were to be "revisited".

[46] Mr Anderson submitted that the father did not claim the agreement to be that the children would return to the United Kingdom. That submission has to be viewed in the total context and assessing all of the evidence, and that is the manner in which Judge Coyle undertook his task. The Judge's conclusion was that the reference to care arrangements being revisited was on the basis that the children would be returned to the United Kingdom at about the youngest child's fifth birthday on 4 November 2012, and that arose only because there was an agreement reached to extend the period during which the boys would remain in New Zealand. But for the clear agreement that they would be returned, the father would, as entitled to do, insist upon his right to have the children returned in March.

[47] Mr Anderson asserted that the father was saying, in reference to a passage in his affidavit dated 24 February 2012 (para 25):

> … we had no agreement for the boys to stay in New Zealand until [the youngest] started school because we had not reached an agreement on the boys being able to travel back to England.

[48] That affidavit, and para 25, is responding to the original affidavit of the mother dated 15 February 2012, in which she stated, in para 24:

> On 9 January 2011 [the father] and I had a telephone discussion and [the father] agreed the boys could remain living in New Zealand with me until [the youngest] was due to start school in November 2012.

[49] The mother annexed an email from the father to her, which she said was "confirming [the father's] agreement for the children to remain in New Zealand until [the youngest] is due to start school".

[50] The full response of the father in para 25 of his affidavit was:

> We discussed the possibility of the boys staying in New Zealand until [the youngest] started school (which were forced discussions [the mother] having unilaterally decided to retain them in NZ and then to say she would not return with them). I need to make it clear that my agreement to the boys staying in NZ until September 2012 was based on seeing the boys as set out

> in my email of 22 January 2011 [that is, in accordance with his wishes for visits to New Zealand up until September 2012].

[51] There were disputes about the mother paying for flights necessary for such "access", and the father refers to the mother's advice to him that she would not be paying for them. His affidavit then continues:

> Clearly we did not therefore have a full agreement on any terms for the boys to stay in New Zealand. …

[52] The context of that statement is clear, namely that the *terms* upon which the father was agreeing to extend his consent to the boys remaining in New Zealand after March 2011 were not settled, nor was the manner in which, after the agreed period had expired in November 2012, any "shared care, access, travel from, maintenance and other arrangements were to be determined in the United Kingdom". But I find that there was a clear agreement that the boys could remain in New Zealand only until November 2012.

[53] I do not accept that the totality of the evidence viewed in all its context supports the argument that this was no agreement as to what would happen in November 2012. There was an agreement and an acceptance by both that the children were to be returned from New Zealand in November 2012. Future details as to arrangements for their continued care would then be made, but those details would be made in the United Kingdom jurisdiction. If the father had insisted upon enforcing the mediated agreement, the children would have to have been returned in March 2011. It is clear from his communication to the mother on 30 December 2010 that if they were not returned, it would be "classified as child abduction" and he referred to his advice that New Zealand was a Hague Convention country.

[54] I find it to be a compelling conclusion from all the communications and evidence that the father expected and required the children to be returned to the United Kingdom under the mediated agreement, but agreed to their being kept in New Zealand for the further defined period until November 2012, but no longer.

[55] I agree with Judge Coyle when he said:[12]

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[12] At [49].

> [The father] consented to the boys remaining in New Zealand only to the extent that he varied the original mediated agreement to provide for the boys to remain until November 2012.

[56] I do not accept that this was a unilaterally imposed condition. If there had been no variation of the mediated agreement, so that the parents agreed to extend the time within which the boys should remain in New Zealand, the father could have enforced the mediated agreement. All that happened was there was an extension as to the date upon which the boys were to be returned.

[57] Reviewing all the evidence afresh, I have reached the same conclusion as Judge Coyle, namely that the father never consented to the boys remaining permanently in New Zealand after November 2012, this time frame being accepted by the mother in January 2011. It is understandable that future practical arrangements concerning the children and their long-term future had to await their return to the United Kingdom. What is perfectly clear is that in January 2011 an agreement was reached by the parents that the boys would remain in New Zealand until November 2012 and be returned to their father in the United Kingdom. The agreement was reached in the context of the father always maintaining his position that the children should be returned to the United Kingdom.

[58] Counsel for the mother acknowledged to the Family Court that the children were habitually resident in the United Kingdom prior to removal (although Mr Anderson contends that they were not so habitually resident on 16 June 2011). But original counsel advised the Family Court:

> … The respondent [mother] acknowledged the applicant's [father] desire for return and indicated she would not stop him coming to New Zealand at the time to uplift the children. However, on 9 January 2011 the parties agreed that the boys would remain in New Zealand until [the youngest] was due to start school (at age 5). … [The child] turns 5 on 4 November 2012, so there has not yet been a breach or wrongful removal.

[59] That concession naturally was made on the basis that there had been no anticipatory breach, so there was no wrongful retention or removal. I deal with this later at [91]-[103] in this judgment. But I am left in no doubt at all that the crucial element of the agreement reached in January 2011 was that the children would return to the United Kingdom in November 2012 as original counsel conceded.

[60] The first ground of appeal advanced by Mr Anderson is rejected.

No wrongful retention in New Zealand on 12 June 2011

[61] Mr Anderson argued that there could not be retention of the children "in New Zealand" because as at 12 June 2011 when the mother told the father unequivocally that the children would not be returning in November 2012, they were not in New Zealand. He refers to the well-known authority of *Re H and Re S (abduction: custody rights)*,[13] a decision of the House of Lords which made it clear that both removal and retention within the meaning of the Hague Convention were events occurring on a specific occasion, rather than a continuing state of affairs. As such, they were therefore mutually exclusive concepts.

[62] The argument of Mr Anderson, therefore, is that the Hague Convention does not apply at all to these children because they were not outside the United Kingdom at the time of the claimed "retention" on 12 June 2011.

Removal and retention

[63] Removal or retention means removal from, or retention out of, the jurisdiction of the courts of the state of a child's habitual residence. Removal occurs when the child is taken away from that state without consent, and retention occurs where a child is outside the state of habitual residence with consent but not returned on the expiry of a limited time period.

[64] In *Secretary for Justice v SB*, Panckhurst J observed that the need for a specific point in time necessarily followed the requirement that a return application had to be brought within one year of the date of the wrongful removal or retention.[14] The wrongful retention occurs at a point when it is unequivocally communicated to the wronged party that the custodian has no intention of returning a child back to the country of habitual residence. Counsel for the father accepted that the mother's repudiation of the agreement of January 2010 that the children would be returned in

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13 *Re H and Re S (abduction: custody rights)* [1992] NZFLR 84 (HL).

14 *Secretary for Justice v SB (Retention: Habitual Residence)* [2006] NZFLR 1027 at [36].

November 2012, was, for the purposes of the limitation period in the Act, the date of the wrongful retention. But he argued that the children were in the United Kingdom only for a short period as part of an agreed holiday, with the father having care in the sense of access, on the understanding they would be returning to New Zealand with their mother for the remainder of the agreed period, up to November 2012.

Anticipatory breach

[65] If Mr Anderson's argument is correct, the logical difficulty is that wrongful retention may not necessarily arise when there is an anticipatory breach of an agreement which occurs inside the original state of residence. For the purpose of the Hague Convention and limitation period can a child be "retained" when, at the time of the breach, he/she is in the state of their habitual residence? Logically, the answer is no. The communication of the intent not to honour the agreement for later return was fixed here, as counsel agreed in the Family Court, as the date of "retention". This is of course a legal fiction arising out of the necessity of application of the concept of anticipatory breach if, at the time of the communication to dishonour the agreement, the children were not in New Zealand.

[66] Judge Coyle accepted that this was a case of anticipatory breach, referring to the decision of Family Court Judge A J Twaddle in *AHC v CAC*. There, in a carefully reasoned judgment and analysis of the authorities, the Judge said that the principles to be applied in Hague Convention cases relating to anticipatory breach are:[15]

- the unilateral intention of one party not to comply with an agreed arrangement must be was communicated to the other party;

- the statement of intention not to comply must be clear and unequivocal;

- the retention may arise from conduct or one or more statements of intent; and

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15 *AHC v CAC* FC Auckland FAM-2010-004-002326, 7 January 2011 at [36].

- the retention is only wrongful where it is in breach of the rights of custody of the other party.

[67] That case was the subject of appeal in *AHC v CAC*.[16] Andrews J referred to the concepts of removal and retention, but did not go into any detailed discussion about anticipatory breach, except to say that she was satisfied that such a breach of the father's rights had occurred. So the reasoning of the Family Court on the concept of anticipatory breach remains.

[68] In Hague Convention cases, ultimate decisions will depend upon all the circumstances which, given the scope of human behaviour, will have an infinite ambit. For example, if children are with a parent, having been taken from the country of their habitual residence with agreement for a defined period, and that parent then communicates, before the end of that period, an intention not to honour the agreement, it is, in fact, a repudiation of it. The whole foundation under which the children were lawfully removed to be within the custody or care of that parent in another country is undermined.

[69] That may not have been the view of the majority in *Punter v Secretary for Justice* (*Punter No 1*), expressed by Blanchard J, and with which Glazebrook J agreed, although without discussion.[17] That view was that a person had to show actual retention of a child and it was not enough to demonstrate anticipatory retention – that is, at the end of an agreed period the child would be retained in breach of the Convention. Gault J dissented on the basis that if a parent brought a child to New Zealand under a shuttle custody arrangement and applied to the New Zealand Court for a custody order, that would defeat the purpose of the Hague Convention, which is aimed at having matters of custody, access and childcare determined in the country of habitual residence from which the child has been removed without consent, or with consent but for a limited time.

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16 *AHC v CAC* [2011] 2 NZLR 694, [2011] NZFLR 677.
17 *Punter v Secretary for Justice* [2004] 2 NZLR 28 (CA).

[70] Later, in *Punter v Secretary for Justice* (*Punter No 2*),[18] which related to proceedings brought by the same parties after the shuttle period for the children to be in New Zealand had elapsed, Glazebrook J referred to the Court's earlier decision that there had been no retention of the children because the application for return was premature, and noted:[19]

> … that this Court's earlier decision was confined to the issue of whether an application for custody in itself constitutes a retention of the children contrary to the Hague Convention in circumstances where the existence of a parental agreement had been disclosed and there was no intention of retaining the children in New Zealand if that custody order had been refused.

[71] As already said, much will depend upon the individual circumstances. *Punter No 1* was a shuttle custody case in which the majority held that simply applying for custody (without more) was not "retention". In *Secretary of Justice v SB*, a mother had travelled with a child to New Zealand from a Hague Convention country for a visit which lasted a few months, but before the agreed period had elapsed she advised the father that she and the child were not returning.[20] Panckhurst J held that the communication from the mother to the father was an anticipatory breach of the agreement and constituted a wrongful retention. Panckhurst J said:[21]

> … Wrongful retention ordinarily arises from the actions of one party, in that their conduct externally confirms a decision and resolve to retain the child or children in breach of the other's rights. Perhaps, there may be cases where the point of dissent represents the time of retention. That would depend upon the nature of any earlier statements by the other party concerning his or her unwillingness to return to the previous place of residence. … There was nothing equivocal [in this case] as to [the mother's] *future* intention. (emphasis added)

[72] I agree with the remarks Panckhurst J made when referring to *Punter No 1*:[22]

> In the end I do not consider that *Punter* is directly in point. This is not a shuttle custody case, although it does involve an agreement to remove a child to New Zealand for a period of disputed duration. If need be I would adopt and follow the reasoning of Gault P, but I doubt that it is necessary to go that far.

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18 *Punter v Secretary for Justice* [2007] 1 NZLR 40 (CA).
19 At [47].
20 *Secretary for Justice v SB (Retention: Habitual Residence)* [2006] NZFLR 1027.
21 At [51].
22 At [50].

[73] It was not seriously argued before Judge Coyle in the Family Court that there had not been an anticipatory breach, but rather that for such to occur there had to be an agreement to return the children on a certain date, with the argument on behalf of the mother that such an agreement had not been made. Mr Anderson likewise did not argue against the concept of anticipatory breach, but rather that there was no breach because no underlying agreement was made.

[74] But this case starkly illustrates how application of Hague Convention principles will depend upon an analysis of individual circumstances and unique facts of each case. The true focus in this case, as now argued on behalf of the mother, is whether, if there has been an anticipatory breach, there could be a later wrongful removal, and/or a later continuing retention *in fact*.

Consequence of anticipatory breach

[75] It could be that communication to retain is an anticipatory breach of a retention only when it is "perfected" by the act of travelling to New Zealand with that intention. So the event which resulted in wrongful retention is the arrival in New Zealand, the anticipatory breach having been intended and conveyed. Or it may well be that the departure itself was a wrongful removal.

[76] Whatever label is attached to the actions of the mother on 12 and 16 June 2011, they were wrongful unless the husband consented.

[77] In my view, a proper analysis of the facts in this case lead to the conclusion that, for Hague Convention purposes and the limitation period, it was the separate act of removal of the children from the United Kingdom in June 2011 that was a *wrongful removal*, the mother intending to retain them in New Zealand. No doubt that is why Mr Anderson argued that the removal was by consent – which, if that was the case, it would mean it was not wrongful.

[78] An example of a somewhat similar case is *Re S*.[23] There a child was wrongly removed from the habitual residence of Germany to England, but later returned to

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[23] *Re S* [1998] 1 FLR 651.

Germany for three days on a temporary basis. The Court held that removal was a question of fact and an event that occurs on a specific occasion, so it could not be argued that once the first wrongful removal had taken place, that event governed the child's status, unless and until the wrongfulness of the removal had been brought to an end. But the time from which the limitation period was to run was the date of the later wrongful removal after the child had been present in Germany for three days and then removed.

[79] In this case, the first removal, pursuant to the mediated agreement, was not wrongful. The second removal was, unless the father consented or acquiesced. Mr Anderson argued that not only was there no retention of the children because they were in the United Kingdom, but furthermore there was no wrongful removal because the father had been told by the mother on 12 June 2011 that the children would not be returned to the father in November 2012. So Mr Anderson argued that the father consented to them leaving because he did nothing to stop them. Any removal then, he says, was with consent, so not wrongful. The argument that there was *no retention* because the children were in the United Kingdom, and no *wrongful removal* because there was consent, if accepted, would conveniently scuttle the father's case. But that does not accord with the facts as I find them to be.

[80] The mother had care of the children in New Zealand only by virtue of the mediated agreement, which was later extended only until November 2012. Upon her unequivocal repudiation of the agreement on 12 June 2011, the father was entitled to treat that repudiation as a termination of the agreement, by virtue of her anticipatory breach. He was entitled to insist upon compliance with the agreement, or to cancel it. If he did, the rights that the mother had under it no longer existed. The father did not have to immediately accept her repudiation and was entitled, if he wished, to wait until the agreed time limit had expired. Or he could choose, as he eventually did on 31 August 2011, to assert his rights based upon the anticipatory breach or repudiation of the essential term in the agreement – indeed, its very essence.

[81] The Family Court Judge based his anticipatory breach finding upon the fact that this had occurred. Once it was held that the agreement was for the children to be returned in November 2012 and the mother had unequivocally said that that

would not happen, the finding of anticipatory breach was inevitable, but on closer analysis the case, as now argued, is one of wrongful removal on 16 June 2011. There was a later wrongful retention once the children arrived in New Zealand, so as to crystallise, or perfect, the earlier act of communicating the refusal to return.

[82] The label given to the actions of the mother is really immaterial to the merits and the application of the Hague Convention principles. The mother was removing the children from the United Kingdom by returning them to New Zealand when she did not intend to abide by the earlier agreement by which she had been permitted to retain them. Counsel's intricate, sophisticated arguments overlook the fact that, but for the agreement, she had no right to keep the children in New Zealand. To take them there was a removal in breach of the father's rights that would have been enforced but for the removal and later retention. It is the same as if she had said nothing to him until back in New Zealand and then communicated her intention not to comply, creating the anticipatory breach.

[83] I reject the argument of Mr Anderson as being unacceptable in dealing with Hague Convention matters. To accept it would enable the "possessing" parent to time their anticipatory repudiation of the agreement by which they had been permitted to remove the children and/or retain them outside their habitual residence, with the effect that the wronged parent would be deprived of their rights.

[84] If not consented to, or acquiesced in, this was a wrongful removal by the mother through her implementing, by departure with the children, her expressed intention to later retain them wrongfully. Hague Convention rules and principles must apply, unless the children were not then "habitually resident" in the United Kingdom, and unless the father consented or acquiesced.

[85] I will return later to deal with the arguments advanced by Mr Anderson on those two issues.

[86] As I have indicated, if the father had said he did not accept the mother's repudiation (and did not then cancel the "contract"), he could still have awaited the completion of the agreed period before reclaiming the children. But if he was to

later reject the mother's repudiation by her words and acts, so that he was no longer bound by the time limits in the agreement, he is entitled to argue that he could seek to reclaim the children on the basis of the unlawful retention. Indeed, counsel for the father in the Family Court said to Judge Coyle that, had there not been the anticipatory breach:

> … we'd be back here in November if [the children] were not returned. So … I'd be happy to accept a consent they'd be returned with an undertaking … not to seek a warrant [by the father] until November.

[87] The Judge observed that there seemed to be logic to that, but the mother declined, her counsel stating:

> The respondent wishes to have the matter dealt with … prior to November in terms of where the children's residence will be in New Zealand or the UK.

[88] The reality is that there was, even then, a communication that the mother wished to retain the children in New Zealand so that our Court would assume jurisdiction for the care arrangements for the children. This essentially reaffirms the decision to repudiate the agreement.

Counsel's claim of factual error by the Family Court Judge

[89] Mr Anderson said that Judge Coyle erred in saying that the mother had not made it clear to the father before 12 June 2011 that the children would not be returned because her evidence was that she "denied" not having told him earlier.

[90] Counsel's present argument is that if the father knew well before 12 June 2011 that the mother was not going to eventually return the children, he must have agreed, consented or acquiesced in their remaining in New Zealand *after* November 2012. But that was not how the mother's case was presented in the Family Court, nor does it accord with this Court's finding that there was an agreement that in November 2012 the children would be returned. The father was entitled to wait until then before demanding such return. He did not have to, as eventually happened here, because of the mother's actions as an anticipatory breach, after which he was entitled to disregard the agreement. I agree with Judge Coyle that the mother's actions were to string along the father, by never quite saying (until 12 June 2011) that she would

refuse to return the boys. If she had made that clear, the father would have acted, as shown by his statement of December 2010 that the children's retention in the absence of agreement after March 2011 would be "an abduction". What in the end mattered was that she unequivocally repudiated the agreement, and what happened thereafter, whether removal or retention, was wrongful.

The children's habitual residence on 12 June 2011

[91] Mr Anderson said that whilst the mother accepted the boys were habitually resident in the United Kingdom prior to removal, that acceptance related only to the original departure on 28 August 2010. He contended that it did not relate to the later actions on 12 June 2011. He said that issue was not raised in submissions or dealt with by the Family Court. It appears that the mother, in the Family Court, was resisting the application on the basis that she claimed there had been no wrongful removal originally. She did not, however, defend the application on the basis that the children's habitual residence had changed to be in New Zealand at the time of the making of the application or the later retention/removal.

[92] Section 105 of the Act allows a claim by the applicant that the children were habitually resident in the other contracting state immediately before the removal (and removal includes retention). Judge Coyle correctly identified the matters which the father was required to prove,[24] including that the boys were habitually resident in the United Kingdom immediately before removal. However, it was quite clear that the father's case was based upon the anticipatory breach of the agreement on 12 June 2011. Nevertheless, as now argued, the Court has to decide the issue of habitual residence.

[93] There is no definition of habitual residence in the legislation or the Hague Convention and the question is discussed by the Court of Appeal in *SK v KP [Habitual Residence]*.[25] Habitual residence is primarily a question of fact to be decided by reference to the circumstances of each case. There the Court recognised

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[24] *AL v RCL* [2012] NZFC 1549 at [16].
[25] *SK v KP [Habitual Residence]* [2005] NZFLR 1064.

the main difficulty arising in habitual residence cases is where residence in another state is intended by the parents to be for a limited period only.

[94] Mr Anderson argued that because, since August 2010, the children had been residing in New Zealand, the only time spent in the United Kingdom was between May and June 2011 (which was "clearly a visit"), the children have family in New Zealand, have started pre-school and their mother had made it clear that it was her habitual residence, the children's habitual residence could only be New Zealand, they having lost the status of habitual residence in the United Kingdom.

[95] The unilateral purpose of one parent cannot change the habitual residence of a child, because to hold otherwise will go against the policy of the Hague Convention and provide encouragement for abduction and retention. But a very lengthy period of residence, even in such a situation, might eventually change a child's habitual residence. A length of stay in the country to which a child is taken is a factor to take into account, but only one factor, with the purpose of the stay and strength of ties to the existing state also to be taken into account. Even in cases where residence in another state is intended to be for a limited, defined period, followed by return to an existing habitual residence, that will not automatically lead to a finding that habitual residence remains in the old state. As was said in *SK v KP*, it will depend on the circumstances of the particular case.

[96] The position is as described by Glazebrook J in *SK v KP*:[26]

> Finally, I note that there may also be a policy dimension involved if the courts find too easily that existing habitual residence has been lost in the context of one off defined periods in another State. Parents should not be inhibited in consenting to children visiting relatives in another State by fears that habitual residence will be held to have changed – see, for example, the remarks of Hale J (as she then was) in *Re HB (Abduction: Children's Objections)* [1997] 1 FLR 392 at p 399, although that particular case turned out to have a rather unfortunate outcome – see *Re HB (Abduction: Children's Objections) (No 2)* [1998] 1 FLR 564 and the discussion in Beaumont and McEleavy, pp 185 - 186 and 199. This policy element will obviously be stronger the shorter the stay in the other State is intended to be. It cannot, however, override the requirement that the inquiry into habitual residence be a factual one…

[26] At [83] and [84].

> There is no doubt that, where the question of habitual residence arises in a situation of retention rather than abduction, there can be some tension between the two aims of the Convention — to deter retention and to ensure the child's future is determined in the forum convenions, that is where the child has the closest links.

[97] What is relevant in this enquiry into habitual residence is that the children left the United Kingdom with their mother so as to be away for a specific period. There was no agreement that their habitual residence was to be abandoned, and it was not. At the time of the agreement in January 2011 that the children might continue to remain in New Zealand for a fixed and defined period, there was no intention that their habitual residence change. Judge Coyle found that the evidence did not substantiate a view or conclusion that the father had consented to the boys remaining permanently or indefinitely in New Zealand.[27] The period during which they were to be permitted to remain there was fixed at about 18 months.

[98] Duration of residence in determining habitual place of residence is simply one of many factors to consider. The actual physical retention of the boys was between 28 August 2010 and 16 June 2011 (when they departed from the United Kingdom), namely about 10 months. A vital issue is the intention during the period of residence in another country. As Panckhurst J said in *S v M*, it is the intention which accompanies the stay in a country which is all important, and habitual residence may cease in a single day, provided there is a settled intention not to return to the previous home.[28] Correspondingly, the acquisition of a new habitual residence may arise after an appreciable period of time and a settled intention to remain in that place is evident.

[99] Because the enquiry is intensely fact-specific, it is impossible to set out or apply rigid rules. Some relevant factors, as discussed in *Punter No 1*, include whether there is a settled purpose, the actual intended length of stay in a state, the purpose of the stay, the strength of ties to the state or any other country, the degree of assimilation into the state and the cultural, social and economic integration.[29] But the Court of Appeal in *Punter No 2* made it clear that the enquiry into habitual residence had to be a broad factual enquiry, with the notion being free from technical

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27 *AL v RCL* [2012] NZFC 1549 at [49].
28 *S v M* [1999] NZFLR 337.
29 *Punter v Secretary for Justice* [2004] 2 NZLR 28 (CA).

rules which might produce rigidity and inconsistencies. The Court must have the latitude to decide on the basis of all the factual material available whether or not a person has his/her habitual residence in a particular country.

[100] In this case, the totality of the circumstances and evidence satisfies me that the habitual residence of the boys had not changed from the United Kingdom to New Zealand at the time of the anticipatory breach of the agreement. The father before the anticipatory breach, and at that time, made it clear that the children were to return to the United Kingdom after the agreed defined period. The mother had earlier gone along with that, accepting that the boys could return to live with their father, despite her natural preference that they remain with her. But, as the Judge observed:[30]

> It appears that she … "Strung [the father] along," as the reality was she did not believe that he would be the type of father who wanted the care of his children and would remain involved with his children, and she expected him to acquiesce and agree to the boys remaining with her in New Zealand.

[101] Although not decisive in the Family Court, counsel for the mother had submitted that she, at no stage, ever indicated that she was to return the boys.[31] Whilst, as I have said, Mr Anderson argued the mother claims that she had told the father, before the meeting of 12 June 2011, that she wished the children to stay in New Zealand, that was not the stance earlier adopted on her behalf.

[102] The focus now has changed on appeal. Mr Anderson said that the only concession was the children were habitually resident in the United Kingdom prior to their first removal, and there was no concession that state existed in June 2011. But it was clearly asserted by the father in his application to this Court (as it had to be in order for there to be jurisdiction) that the children were habitually resident in the United Kingdom before their wrongful retention in New Zealand, and that was not denied or disputed then by the mother or her counsel.

[103] The task of the Court in establishing the date of wrongful retention, or for that matter habitual residence, is not, however, dependent on the intricacies of

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30 At [5].
31 At [9].

pleadings, but on the substance of the matter, and after proper analysis of the facts and evidence by the Court. So how the matter is pleaded is not decisive. But when all the evidence is viewed in its entirety, I am satisfied that in the particular circumstances of this case involving these parents and these children, the habitual residence of the boys remained that of the United Kingdom at the time of the removal on 16 June 2011. The mother obviously had made up her mind (possibly during June) not to later return them, but up until that time there had been agreement and acceptance that the boys, whilst being permitted to remain temporarily in New Zealand, were to be returned to the United Kingdom after a defined period. The absence of 10 months in those circumstances did not alter their habitual residence.

[104] Generally courts should strive to achieve what they perceive to be the objects of the Hague Convention and take the view that:[32]

> It is the duty of the court to construe the Convention in a purposive way and to make the Convention work. It is repugnant to the philosophy of the Convention for one parent unilaterally, secretly and with full knowledge that it is against the wishes of the other parent who possesses "rights of custody," to remove the child from the jurisdiction of the child's habitual residence

[105] The removal for Convention purposes occurs when the child is taken across the frontier of his state of habitual residence. So in this case, it occurred in two possible respects. First, through the anticipatory breach of the refusal to return at the agreed time, and secondly, through the wrongful removal of the children on 16 June 2011. Because wrongful retention under the Hague Convention is not a continuing state of affairs, if a child is wrongfully removed but then returned, even for a very short period of time to its state of habitual residence, any subsequent removal is a new "wrongful removal" and the time for the purposes of the Article starts to run from the date of the new removal.[33]

[106] In the present case, the initial removal was not wrongful, but the anticipatory breach and repudiation which entitled the father to cancel the agreement meant that

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[32] *Re F (a minor) (abduction: custody rights abroad)* [1995] 1 Fam 224 at 229F-G, per Butler-Sloss LJ.

[33] *Re S (child abduction: delay)* [1998] 1 FLR 651.

the subsequent removal itself became wrongful if the children were being removed without the father's true agreement.

[107] This ground of appeal fails and I now deal with the issue of consent to later removal, or acquiescence in what was done.

Did the father acquiesce or consent?

[108] The issue of acquiescence is to be considered in accordance with the principles expounded in *Re H & ors (minors) (abduction: acquiescence).*[34] Lord Browne-Wilkinson, delivering the speech of the House of Lords, rejected the view that acquiescence in this context required words or actions of the relevant person to be objectively construed. He emphasised that acquiescence was a question of the actual subjective intention of the wronged parent, being a pure question of fact, with the fact-finder being able to infer actual subjective intention from outward and visible acts of a wronged parent. Although each case depends on its own circumstances, judges should be slow to infer an intention to acquiesce from attempts by a wronged parent to reach a voluntary agreed return of the abducted child.

[109] Lord Browne-Wilkinson summarised the applicable principles as:[35]

> (1) For the purposes of art 13 of the convention, the question whether the wronged parent has 'acquiesced' in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in *Re S (minors) (abduction: acquiescence)* [1994] 1 FLR 819 at 838: '… the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact.' (2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent. (3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law. (4) There is only one exception. 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

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34 *Re H & ors (minors) (abduction: acquiescence)* [1998] AC 72, [1997] 2 All ER 225.

35 At 237.

> with such return, justice requires that the wronged parent be held to have acquiesced.

[110] Mr Anderson's argument essentially was that the father consented to the children leaving the United Kingdom with their mother on 16 June 2011, after she had made it clear to him that the children were not going to be returned in November 2012, because he did nothing to stop her. He also argued the father had entered into the agreement on 9 January 2011 knowing that the mother wanted the children to stay in New Zealand, and he visited and had access to the children in March 2011 without seeking to take them back. Further, counsel argued that, after the children had been taken back to New Zealand by their mother, the father later confirmed schooling arrangements by an email dated 1 September 2011 on the basis that that schooling could be for a 6-12 month period.

[111] I dispose first of the last two arguments. The agreement of 9 January 2011 was for a specific limited period for the boys to stay in New Zealand only until November 2012. Whatever may have been the mother's wish or hope, she had agreed with the father on that issue. On the facts, he did not acquiesce in, or consent to, anything else. The father's communications in September 2011 were not actions by him that could be seen as acquiescence, because the communication regarding schooling has to be seen in the light that that communication was made one day after his Hague Convention application had been brought. It could not possibly be the case that his subjective intention was that he was acquiescing in what had happened. The logical conclusion I draw is that he was acting as a father concerned about the boys' schooling pending the determination of his Hague Convention application. It is abundantly clear from all the evidence, correspondence, emails, and actions of the father that he consistently maintained that the children were required to be returned to the United Kingdom pursuant to the agreement he had made with their mother in January 2011. Neither of those matters establish that he acquiesced in the actions and intentions of the mother.

[112] That leaves the final argument posed by Mr Anderson as to "acquiescence" or "consent", namely that the father consented to the children leaving the United Kingdom on 16 June 2011. Counsel said that the father then knew that the mother

did not intend to return the boys to the United Kingdom in November 2012, and did nothing about it.

[113] Mr Anderson referred to an exchange between counsel for the father and Judge Coyle as establishing consent:

> … because he did not object to them returning to New Zealand at the time. He consented to them coming back to New Zealand but in my submission that was based on his understanding at least, which seems to be agreed, that in November 2012 the issue of childcare would be revisited and it was his clear intent that the children return to New Zealand. [The transcript is clearly a slip because it should read "to the United Kingdom".]

[114] I am not sure counsel's submission accurately reflected the father's position. But if it did, then the stance was that although there had been a repudiation by the mother of the agreement, the father retained some hope that the agreement might be honoured at the completion of the agreed duration. That is, whilst there was an anticipatory breach of the agreement, being a repudiation of it on the part of the mother, he did not accept that repudiation at that time. His angry response, after the mother told him of her intent to repudiate the agreement late in the afternoon of 12 June 2011, could not be seen as evidence of a subjective intention that he was agreeing to what the mother proposed.

[115] In any event, I do not consider that inaction by the father in the circumstances of this case through not taking steps to stop the mother returning with the children to New Zealand amounted to acquiescence. The meeting was at 4pm on Sunday, 12 June 2011 and the children and their mother departed from the United Kingdom on Thursday, 16 June 2011. If the father was to have taken any action to prevent their removal, that had to be done within the next three week days. He had what he believed to be the benefit of an agreement as to the later return of the children.

[116] If he had managed to bring some form of proceedings in the United Kingdom in the three days before the children departed with their mother on 16 June 2011, I can envisage that he would have been met with the answer "but there was an agreement that they do not have to be returned until November 2012 and the removal is therefore lawful".

[117] The father's evidence was that he was delayed in bringing the proceedings before the Central Authority in the United Kingdom because the mother had the children's birth certificates, and she must have had the passports in order to undertake the return journey to New Zealand.

[118] His evidence was that after the departure of the mother and the boys on 16 June 2011, he contacted New Zealand Immigration and Passport Services in an attempt to ensure the children did not obtain New Zealand passports. He was concerned that, if they did, they would be established as residents in New Zealand and he would not be able to have them returned to the United Kingdom (either on the expiration of the agreed period or earlier). His evidence is that he was told he could not prevent that happening and that he was advised to bring the Hague Convention application. He contacted the Central Authority in England to obtain the necessary documents, but this took time. He also believed or hoped the boys might be returned to the United Kingdom, and wanted to avoid what he believed could be unfortunate resulting consequences to the mother. So his International Child Abduction and Contact Unit (ICACU) application was completed after duplicate copies of birth certificates were obtained, and filed on 31 August 2011.

[119] It was not unreasonable for the father to entertain a hope that the repudiation of the agreement by the mother might not be maintained at a time when the boys would have to be returned. But he obviously came to accept the repudiation as an anticipatory breach and that the mother was determined that the agreement would not be met. So, his Hague Convention application was based upon his acceptance of the repudiation by the mother and he was no longer bound by it so as to wait until November 2012. He was entitled to then act and cancel the agreement because of the mother's anticipatory breach.

[120] The burden of proof that a wronged person acquiesced falls upon the mother. Viewing all the circumstances and the evidence in its entirety, I am satisfied by a wide margin that the argument cannot be maintained that the father acquiesced in what the mother was doing, and that she could not genuinely have believed that he would not assert his right to the children's return in November 2012. The later proceedings brought on 31 August 2011 are simply evidence of his then acceptance

of the mother's repudiation of the agreement through her anticipatory breach (by cancellation). The evidence satisfies me that the father never acquiesced or agreed to the boys being retained in New Zealand after November 2012, or that he agreed to their departure to New Zealand on the basis that such retention would occur.

[121] The father did not consent to the boys leaving the United Kingdom on the basis that they would not be returned in November 2012, nor did anything he did thereafter amount to acquiescence on his part. This ground of appeal fails.

Conclusion

[122] For the foregoing reasons, the appeal fails. I agree with Judge Coyle that the children must be returned. In summary:

- The children's habitual residence is in the United Kingdom and this has not changed.
- The parents agreed that the children could be removed to New Zealand for a limited period from August 2010 to March 2011.
- That agreement was varied to extend the period in New Zealand until November 2012.
- The mother, when in the United Kingdom on holiday with the children, unequivocally repudiated the agreement.
- The father never accepted that repudiation.
- The anticipatory breach of the agreement by the mother entitled the father to cancel it.
- The removal of the children on 16 June 2011 after they had been temporarily in the United Kingdom was wrongful removal given the mother's anticipatory breach.

- The father did not thereafter consent to, or acquiesce in, the children's continued residence in New Zealand.

- Judge Coyle was correct in his decision on the basis of the case as argued in the Family Court. Although the case as argued on appeal differs, it nevertheless fails upon full reconsideration.

[123] The appeal is dismissed. The children are to be returned to the United Kingdom as directed by Judge Coyle.

[124] The father is entitled to costs if the mother is not legally aided. Counsel may submit memoranda as to that fact, and quantum.

J W Gendall J

Solicitors/Counsel:
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Garry Collin, Christchurch for respondent