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**IN THE FAMILY COURT
AT CHRISTCHURCH**

**FAM-2016-009-001251
[2016] NZFC 10308**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004
 AND THE RATIFICATION THEREBY OF
 THE HAGUE CONVENTION ON THE
 CIVIL ASPECTS OF INTERNATIONAL
 CHILD ABDUCTION 1980

BETWEEN KORO MILTON
 Applicant

AND AROHA MILTON
 Respondent

Hearing: 21 November 2016

Appearances: I Mitchell for the Applicant
 A Corry and J A Mehrrens for the Respondent

Judgment: 5 December 2016

**RESERVED JUDGMENT OF JUDGE E. SMITH
[as to ss 105 and 106 Care of Children Act 2004]**

Applications

[1] The parties are the parents of one child, **Matiu Milton** (“Matiu”), born [date deleted] 2010 (now aged 6 years). Matiu was born in New Zealand.

[2] The parties and Matiu moved to live in Australia in or about October 2013.

[3] While the parties were living in Australia they separated (May or July 2014) and thereafter both remained living in Australia and in essence co-parenting Matiu.

[4] Unbeknown to the applicant (“Father”), on 27 June 2016 the respondent (“Mother”) relocated herself and Matiu to New Zealand ([location deleted]) where she currently resides with Matiu.

[5] Father remains living in South Australia together with his partner, Sandy, and wishes Matiu to be returned to Australia.

[6] Accordingly Father has made an application (through the Central Authority) pursuant to s 105 of the Care of Children Act 2004 (“the Act”) seeking an order for Matiu’s prompt return to Australia. Mother defends that application and argues that Father either consented or acquiesced to Matiu’s relocation to New Zealand so the Court should refuse to return Matiu to Australia.

Contested Issues

[7] All of the jurisdictional matters in s 105(1)(a) to (d) of the Act have been conceded.¹ Three contested issues remain for the Court’s determination, namely:

(a) Did Father consent to Matiu’s removal to New Zealand (*s 106(1)(b)(ii) of the Act*); or

(b) Did Father acquiesce in Matiu’s removal to New Zealand (*s 106(1)(b)(ii) of the Act*); and

¹ See Ruling Judge E Smith of 16 October 2016, r 175D FCRs

- (c) If the Court finds Father either consented or acquiesced in Matiu's removal, should the Court exercise its discretion to nevertheless order Matiu's return to Australia (*s 106(1) of the Act*).

The Evidence

[8] As is common in these matters the parties have not been cross-examined so my assessment of the (contested) affidavit evidence is as approved in *Basingstoke v Groot*², in particular a need to consider contemporaneous words and actions of the parties and any independent evidence within the factual matrix.³

Background

(a) Parties born and grow up in New Zealand

[9] Father was born on [date deleted] 1979 in [location deleted], New Zealand. He is a New Zealand citizen and on 7 November 2014 he also became an Australian citizen. Mother was also born in New Zealand and is a New Zealand citizen. The parties met in Christchurch in 2001. They had at some periods in their relationship lived in Australia prior to Matiu's birth.

[10] Matiu was born in New Zealand on [date deleted] 2010. He is a New Zealand citizen.

(b) Parties move to Australia (2013)

[11] In October 2013 (when Matiu was three years old) the parties decided to live in Australia and moved to Adelaide where Mother obtained fulltime work. Father says it was agreed he would care for Matiu while Mother worked.

[12] However, tensions between the parties had become apparent with Mother becoming increasingly unhappy in the relationship, particularly given, she says,

² [2007] NZFLR 363

³ At the Judicial Conference on 16 October 2016 I declined appointment of Lawyer for Matiu. There was no grave risk or child objection defence raised and I did not consider representation was required given the nature of this hearing.

Father had agreed to seek part-time work, but did not. She considered Father did not engage Matiu sufficiently during his care of him, that he spent too much time on the computer. She feared Father had little insight into Matiu's developmental needs.

(c) Parties separate (May – July 2014)

[13] Mother says that on or about **1 July 2014** she told Father she wanted to end the relationship. Father believes the separation was likely May 2014 when Mother said she had found a new relationship with a man called Garry. Whatever the date of separation, the parties agree that for a period afterwards they lived separately in the house, but in different bedrooms, until late July 2014 when Father moved out.

[14] Mother had planned to holiday in New Zealand to visit her family in July 2014. Mother suggested to Father that upon her and Matiu's return from their holiday in New Zealand she wished him to have left the family home.

[15] Mother's evidence was the day before her and Matiu's departure to New Zealand in July 2014 Father engaged her in unwanted sex, she believing given their size difference she had no alternative than to acquiesce, yet she had told him that she did not want intercourse. Mother says some weeks later she spoke to the police and was advised to lay a complaint. She decided not to as at the time all she wanted to do was forget about it and focus on looking after Matiu. The first time Father learned of this allegation that was purported to have occurred was when Mother told him in an email she wrote to him on 1 July 2016 (some two years later) after she had removed Matiu to New Zealand.

(d) Parties co-parent Matiu 2014 - 2016

[16] By the time Mother and Matiu returned from New Zealand Father had moved to his own accommodation. Thereafter the parties co-parented Matiu.

[17] Father, who was initially living with a friend, could not have Matiu overnight during the week and because he was a New Zealand citizen he was not entitled to social security benefits. While he had Matiu most weekends overnight, Mother gave

Father \$50 per week to look after Matiu from 7am to 6pm each weekday when Mother was working. This co-parenting continued likely from July to September 2014.

[18] In about September 2014 Mother enrolled Matiu at [name of school 1 deleted] and then in early 2015 [name of school 2 deleted] and in October 2015 at [name of school 3 deleted].

[19] With Matiu attending pre-school and then primary school Father was not required to assist in daytime care so his contact with Matiu was largely overnight during the weekends and Matiu stayed with Mother during the week. There appears to be a continued large degree of co-parenting with the ability between the parties to make casual arrangements to accommodate each other's schedules.

[20] Father formed a relationship with his current partner Sandy Brewer in late 2014. She has been a firm fixture in Father's and Matiu's life for about two years now. Father has now become an Australian citizen and is entitled to social security benefits in Australia. Father says he offered to have Matiu live with him full time but Mother did not agree so Father did not pursue the matter and their co-operative parenting arrangement continued. Father obtained some work (mostly part time) and currently studies in [details deleted].

[21] There is some disagreement regarding Matiu's progress at school. Father understood from his communications with teachers and his own assessment that Matiu was settling well and he had friends. Mother believes that Matiu was not settling and was having difficulty getting on with his peers and Mother considered the transition from day care to school a testing time for Matiu.⁴

[22] If the parties had difficulties with the other this may have surfaced from time to time but by and large from my general sense of the evidence, up to the end of June 2016 the parties were in fact able to communicate relatively well, often in a flexible and supportive fashion. Both parties are absolutely dedicated to and love Matiu

⁴ The only independent evidence of Matiu's school progress is his mid year report of 2016 (see Exhibit A to affidavit of K Milton of 1 November 2016) which does not support Mother's concerns regarding lack of settling.

deeply. During large tracts of time it appears to me the parties were able to cooperate to ensure Matiu was happy. If Mother, in particular, had grievances about Father's care of Matiu or her dissatisfaction with the care arrangement or Father in any way, she did not tell Father or press those matters. Mother certainly, however, continued to hold grievances about the financial burden she weathered in the care arrangement and favoured her parenting style over Father's.

[23] Mother appears to have met her current boyfriend Leo Perreault likely online. Leo lives overseas (currently [name of country deleted]). When exactly they met and what, if any, contact Leo has had with Matiu is unclear on the evidence.

[24] Mother and Leo went on a holiday to Malaysia from about **25 May to 12 June 2016** and Father and Sandy happily cared for Matiu throughout that time as asked to by Mother.

(e) Mother raises with Father her wish to relocate to New Zealand with Matiu – 14 June 2016.

[25] Both parties agree that on about 14 June 2016 (two days after Mother had returned from her holiday with Leo) Mother indicated to Father she was thinking about moving to New Zealand with Matiu. The parties' recollection of that meeting and what was said are somewhat diametrically opposed.

[26] Father says on 14 June 2016 Mother came to his home and looked unsettled. His distinct recollection is he said "*Are you thinking about the living arrangements?*" to which Mother said "*Yes, I'm thinking of moving back to New Zealand with Matiu but it's just a discussion at the moment*". Father remembered himself saying "*If you do that I won't get to see Matiu very much and I don't think I would like that*". Father says they did not have any other discussion about Mother and Matiu moving to New Zealand, that he certainly did not consent or agree to it but he was left with the impression and understanding that was what Mother wanted to do.

[27] In retrospect Father has a belief that Mother's wish to move to New Zealand was because of her debt situation in Australia and other difficulties she was having including losing her job.

[28] For Mother's part she agrees she went to Father's home on 14 June 2016 and advised her intentions with a recollection that she and Father had a lengthy discussion on the issue. Her recollection is they even went to the extent that Father would sell her furniture on her behalf and retain half of the proceeds for his time and effort. Mother says that during that meeting Father agreed to her returning to New Zealand with Matiu, on the condition that he and his partner Sandy would have holiday visits with Matiu. She agreed as she says she wanted Matiu to have an ongoing relationship with Father.

[29] That said, Mother acknowledges that she and Father had not agreed when Matiu and her would return to New Zealand as she had not at that time made arrangements.

(f) Communications between the parties from 14 June 2016 to 30 June 2016 (14 days)

[30] There are a number of texts, emails, discussions and behaviours between the parties and their respective partners (Sandy and Leo) after 14 June 2016 that each of the parties seek to have the Court interpret as either consistent with Father consenting or acquiescing to Matiu's return to New Zealand (as Mother wishes) or consistent with demonstrating Father did not consent and neither did he acquiesce (as Father says).

(i) Email and text exchanges between Leo Perreault, Sandy Brewer, Father and Mother.

[31] On **16 June 2016** (out of the blue) Leo sent an unsolicited email to Father and Sandy (copied to Mother). My summary of material matters is that the email appears to be Leo introducing himself to Father and Sandy (given they had not met) thanking them for caring for Matiu over the past two and a half weeks, confirming

that he and Mother had talked about Mother moving back to Aotearoa and what a good choice that was for everyone. He confirms in no way will he ever be Matiu's dad or pretend to be and he wants to support Mother and Matiu. He confirms clearly his and Mother's discussions that Father and Sandy are going to spend good time with Matiu particularly given Leo is committed to [name of country deleted] for two years or so and there will be times when Mother will be visiting him in [name of country deleted]. He extorts the values for Matiu of growing up in New Zealand. It is a positive and thankful email. There is no suggestion in any of it that Father has acted badly to Matiu or Mother for that matter and no suggestion Mother intends to require Father to have supervised contact in New Zealand – quite the opposite.

[32] Sandy responded on **17 June 2016**. As it is relied on by Mother as Father's consent to her removing Matiu to New Zealand I reproduce it in its entirety.

Fri, June 17, 2016 at 10.06am

Sandy Brewer [email address deleted]

To: Leo Perreault [email address deleted]

Cc: Koro Milton <[email address deleted]>, Aroha Milton <[email address deleted]>

Hi Leo

Thank you for expressing your gratitude in our care of Matiu. I have always known Koro to take full responsibility for Matiu as his father. Although I do see this as Koro's responsibility as a father so frankly he was just doing his job, a but more full time than normal but his job nevertheless.

To be completely honest this situation has been a bit of a nightmare, this email making it that much worse. I have been unable to eat and assignments and work responsibilities have been ignored as I try to support Koro in any way I can as he deals with the potential of not being able to see his son regularly.

I was never going to get involved in this as it is not my place as Koro's partner. Koro and Aroha are Matiu's parents thus are the decision makers. My role which I have accepted, is to be a role model and parent to Matiu when he is in our care but also to know my place. Being in a co-parenting role is the hardest thing I have ever done as you gain responsibility but you don't have a lot of say because no matter what I am and will never be Matiu's mum. Saying all that I am happy with the bond Matiu and I have created and consider him family.

You don't know me and you don't know the kind of father Koro is and what you are suggesting of taking away from Matiu. This option does not benefit us. As someone who has worked with children for the past 17 years I do not

agree that taking Matiu out of his routine again will benefit him. At the very least I plead to let him finish Reception at the school he is at and wrap his head around moving. He is at a tender age developmentally and he needs both his mum and dad on a regular basis.

I don't really know what a donor father is and what responsibility it takes. I do know that parenting is 24/7 and the notion quality versus quantity is downright insulting to Koro. Koro may only have Matiu once a week but he has always been there when Aroha needs him. For instance, the night she met up with you, Koro dropped what he was doing to pick Matiu up at a bar at 10.00 at night. He did it for his child, he did it because it would make Matiu's mum happy which is good for Matiu. You cannot imagine the pain Koro is in and to be told that his son who he loves could be taken to another country, we literally moved 6 weeks ago so we could be closer to Matiu and Koro could be more involved in his life. Quantity versus quality is missing the point of being a parent altogether, you are there when your child needs you, period. I cannot imagine growing up and only seeing my father a few times a year that is heartbreaking and even suggesting it to Koro, a father you have never met is crossing the line.

We care about Aroha's happiness and are able and willing to give her the support she needs to keep Matiu here. Again it is not up to you to suggest to Koro how his son should be brought up, it is a discussion for his parents and as partners we support. This is not just up to Aroha and you. We cannot move around every time any one of us decides we don't want to live somewhere anymore. I will not be able to return to [overseas location deleted] anytime soon and I accepted that the day I became in a committed relationship with a man who has a child. There is a child involved and everyone's own individual lives to take into consideration. As far as us watching Matiu if Aroha comes to visit you, that's fine. The potential for Matiu to travel and even do some school abroad is great but with that a discussion to be made by Koro and Aroha.

This is certainly not the email I hoped to be writing you but you simply do not have the right telling Koro and I what is best for us or Matiu for that matter. This is not simple and more emotional than you seem to realise. I am committed to supporting Koro through this process and hope that he and Aroha can reach an agreement. I know that Koro wants to be an active part of Matiu's life and doesn't want him growing up without his daddy.

Cheers

Sandy

[33] Leo responds to Sandy and Father in an email on **17 June 2016 at 12.58 pm** thanking them for the email and thoughts. Leo responds to the extent of being thankful to Sandy and Father for sharing their thoughts, apologises if he is essentially stepping over any lines and says their email provides a better understanding of where they are at. He indicates that he was speaking as to how he thought it might be a good thing for everyone but did not realise what the downside might be and in essence wants to continue a positive dialogue.

[34] On **17 June 2016** there are important and telling texts between Father and Mother. The text exchange is:

17 June 2016

Father (9.42 am)

Ok cool Let me know. I got Leo's email. I appreciate the mood in which it was expressed and I see that he is a decent guy, but he is overstepping his place. Decision like this need to be made by you and me. You needed to bring me on the journey with this aye.

Mother (9.46 am)

No he's not overstepping his place, he is very much a part of this and a part of my and Matiu's life. All decisions will be made involving and including him, as they should with Sandy too.

Father (9.58 am)

No is our child, we are his legal guardians. Decisions regarding his life reside with you and me. Our partners play a support roll. Look, your happiness is important to me, but so is Matiu's and my happiness. You need to have my permission for him to leave with you, and for that to happen you need to convince me that this is the right thing to do. So far you haven't done that.

Mother (11.4..)

Hey thanks, I've read Sandy's email and will think things over the coming weeks.

Can you pick Matiu up from school, I'm working tonight and tomorrow and I'll pick him up tomorrow dinner time. I'll leave his overnight bag at school with some painkillers in it.

His teeth are really sore and he can't eat hard things, scool dentist is closed until Monday.

Cool thanks.

[35] It is very clear from Father's text of **17 June 2016** he has not made a decision about relocation. He is clear it is a discussion that he and Mother have to have and he says clearly in his text of 9.58 am "*You need to have my permission for him to leave with you, and for that to happen you need to convince me that this is the right thing to do. So far you haven't done that*". This text of 17 June 2016 is after

the purported conversation of 14 June 2016 (see paragraphs [25] and [26]) and Mother could not possibly have then interpreted any discussions she thought they had on 14 June 2016 as consent given the exchange of emails between Sandy and Leo (refer above) or the text from Father of 17 June 2016.

[36] It then appears that Father writes to Leo (no other parties copied in) on Friday **17 June 2016** at 6.32pm. Given this email is relied on by Mother that Father gave consent to Matiu leaving, it is recorded in its entirety where material.

Hi Leo

I appreciate the mood of your original email and I can see you are a decent and reasonable person.

Aroha is lucky to have someone like you in her life, she is a fantastic human being and deserves to be happy.

It seems to me though that you and Aroha have misunderstood the nature of the situation a bit. Matiu means the world to Sandy and I, as he does to Aroha. So taking Matiu away is as devastating to Sandy and I as it would be for Aroha if the situation was reversed. Aroha would fight tooth and nail if I tried to do that, and the thing is I wouldn't try. Matiu needs his mother just as much as he needs his dad.

I can respect that you care, but your relationship and emotional attachments have been built around your long distance relationship with Aroha. You care for Aroha and possibly even love her, (she has a way of making people fall head over heels in love with her).

So with respect to this, you care about what she cares about, Matiu but you haven't been here to build up emotional attachments and a relationship with him. Additionally, not to diminish your sincerity and commitment, you haven't been around that long.

In saying all this though, Aroha cares a lot for you and I respect that. So, I am willing to include and engage you in these matters as long as your intentions remain focused on the greater good for all parties.

What I don't appreciate is Aroha coming around and saying she is moving back to NZ and taking Matiu, and that's that. This excludes Sandy and I from the trouble shooting and decision making process, which we are entitled to be a part of. This approach is significantly more likely to generate conflict and encourages me to enact my power of Veto. Aroha needs my permission for Matiu to leave the country, and I will not give it if I feel like this is not good for everyone. As it stands I am yet to be convinced.

So it would seem the crux of the problem is that Aroha is lonely. I image this is a significant downside to a long distance relationship. The easy fix would be for you to move back to Adelaide and be with her ☺ she is worth it after

all. Alas, you have the “save the world bug”, you are following your passion and your dream.

This is probably why Aroha likes you so much, and to ask you to not do it would be like stomping on your soul.

It is a shame that Aroha has a tendency to isolate herself. I myself have a similar tendency and this is probably why we didn't work that well together in the long term.

People need quality social engagements otherwise there is no happiness. A contributing factor to this self-imposed isolation was a common interest and drive we shared and developed. This drive was to get to the truth of things, to look behind the curtain and find the underlying nature of reality. The unfortunate side effect of this is that you see people for what they are, generally self-focused and petty. When you know this it is hard to bring people into your social space without some sort of constructive framework. This framework gives you a situation of common interest as well as a buffer from people that allows a level of control as to how you connect. An example of a framework would be a social club – yoga, meditation, dance etc.. or a job doing something you love. The best thing though is being with a partner or people with a similar outlook, which can be challenging to find.

My point here is that if Aroha could address the core issues, the problem could be sorted without moving countries.

A solution might be, starting a routine social activity that has personal development elements. Working towards getting a soul satisfying job, maybe social work or community aid work? And possibly getting her mother over for a holiday.

I am willing to work around timetables to provide care for Matiu as needed, to contribute to the cost of getting Aroha's mother over for a holiday and to contribute to costs involved with social activities if needed. I have also recently put in a pretty large vegetable garden with Matiu and Aroha in mind. As well as moved house to be near by, specifically to be on call for what ever she needs.

What I would like to work towards is establishing a family/social base here that will accommodate and support everyone's requirements. Care for Matiu and support where needed, organic food, a platform that allows Aroha to travel with you, and Sandy and I being able to travel occasionally too.

What do you reckon?

Koro

*Koro Milton
[Occupation deleted]
[Occupation details deleted]
Phone [number deleted]*

[37] Father's email to Leo cannot in my view be reasonably interpreted (as Mother seeks) to be consent to Matiu moving to New Zealand. On the contrary it indicates

that Father wishes to be involved in all of these decisions, that Mother “*coming around and saying she is moving back to New Zealand and taking Matiu and that’s that*”... is more likely to enact his power of veto as “*Aroha needs my permission for Matiu to leave the country and I will not give if I feel like this is not good for everyone. As it stands I am yet to be convinced*”. Father goes on in his email to clearly suggest other solutions that would enable Matiu to remain in Australia and alleviate some of Mother’s sense of isolation.

[38] Leo responds on **17 June 2016** to the effect he is on a plane and he will get back to Father. Then on 22 June 2016 Leo (copying in Mother) responds to Sandy and Father to the extent that he is sorry for the “radio silence”, he had written a long email but did not send it and given he is busy with a project in London, he is too new and too far away to add any voice to the mix. It is a positive email but in retrospect that “radio silence” was likely during a period when Mother was planning Matiu’s active removal.

[39] From **14 June 2016** to **21 June 2016** there are also other texts between Mother and Father. They are conciliatory, normal, talking about ordinary day to day care for Matiu. At no stage does Mother indicate her impending intent to relocate or that she is making plans to do so. She doesn’t raise any requests for Father’s contact to be supervised (as she quickly does by 1 July 2016).

(ii) *Father seeks to have Matiu on Thursday 30 June 2016*

[40] It transpires that Father and Sandy wish to go away for a weekend and sought to have Matiu for that weekend and also Father was wanting to explore to have not less but rather more time with Matiu during the week. Those texts from 22 to 23 June are as follows:

Wednesday 22 June

Father (1.33pm)	Hey just wondering if everything was ok for Sandy and I to do the road trip we planned? Starting Friday the 1 st . We could have Matiu on the Thursday night? Also I wanted to talk to you about possible having Matiu a couple more nights during the week on a regular basis. I would like to help out
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more and it was fun having the daily routines with Matiu while you were away.

Mother (4.59pm) Yep all good, I've let work know I won't be there...

Father (5pm) Is that going to impact your financial situation?

Father (5.20pm) Because if it is you should let me know and I can plan around it.

Thursday 23 June

Mother (2.29pm) Hey, no its all good ☺

Father (2.32 pm) OK cool. So I think Leo has bowed out of the conversation so we will need to talk at some point aye.

Mother (8.20pm) Yep, probably a good idea.

[41] It is clear from the above exchange that Father wishes to collect Matiu on **Thursday 30 June 2016**. Mother clearly agrees (although she is silent about Father's wish to have Matiu a couple more nights during the week on a regular basis).

[42] Mother's evidence is that on **24 June 2016** she told the school that Matiu would be leaving. There are some texts between Mother and Father about how Matiu got on at the dentist on 24 June 2016 and at no time during that series of texts did Mother tell Father that she had informed the school Matiu would be leaving. Father's evidence is that the school never knew Matiu would be leaving. There were certainly very co-operative texts through from 24 to 25 June with Mother saying Matiu wants to hang out at Father's and he says that's cool and Mother takes him over and on Saturday Mother casually suggests a 5pm pickup and Father says that seems cool. Again throughout 25 June 2016 Mother does not tell Father she had advised the school that Matiu would be leaving. If she had advised the school on 24 June 2016 she must have already planned Matiu's departure by then.

(g) Mother and Matiu leave for New Zealand

[43] Unbeknown to Father, on Monday 27 June 2016 Mother leaves Australia with Matiu and relocates secretly to New Zealand.

[44] It is clear that Mother did not tell Father she was coming either that day or during the days prior when she must have known the date and time of her and Matiu's intended departure. She clearly did so secretly with the intent that Father would not know.

[45] Mother continued this subterfuge over the next few days. In particular on **28 June 2016** Father sends a text to Mother (he having left some belongings on Mother's doorstep) "*Hey did you get the stuff I left on the doorstep?*" Mother replies by text dated Wednesday 29 June 2016 "*Hey yep sorry! Got it thanks☺*" at 8.35am. Mother could never have got the belongings because she had left on 27 June 2016 and she simply lied by telling Father on 29 June she had got the belongings.

[46] Mother continues the subterfuge further. In particular, on 29 June 2016 at 12.11pm Father texted Mother saying "*Hey did you want to catch up for a chat today or tomorrow?*" Mother responds at 3.03pm "*No, can we just leave it until next week? Enjoy your road trip*". Father responds at 3.20pm by text saying:

"Ok well we need to talk at some point, we need to figure things out. Sooner rather than later is better for me. You seem like you are intentionally distancing yourself from me. It would be cool if we could sort all this out together in a collaborative way.

[47] Mother did not respond to Father's text at 3.20pm. She had been in New Zealand for at least two days by that stage.

[48] In accordance with what Father thought was their agreement (see paragraphs [40]–[41]) he went to collect Matiu from school on Thursday 30 June 2016 to accompany him and Sandy on their weekend away.

[49] Father went to Matiu's school with the expectation he would be there to be collected. When he arrived he received a call from his own mother. His mother said that Aroha and Matiu are in New Zealand and she did not think they were planning on returning. Father says this came as a complete shock to him and to the best of his knowledge the primary school did not know Matiu was not coming back. Matiu was obviously not at school. His evidence is that his mother told him that Aroha was making wild accusations about him. Father says he was distraught, particularly

given that he had realised then that Mother had made him think she was still in Australia. Given what his mother was telling him and the accusations she was referring to seemed to him so bizarre together with Matiu's sudden removal he feared for Mother's state of mind. He was worried at destabilising Mother as that might further negatively impact on Matiu.

(j) *Father lets Mother know he is aware Matiu is in New Zealand – 30 June 2016*

[50] Father says he did not know what to do after receiving the phone advice from his mother and discovering Matiu had been secretly removed from Australia but wanted to react positively if he could and keep things calm. He therefore as soon as he had heard from his mother and trying to assimilate matters sent a text to Mother at 9.18pm on **Thursday 30 June 2016**. Mother says this text is evidence of Father's complete acquiescence. It should be read in its entirety. He says:

Hey dud this is crazy, and you know it. I have been nothing but good to you. I have given you everything you have asked for, and I have evidence a mile long that demonstrates this. Let's not do the whole court thing it will be bad for everyone. If you want to keep Matiu there and do your thing that's cool. Please just let me have holiday access and don't vilify me in his mind. I am a good person and deep down you know this. If for some reason you can't see this just ask Matiu, he loves me. He loves me because I'm a good dad. Listen to your heart ♥ I mean you no harm and I never did.

[51] Father sends a further text at 9.34pm that reads:

All I ask is that you find a way to be happy and continue to be a fantastic mother to Matiu. I love the little dude so much and he deserves a good life. I know he will have that if you are happy.

[52] Mother does not reply by text.

(h) *Mother responds to Father by email – 1 July 2016*

[53] What Mother then does is send Father an email dated **1 July 2016** at 8.27 pm entitled "*Moving us forward*".

[54] Within that email Mother confirms that she is in New Zealand with Matiu and says *“I wanted to work through this with you while I was still in Australia however, the nature of our relationship meant that was not going to be possible.”*

[55] She goes on to say:

“ I have made a decision that is best for both Matiu and myself, and I hope you too, to live a life that is free from stress, worry and fear.

I know this has all come as a shock to you, and it was not an easy decision for me to make, but absolutely the right one.

[56] The balance of the email in essence talks about what in fact was the effect on Mother of Father’s actions towards her and how she has lived in fear particularly if she pushed Father outside of his comfort zone. She advises she wants to get full custody of Matiu and included an appendix outlining her reasons for this. Mother indicates that she does not want to drag the issue through the Courts and wants to solve the issue with Father and then says *“It is not my intention to deny him [Matiu] a relationship with you but to create a situation that supports us all in a positive way in our lives”*. She invites Father to read her “Appendix A” and if Father is happy she will have a lawyer draw up an agreement.

[57] “Appendix A” is a one page document that starts with Mother’s version of events which include materially (my summary):

- (a) Matiu has been in her exclusive care for two years since separation. She was Matiu’s primary caregiver and solely and financially responsible for his wellbeing and education;
- (b) She wants custody of Matiu due to the emotionally abusive nature of her relationship with Father and her deep seated fear of him due to his unpredictability if she does anything that affects him emotionally;
- (c) Concern about Father’s regular intake of marijuana around Matiu;
- (d) Fear the use of marijuana exacerbates mental health difficulties;

- (e) A claim that Father raped her at the end of the relationship when she said she wanted to end the relationship – she saying the rape was premeditated and she did make a report to the Police for which she has a reference number;
- (f) He got angry and abusive over the phone and threatened to take Matiu back to New Zealand when I told him I was going to stop paying him for looking after Matiu;
- (g) His lack of financial support of her and Matiu;
- (h) Accordingly she wanted 100 per cent full custody, Father to have supervised contact such as through Barnardos or CYFS and be reassessed after a year upon evidence that he had stopped smoking marijuana and his anxieties had subsided, once that was established supervised visits between Father with his family members present.

[58] The accusations in “Appendix A” came as a shock to Father. He denies any impropriety at all. This is the first time he has learnt of an allegation of rape. He says he had never been visited by the Police or that it was raised with him prior.

[59] For Father’s part he considered the email of 1 July 2016 to be a replication of the kind of concerns his mother told him about on 30 June for which Father thought Mother was exhibiting unstable behaviour and that is why he sent a conciliatory text of 30 June 2016 (see paragraph [50]). The true extent of Mother’s intentions to require him to have supervised contact for at least a year were shocking and certainly not known to him before his text of 30 June 2016.

[60] Mother’s email of 1 July 2016 and particularly her professed fears of Father and need for supervision, is inconsistent with her behaviour since separation. In particular: she facilitated Father having significant unsupervised contact with Matiu; sometimes she paid him to help her care for Matiu; the parties’ email and text communications are by and large extremely co-operative; there is no indication of fear by her on any part and leaving Matiu with Father regularly overnight or for two

to two and a half weeks in May/June 2016 was completely inconsistent with the need to now claim Father should have nothing but supervised contact with Matiu for a year and only after demonstration of no further use of drugs, his family may supervise. Further, Leo's emails of June 2016 do not speak of the need for supervision or fear of Father by Mother.

[61] The potential lack of merit to Mother's claims that Father is somehow a danger to Matiu is amplified by her (now) position at this hearing (through counsel) indicating that Father can have significant unsupervised contact including extensive holiday periods in New Zealand (and presumably Australia).

[62] For Father's part he simply considered Mother's email of 1 July 2016 indicative of what he considered to be a fragile mental state and he was desperate to keep her on an even keel and positive and supportive of Matiu in every regard. Father's reasoning was that if he indicated a negative reaction this might destabilise Mother further.

[63] Father writes an email to Leo dated **Friday 1 July 2016 at 12.10am**. It is long and should be read in its entirety.⁵ It does however begin by saying to Leo he imagines he has been privy to recent events. He indicates that he does not agree with all of Mother's perspective and takes some time to explain his perspective.

[64] Mother considers the contents of that email to be Father's acquiescence in her unilateral removal of Matiu and in particular she focuses on phrases within that email that say:

"When and if you finally join forces with her [Mother] I also ask that you be a fantastic parent to Matiu. He is a beautiful little boy and deserves a good life.

...

Based on the abruptness of what has happened here I can see that she needed to do it to move forward with her life. I can respect that.

I would really like to see my son sometime. I love him dearly and feel I have been a good dad to him. I'm sure he will vouch for that.

⁵ See pages 95 and 96 Bundle of Documents

[65] Much of the balance of the email talks of Father's life and what he has done of recent times and his general positivity.

[66] Mother entirely disagrees that she has any degree of mental fragility and says Father recasting his concerns in that regard are a post facto excuse to explain what (she says) is quite clear acquiescence particularly in his text to her of 30 June 2016 and Father's email to Leo of 1 July.

(i) Father takes steps to secure Matiu's return to Australia – 4 July 2016 – 21 November 2016

[67] Father says he reflected saying he did not know what to do, he wanted Matiu to return. So on or about **4 July 2016** he consulted a lawyer at the Family Courts in Adelaide. That is very quickly after learning of Matiu's departure and Mother wanting him to only have supervised contact. That lawyer informed him about the Hague Convention. Father says that he then immediately downloaded a form from the internet and put together an application seeking Matiu's return under the Hague Convention. He moved quickly submitting the documents to the Australian Central Authority ("ACA") on **6 July 2016**. He was subsequently contacted by the ACA who suggested he contact International Social Services ("ISS") Australia for assistance with his application. Father did that on **15 July 2016** and ISS Australia assisted and submitted his amended documents to the ACA on **16 August 2016**. I am satisfied that the first affidavit that Father produced was dated 1 August 2016 and he signed his application to the ACA to act on his behalf on 11 August 2016. In my view Father acted immediately and with haste to have Matiu returned. Any delays are reasonable legal system and professional delays, not his.

[68] From 24 July to 28 August 2016 the parties exchange relatively civil texts to organise telephone contact and an address for Father to send presents and courteous responses.

[69] For Father's part he says Mother has become difficult and retentive regarding contact by telephone and through his family. Mother disagrees entirely.

(j) *Parties' current circumstances*

[70] In terms of the parties' current circumstances Father remains in South Australia living with Sandy. He is [occupation deleted]. Sandy works. Mother has not described her exact circumstances in New Zealand, other than living with her parents at [location deleted] who are supportive of her and Matiu living with them, that Matiu has been enrolled in school and is doing particularly well and is settled. Mother has indicated an intent to secure part time work to support herself and Matiu and her plans are to remain in New Zealand to have access to family support network. She says however that if there is an order for return she would accompany Matiu back to Australia and seek a parenting order for his day to day care there.

The Law

[71] The relevant provisions of the Act are ss 105(1) and (2) and s 106(1):

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.

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.

...

[72] Accordingly, subject to s 106, s 105(2) requires the Court to make an order for the return of Matiu to Australia if Father satisfies the Court of the grounds set out in s 105(1). The parties have already conceded that all of the prerequisites in s 105 are present.

[73] Given s 105 is satisfied, the Court may only refuse to make an order for return of Matiu if it is satisfied that one or more of the grounds listed in s 106(1) are made out. In this regard the respondent mother argues only one ground for refusal and that is s 106(1)(b)(ii) that Father consented to or later acquiesced in Matiu's

removal on 27 June 2016. The party opposing the return (Mother) has the onus of satisfying the Court that this ground is made out.

[74] If, however, one or more of the grounds listed in s 106(1) is made out, the Court nevertheless has a residual discretion whether or not to return Matiu (*s 105(2) of Act*).

Question 1- Did Father consent to Matiu being removed from Australia on 27 June 2016 to New Zealand?

(a) *The Law - Consent*

[75] I do not understand the parties to disagree regarding the applicable law – only the application of the facts to those principles.

[76] In *Re A (Minors) Abduction: Acquiescence* (1992) 1 All ER 929 the Court held:

The difference between consent and acquiescence is simply one of timing. Consent, if it occurs, precedes the wrongful taking or retention. Acquiescence, if it occurs, follows it.⁶

[77] The Court needs to determine the date of removal before the s 105 factors are assessed.⁷ It is uncontested that the date of removal was 27 June 2016.

[78] It would not be wrong to employ common vocabulary usage to consider “consent” as commonly defined as agreeing to a proposal or request or similar.

[79] It is clear that the consent must be actual and not construction, clear and cogent.⁸

⁶ Many cases have confirmed the sequence and timing in that consent precedes wrongful taking or retention – see also – *Chief Executive Department of Courts v Phelps* [2001] NZLR 168 (CA) at [12] and *Ryan v Phelps* [1999] NZFLR 865 (CA) – particularly Keane J at page 871.

⁷ See *Secretary for Justice v SB* [2006] NZFLR 1027 at [36] where the Court said “It is well established that the date of removal or retention is not a continuing state of affairs, but rather an event occurring on a specific occasion”.

⁸ See *ICMA v The Secretary for Justice* [2007] NZFLR 891 and *Re C (Minors) Abduction: Consent* [1996 3 FLR 222

[80] For the applicant's part he highlights the comments of Judge Callinicos in *DGH v MJT*⁹ at page 58 (paragraph [43]) where His Honour commented:

It defies credibility to say, as she has, that he repeatedly consented willingly to the children returning to New Plymouth and yet she did not advise him of a date of departure, she did not advise him of their whereabouts in New Zealand, or discuss contact arrangements or any other matters that a couple who had reached apparent consent would obviously enter into, given the significant obstacle to relationship that a cross Tasman relocation would cause. It is clear to me that she did not tell him about the removal of the children because she knew he would not agree. There was no consent.

[81] In *PIC v GK Hague Convention*¹⁰ Judge Hikaka attempted to summarise the principled approach to the law with respect to consent and particularly as set out *Re K Abduction: Consent*¹¹ [1997] NZFLR 212 when His Honour suggested that there was perhaps six criteria that apply as elicited from the cases, namely:

- (1) Consent must be proved on the balance of probabilities by the person relying on the defence;
- (2) The evidence needs to be clear and cogent;
- (3) If the Court was left uncertain, then the defence fails;
- (4) The consent has to be real, positive and unequivocal;
- (5) There could be circumstances in which the Court could be satisfied that the consent had been given, although not in writing, but most people who wish to retain or remove a child would be well advised to get written consent;
- (6) There may be cases where consent can be inferred from conduct.

(b) *Parties Positions*

(i) *Father's Arguments*

⁹ [Abduction] [2009] NZFLR 49

¹⁰ [2008] NZFLR 391

¹¹ [1997] NZFLR 212

- There may have been a discussion on 14 June 2016 but whatever its extent there was no consent, it was not unequivocal, it was not unconditional, it was not clear, at best he says they intended to discuss the matter further;
- There was no specifics as to date and time of moving or discussions and in fact Mother secreted in every way the child's removal, suggesting that she well knew that Father would not consent to it. Mother's decision was unilateral in all regards;
- Father in correspondence stated he would not give permission for Matiu to leave the country and that he would enact his power of veto if he was not convinced that such an arrangement (to leave Australia) was appropriate (see his email to Leo of 27 June and his texts of 17 June 2016 to Mother make it clear he was not agreeing);
- Mother must have known from the email exchange between Mr Perreault, Father and Sandy that Father would not agree to the child moving to New Zealand;
- Mother's email of 1 July 2016 particularly verifies that there was no agreement or discussion prior saying "*I wanted to work through this with you while I was in Australia. However, the nature of our relationship meant that this was not going to be possible*".

(ii) *Mother's Arguments*

- Mother argues that there are two critical records corroborating Father's consent before Matiu's departure on 27 June 2016 in particular

(a) Leo Perreault's email to Father and Sandy on 16 June 2016
(refer paragraph [31]);

(b) Sandy Brewer's email to Leo Perreault 17 June 2016
(refer paragraph [32]);

- Uncertainty about the dates of departure does not viate the consent and in all regards it was clear from the conversation of 14 June Father consented, corroborated by the emails between Leo and Sandy.

(c) *Findings*

[82] I am satisfied there is no clear, cogent, unequivocal consent by Father to Matiu's removal from Australia on 27 June 2016. At best there appears to be a tentative agreement that there may be ongoing discussions about that. In coming to this finding I have taken the following material matters into account:

- (a) Mother clearly secreted Matiu's removal from Australia and carried out a subterfuge about that which is more consistent with Father's evidence that at the meeting on 14 June 2016 there was no agreement as to Matiu's removal (at best agreement to discuss the matter) as opposed to Mother's evidence that Father categorically agreed. If so there would have been no need for the subterfuge which was evident. It is simply implausible Mother thought at any time Father consented, given her covert behaviour;
- (b) I do not interpret Leo Perreault's email to Father and Sandy of 16 June to evidence consent (as Mother argues). Leo Perreault cannot give consent to Matiu moving. That email seems to be some kind of implied understanding by Leo that Father had agreed. What impression Leo Perreault had about Father's consent or not can only have come from Mother and cannot be interpreted as Father giving consent. If anything Leo's email is his understanding of Mother's

representation to him about what she intended to do (i.e. relocate) and his interpretation of what Father intended. It cannot be properly used as corroboration of Mothers understanding as to whether consent was given or not;

- (c) Sandy Brewer's immediate reply to Leo of 17 June 2016 gives no indication of clear consent at all on behalf of Father or her understanding that Father has consented. Rather it is lamentful about the prospect of relocation, clearly indicative that more discussion was required and even if it is indicative of a possibility that Matiu may go to New Zealand and the ramifications of that, in no way does it indicate clear, cogent consent at all from Father;
- (d) Father's text to Mother of 17 June 2016 indicates that after receipt of Leo's email of 16 June 2016 Father does not agree at all to the relocation and he is clear when he says "***You need to have my permission for him to leave with you and for that to happen you need to convince me that is the right thing to do. So far you haven't done that***". Mother knew that and whatever her interpretation of the meeting of 14 June 2016 it would have been clear to her after receiving Father's text of 17 June 2016 that he did not agree to Matiu's relocation at that time and may not in fact ever consent;
- (e) One interpretation of Father's email to Leo of 17 June 2016 is that he is actually offering to have Matiu in Australia to live with him if Mother wishes to relocate to New Zealand or offers way to see if Mother's family can travel from New Zealand to alleviate her sense of isolation. While it does not completely negate the possibility that Matiu may go to New Zealand, it is not consent and cannot be interpreted as such.

[83] Accordingly I do not find that Father consented to Matiu leaving Australia to live in New Zealand on 27 June 2016.

Question 2 – Did Father acquiesce in Matiu’s retention in New Zealand post 27 June 2016?

(a) *The Law - Acquiescence*

[84] In *JHL v Secretary of Justice*¹² Ronald Young J summarised the legal position regarding acquiescence for the purpose of s 106(2)(b)(ii) as follows:

[24] New Zealand Courts have followed the House of Lords approach in *Re H*. The fundamental principle identified in *Re H* is that whether a parent has acquiesced in the removal or retention of a child will depend upon the state of mind of the parent who is said to have acquiesced. The burden of proving a parent has acquiesced is on the abducting parent on the balance of probabilities. The one exception to the rule expressed by their Lordships was:

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

...

[27] A parent cannot be said to have acquiesced unless he or she is aware the other parent’s actions of removal and retention are unlawful and know, at least in general terms, their legal rights: In *Re A (Minors) (Abduction: Acquiescence)* [1992] 1 All ER 929. However, in this case the mother does not claim, nor could she, that she was unaware that the abduction was unlawful. She accepted she knew, at least in a general sense, her Hague Convention rights.

[85] Further, His Honour Gendall J in *RCL v APBL*¹³ (equally referring to the English case of *Re H*) at paragraph [108] set out the principles of acquiescence as expounded by Lord Browne-Wilkinson where he said:

[108] The issue of acquiescence is to be considered in accordance with the principles expounded in *Re H & ors (minors) (abduction: acquiescence)*. 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

¹² [2008] NZFLR 54

¹³ [2012] NZHC 1292

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.

[86] I accept (that as with consent) there has to be clear evidence of the acquiescence. In the *Secretary for Justice v M*¹⁴ Judge Robinson applied the following test regarding acquiescence from Waite J in *W v W* (Child Abduction: Acquiescence) [1995] 2 FLR 2221:

Acquiescence means acceptance. It may be active arising from express words or conduct, or passive arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general right of objection, but precise knowledge of legal rights and remedies and specifically the remedy under the Hague Convention is not necessary. It must be ascertained on a survey of all relevant circumstances, viewed objectively in the round. It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return.

(b) *Parties' Positions*

(i) *Father's arguments*

- His text to Mother of 30 June 2016 was written while in shock, without knowing his rights and wanting to keep mother calm given he thought her behaviour bizarre and was written before Mother's email of 1 July 2016 where she was requiring his contact supervised for at least a year. Father argues he never acquiesced to removal on that basis;
- Thereafter he moved immediately (4 July 2016 and since) to find out how to have Matiu returned and acted consistently with that.

(ii) *Mother's arguments*

- Father's text to Mother of 30 June 2016 (see paragraph [50]) clearly denotes acquiescence;

¹⁴ [1996] NZFLR 128

- The above text read together with the consistency of the respondent's evidence that she obtained consent to Matiu's relocation on 14 June 2016;

(c) *Findings*

[87] Detailed consideration of Father's behaviour, understanding and position from 30 June 2016 must be considered.

[88] I find that on 30 June 2016 Father had no idea that Matiu had been taken to New Zealand three days prior. He had been led by Mother to believe that he was in Australia and in fact Mother had encouraged Father to collect Matiu from school on 30 June 2016 when Mother knew Matiu was not there. Father was likely shocked, as he says, when he arrived at school to find Matiu was not there given Mother's support of him having Matiu for that weekend.

[89] I find Father did receive a call from his own mother in New Zealand and that call eluded to the respondent Mother raising serious allegations against Father which maternal grandmother relayed to Father and which he found shocking, bizarre and disturbing – particularly given for years prior he knew of none of the allegations.

[90] It is possible that Father considered Mother's actions, in taking Matiu to New Zealand while leading him to believe that Matiu was in Australia, her complaints regarding his behaviour to paternal family, as unusual, bizarre and potentially of fragile mental health disposition. This must be viewed from Father's subjective position particularly given as recently as 17 June 2016 he had made it clear to Mother that he was not agreeing to Matiu going and he in fact sought further discussions. Father's text was instant and reactive.

[91] Father's two texts of 30 June 2016 to Mother could be interpreted as acquiescence by Father. The texts, however, must be read in their entirety and carefully. The first indicates how crazy Father thinks Mother's unilateral relocation is. He laments that he has been nothing but good to Mother in everything she asked. He says he does not want the matter to go to Court. He then says "*If you want to*

keep Matiu there and do your thing that's cool. Please just let me have holiday access and don't vilify me in his mind". He is particularly worried that Mother not vilify him (a reference he says to things his own mother was telling him that the respondent Mother had alleged against him).

[92] The text of 9.34pm, sent only minutes later, asks Mother to find a way to be a fantastic mother as Matiu deserves that and he believes that Matiu will have that if Mother is happy. The reference to Mother being happy is completely consistent with his views that happy Mother makes happy Matiu (see the other emails and texts).

[93] It is clear that Father's texts of 30 June 2016 were communications sent prior to the receipt of Mother's email of 1 July 2016 which had particularly disturbing information, more acutely articulated, including allegations of rape, heavy drug use and then a declaration that Father was to have only supervised contact in New Zealand and that would endure in Mother's view for at least a year. Clearly Father, in light of this information, did not acquiesce in any event to Matiu remaining in New Zealand on such a basis, if at all.

[94] Father did not sufficiently know his legal rights or the legal position on 30 June 2016. He did not know particularly anything about the Hague Convention or the ability to have Matiu returned when he indicated that "*he just wanted holiday access*" or that it was "*cool*" if she wanted to keep Matiu there.

[95] Within a few days (which is as fast as he reasonably could) Father had taken immediate and acute steps to find out the legal position by visiting counsel in Adelaide and thereafter in a relatively quick fashion he marshalled all of the necessary documents (after receiving guidance from each authority) to have Matiu returned. He was not dilatory, he did not delay. He did not prevaricate in terms of the legal process, he took every step in a timely fashion to facilitate return. If there was any delay it was because of those assisting him in marshalling his evidence. There is inevitably some delay in trans-Tasman applications of this type.

[96] Father's behaviour thereafter has been to seek to talk to Matiu, to try and find out where Mother is and on no other occasion did he indicate acquiescence.

[97] Looked at subjectively from Father's perspective I accept it was possible he texted Mother on 30 June 2016 for the purposes of keeping her calm, he did not want himself to be vilified to Matiu and he was trying to keep matters on an even keel.

[98] Mother has not persuaded me against that background on the balance of probabilities Father properly and truly acquiesced.

[99] Given I have not found the defences in s 106 proven, there shall be an order for prompt return.

Question 3 – Would the Court nevertheless exercise its discretion to return?

[100] While I have found Father neither consented or acquiesced in Matiu's removal and retention in New Zealand on and post 27 June 2016, if I am wrong in that regard and there was consent or acquiescence this is nevertheless a matter where I would have exercised my discretion under s 105 to nevertheless have ordered Matiu's return for the reasons below.

The Law

[101] Even if the Court had found that Father had either consented or acquiesced and therefore the defence made out, the Court has a discretion to nevertheless order Matiu's return.

[102] As to whether or not the Court should exercise its discretion if it had found consent or acquiescence, in *H v H*¹⁵ Waite LJ suggested the following factors relevant to the exercise of such a discretion, namely:

- (a) The comparative suitability of the forum and the competing jurisdictions to determine a child's future in the substantive proceedings;

¹⁵ [1996] 2 FLR 570 at 574-5

- (b) The likely outcome (in whichever forum they be heard) of the substantive proceedings;
- (c) The consequences of the acquiescence, with particular reference to the extent to which a child may have become settled in a requested state;
- (d) The situation which will await the absconding parent and the child if compelled to return to the requesting jurisdiction;
- (e) The anticipated emotional effect upon the child of an immediate return order (a factor which needs to be treated as significant but not paramount);
- (f) The extent to which the purpose of the underlying philosophy of the Hague Convention will be at risk of frustration if a return order were to be refused.

[103] The New Zealand Supreme Court considered the nature of the Court's discretion (albeit in respect to the discrete defence under s 106(1)(a). The majority held:

The discretion requires the Judge to compare and weigh two considerations. One concerns the welfare and best interests of the child or children involved in the case. The other concerns the significance of the general purpose of the Convention in the circumstances of the case. The two considerations will not necessarily conflict.

[104] Duffy J in *BK v CJ & KJ*¹⁶ summarised the majority position in saying at paragraph [84]:

[84] The majority noted that everything logically capable of bearing on whether it is in the best interests of the child is relevant. This will include the circumstances in which the child is now settled, the circumstances in which they came to be wrongfully removed or retained, and the degree to which the child would be harmed by return. The nature of any evidence directed to another ground or refusal, whether or not that ground is made out, will also be relevant.

¹⁶ [2015] NZHC 2169

Analysis

[105] In exercising that discretion I would have nevertheless made an order returning Matiu. In so doing I would have considered and balanced the following matters:

- (a) Matiu is a New Zealand citizen and has spent the last three years approximately in Australia;
- (b) Prior to Matiu's removal to New Zealand on 27 June 2016, his care was shared and had been for the two years prior (albeit in later years with a more anchored care arrangement with his mother although Father of recent times wished to have more shared care);
- (c) Prior to removal Matiu's life was centred in Australia with his mother there, Father, Sandy (who had become bonded to him and he likely her) and he had begun school;
- (d) Despite Mother's evidence I do not find that there is independent indication that he was not settling at school and he was going to the school selected by Mother;
- (e) This is not a matter where any grave risks have been raised or evident;
- (f) Mother's removal of Matiu was palpably wrong, done in a secretive and elaborate subterfuge;
- (g) There is unlikely to be harm for Matiu to return to Australia given: he would return to the familial environment of Father and Sandy's home; a familiar school (although those memories may fade the longer he remains in New Zealand);
- (h) Mother has indicated she would travel to Australia with Matiu and to continue to care for him. While Mother's financial circumstances in

Australia are not known, she is able to work in Australia as she did previously (if she could obtain work);

- (i) Mother has not alluded to any significant or palpable emotional effect for her in returning to Australia (particularly given she has indicated she would return) although it has to be inferred that one of her reasons for returning to New Zealand is to be reunited with the support of family;
- (j) Mother's advised circumstances in New Zealand are limited to her advice that she is living with her parents; Matiu being enrolled at school; and she is intending to obtain part time work.
- (k) Matiu has settled well in his New Zealand school;
- (l) Matiu has been in New Zealand since 27 June 2016, not a lengthy period of time but neither is it a short period and is becoming elongated as these proceedings continue;
- (m) It seems to me most of the evidence regarding issues of welfare that will be at the heart of any substantive proceedings are indeed anchored in Australia given the length of time Matiu was there, Father and Sandy's presence there and the lack of any maternal or paternal contact of which they could give evidence;
- (n) If Leo is to give evidence given he is resident overseas, his evidence can equally be given to an Australian or New Zealand court. In any event there is no current evidence he has played a significant part in Matiu's life to date;
- (o) Both New Zealand and Australian courts are clearly and highly competent at resolving issues of care and parenting and both have at their heart of their legal systems the need for the welfare interests of the child to be paramount;

- (p) Father's contact with Matiu has been restricted given he is unable to readily travel to New Zealand for any length of time;
- (q) I do not consider Matiu's wellbeing or interest to be likely negatively impacted therefore if he is compelled to return to Australia pending substantive hearing and any emotional effect is clearly ameliorated by his mother's intent to return with him;
- (r) Both parties currently appear able to parent Matiu;
- (s) All matters currently point to Australia being the appropriate jurisdiction to properly determine issues of welfare;
- (t) The deterrent aspect of the policy of the Hague Convention would be better optimised by a return to Australia.

[106] When I balance those material matters I am of the view (if I had found Father either consented or acquiesced) that I would nevertheless have exercised the discretion to return Matiu.

Orders and Directions

[107] Given the above I make the following orders and directions:

- (1) There shall be an order for Matiu's prompt return to Australia.
- (2) The respondent had asked that if I had reached that position that such an order not take effect until the end of the New Zealand school year and the parties have asked for an opportunity to be heard on the exact terms of any return order.
- (3) It is in Matiu's interests to be returned prior to Christmas and as soon as practicable, but the matter is adjourned for seven days for the parties to file a joint memoranda indicating if they have reached agreement

as to the terms of any return order or if not, what matters they agree or disagree. The parties to advise if they believe a warrant is required. Upon receipt, I shall issue the exacting order for return and determine if I will grant the warrant application, taking into account counsel's views in that memoranda. If counsel do not file memoranda within this time, I shall determine absent their advocacy.

E Smith
Family Court Judge

Signed at Christchurch on 5 December 2016 at am/pm