[2018] EWHC 2980

Case No: FD18P00545

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 18/10/2018

Before:

Her Honour Judge Nancy Hillier sitting as a High Court Judge

- -

Between:

G (Applicant)

- and -

E (Respondent)

- -

- -

Mr Mark Jarman (instructed by JI Solicitors**)** for the **Applicant**

Ms Charlotte Baker (instructed by Irwin Mitchell LLP) for the **Respondent**

Hearing dates: 15, 16 and 18 October 2018

HER HONOUR JUDGE HILLIER:

Introduction

1. Pursuant to an application issued on 9 August 2018, I am required to determine the immediate future of R and W. R was born in September 2012 so she is now six years old and W was born in December 2014, so he is 3 years old. Their father is Australian and their mother is English. Both children were born in Australia but have spent time in England. They have dual nationality.

2. The father is represented by Mr Mark Jarman of Counsel. The mother is represented by Ms Charlotte Baker of Counsel. The case was listed for hearing before me to determine the father's application for a summary return of the children to the jurisdiction of Australia pursuant to the provisions of the Child Abduction & Custody Act 1985 incorporating The Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Hague Convention").

3. For the purposes of determining these proceedings I have read the bundle including the statements filed by and on behalf of the parents, a number of supporting documents, and the report of the CAFCASS reporter Ms Jolly together with the written documents prepared by Counsel. I refused an application by the mother to admit some 40 pages of photos on the first day of the hearing. There had been adequate time for all her

evidence to be filed in accordance with the timetable and the father was giving evidence by video link from Australia. Under those circumstances there would have been significant delay for the documents to be emailed and for instructions to be taken on them. I heard limited oral evidence from both the mother and the father on the issue of determination of the date of retention. It was agreed that the issue of the Art 13b defence of 'quasi- settlement' raised by Ms Baker on behalf of the mother should be decided on the basis of submissions only.

Background Facts

4. The background facts can be summarised as follows. The father is aged 50 and the mother is 38. They are not married. The father is a travel guide/farm show demonstrator and the mother is a GP. They met in 2010 when the mother was travelling and working in Australia for 12 months.

5. R was born in September 2012 in Australia. From October the parents lived in Kalbarri until September 2013. The father was working as a tour guide and was away for 2-3 months at a time. The mother, father and R came to England for 1 month over Christmas 2012.

6. In 2013 the mother and R visited her parents in England for about 6 weeks in the summer. The father was living away from home in Australia in order to work. Later that year he got a job in Kimberley which meant that he would be away for tours of 16-20 days. He would come home for a couple of days between tours. The mother obtained work at a medical practice in Palmerston, Darwin and they lived initially in a flat provided by that employment. R attended nursery 3 days per week. In December 2013 the family moved to a townhouse in Darwin. The mother and R went to Western

Australia for a few days to be with the father at Christmas. She also visited her parents in the UK with R for 6 weeks in late spring 2014.

7. W was born in December 2014. M moved to an apartment in Darwin with the children in December. The father visited over Christmas, leaving in early January and the mother visited England with both children for 6 months from March to August 2015. Both R and W attended pre-school in England 2 mornings per week. The mother returned to Australia in August 2015, initially staying in a B and B and then a holiday rental. The father left on 3 September to work and returned for a few days in November. The mother, W and R moved to Success in Perth in late September. The mother worked 3 days a week and R attended nursery. The father visited the family on Christmas day 2015.

8. The father continued to work away from home and moved to Coral Bay in January 2016 to start a business. It was about 2 days' drive away from their home. He visited the children in late March or early April and the mother and children moved to Baldivis, Perth in May. Mother and children visited her parents in the UK for about 6 weeks in the summer and returned for one month at Christmas 2016.

9. In January 2017 the mother applied online for a school place in the UK near her parents' home for R which was confirmed in April. It is accepted that she did not tell the father about it. She also sought to obtain a shipping quote from Pickfords on 28 February to move her possessions to the town where her parents live in the UK. The quote was confirmed on 5 April as storage with a quote for removal to England.

10. The father visited the children for a few days in January. In March he left the Coral Bay business and started work as a tour guide in the Northern Territories, texting the mother: *"think I work away to avoid you that's crap I want to see and be with you and my*

children all of them. So think and do what you like. I am and have not been allowed to have much say in what goes on with R or W even when I was around. So what goes on with them has very little to do with me even if I am there. So go or stay your choice. Very shit time at the moment has been for a while. I do love you. You tell me its hard with all you have to do with kids. I am sure it is. Try not being around the kids that's hard but you would not know because you will not allow me or anyone to be as involved as you. When was the last time you spent a night without the kids? I wish I was more a part of R and Ws life. Yes I know I am not there".

11. The father visited the children from 4-13 June. The parents discussed the potential visit of the mother and the children to see her father in England. At some point in June the mother purchased tickets to the UK for herself and the children and she flew to England with the children on 21 July, leaving their possessions in storage. She gave up the lease on their home, which was running out, as both parents agreed it was too small. She made arrangements for leave of absence with her employer. She arranged for her possessions to be removed from the rented home and to be stored by Pickfords in Perth. The visit to the UK was agreed by the parents as the mother's father was terminally ill.

12. On arrival in the UK the mother and children lived for 3 weeks in a holiday rental near her parent's home and they have lived since August 2017 in a flat near the children's school. The mother purchased a school uniform for R on 20 August 2017 and sent photos to the father with the message "Big girl fashion shoot.". She tried to call him later in the day and sent the message "Trying to call. Did you get pics? Says u are online now??"

13. On 2 September 2017 the maternal grandfather died and it was agreed that the stay would be extended until February 2018. R started school on 4 September. The mother sent the father photos of R wearing a school uniform on the pavement outside a building with the message "Your little girl off to big school". W started at a Pre-school class at the same school. On 9 November the mother also sent a photo of R to show she had lost a tooth. She said "Miss yr big al arms around me.Xx"

14. On 20 December M texted the father to say she was "…not angry just trying to work things out". The following day she consulted solicitors. It is accepted that she knew about the Hague Convention from that time.

15. On 27 December 2017 and 16 January 2018 the mother emailed her employer/work colleague, S.

16. On 28 February the father messaged the mother stating: "I don't know how it works if you stay in England. I will look at any ideas you have got that you think will work".

17. In March 2018 the mother travelled to Australia alone and met with the father. On the day she left for England (11th) the mother confirmed to her colleague S by email that she was not going to return to Australia.

18. The father texted the mother on 16 March and asked her to return for 12 months. He stated "You have my word if you think it is not working after that then be in England, it's ok." On 27 March the mother emailed the father and said she did not intend to return to Australia. The mother had commenced a sexual relationship with a man who she described as 'an old friend' and her evidence is that she learnt at about this time that she was pregnant by him. The child is due in November. He is called A. In April W started nursery.

19. On 9 August the father made an application for the summary return of the children which was heard ex parte by Knowles J. The case was heard by Parker J on 22 August (there is a transcript in the bundle) and on 30 August when it was listed for final hearing before me. M disclosed she was pregnant around this time.

Summary of defences relied on

20. The exceptions to return initially relied on by the mother were firstly that the children were habitually resident in the UK by 27 March 2018 (Art 3), secondly that the father had consented or acquiesced to removal (Art 13(a)), thirdly that returning the children to Australia would place the children at grave risk of physical or psychological harm or place them in an otherwise intolerable situation under Art 13(b) and finally that R objects to returning to Australia and is of an age and level of maturity where it would be appropriate to take account of her views under Article 13.

21. At this hearing she did not pursue the defences of consent/acquiescence or child's objections and therefore I am not required to determine them. The defence raised under 13(b) is one of 'quasi settlement'.

Habitual residence and the Hague Convention - relevant law

The Hague convention

22. This application is determined by reference to the provisions of the Hague Convention, the objectives of which were summarised by Baroness Hale in the decision of ***Re D*** *(A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 All ER 783, [2007] 1 FLR 961 wherein she said at paragraph 48:

> "The whole objective of the convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home' but also so that any dispute about where they should live in the future can be decided in the courts of their home country according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed."

23. The starting point is Article 3, which specifies that the removal or the retention of the 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 the retention (my emphasis).

24. In this case it is common ground that the children were habitually resident in Australia prior to removal in 2017. Both parents were exercising jointly their parental rights over the children as the mother needed either the father's permission or the court's consent to remove them. There is no permission from the Australian court for the children to move here permanently so if the children were not habitually resident in the UK at the time of retention there has been a wrongful retention of the children. Accordingly, I must "order the return of the child forthwith" pursuant to Article 12 unless one of the exceptions in Article 13 applies. The burden is on the mother to establish that either the children were habitually resident in the UK at the time of the retention or one of

the defences. If I find that an exception is made out the mother would ask me to exercise my discretion in order to allow the children to remain within the jurisdiction and the father would ask me to exercise discretion in favour of return. If I make an order to return the parties would like to address me on the issue of when that that should be implemented. There is broad consensus that implementation could not take place until at least January 2019.

Date of retention

25. The date of retention is disputed and is key to the application because it is the date at which I must consider whether, immediately prior to the retention, the children were habitually resident in Australia or the UK.

26. Both Counsel referred me to the Supreme Court case of *In the matter of C and another (Children)[2018] UKSC 8* and in particular to the speech of Lord Hughes (with whom Lady Hale and Lord Carnwath agreed) at paragraphs 43-47:

[43] *When the left-behind parent agrees to the child travelling abroad, he is exercising, not abandoning, his rights of custody. Those rights of custody include the right to be party to any arrangement as to which country the child is to live in. It is not accurate to say that he gives up a right to veto the child's movements abroad; he exercises that right by permitting such movement on terms. He has agreed to the travel only on terms that the stay is to be temporary and the child will be returned as agreed. So long as the travelling parent honours the temporary nature of the stay abroad, he is not infringing the left-behind parent's rights of custody. But once he repudiates the agreement, and keeps the child without the intention to return, and denying the temporary nature of the stay, his retention is no longer on the terms agreed. It amounts to a claim to unilateral decision where the child shall live. It repudiates the rights of custody of the left-behind parent and becomes wrongful.*

[44] *The plain purpose of the Abduction Convention is to prevent the travelling parent from pre-empting the left-behind parent. The travelling parent who repudiates the*

temporary nature of the stay and sets about making it indefinite, often putting down the child's roots in the destination State with a view to making it impossible to move him home, is engaging in precisely such an act of pre-emption.

[45] *It is possible that there might also be other cases of pre-emptive denial of the rights of custody of the left-behind parent, outside simple refusal to recognise the duty to return on the due date. It is not, however, necessary in the present case to attempt to foresee such eventualities, or to consider whether fundamental failures to observe conditions as to the care or upbringing of the child might amount to such pre-emptive denial. It is enough to say that if there is a pre-emptive denial it would be inconsistent with the aim of the Abduction Convention to provide a swift, prompt and summary remedy designed to restore the status quo ante to insist that the left-behind parent wait until the aeroplane lands on the due date, without the child disembarking, before any complaint can be made about such infringement.*

Further at paragraph 47:

[47] *If a concept of repudiatory retention exists, it would indeed follow that, once such an act occurs, the Art 12 12-month clock would begin to run at that point. If the left-behind parent knows of the repudiation, there is every reason why it should run. If he does not, the possibility exists that the 12-month period partly, or sometimes wholly, may pass before he finds out and can make an application under the Abduction Convention. But it is a mistake to think of the 12-month period as a limitation period, of the kind designed in Limitation Acts to protect a wrongdoer from claims which are too old to be pursued. It is not a protection for the wrongdoer. Rather, it is a provision designed in the interests of the child. It operates to limit the mandatory summary procedure of the Abduction Convention to cases where the child has not been too long in the destination State since the wrongful act relied on. Where it applies, it does not prevent a summary return; it merely makes it discretionary. In the event that an act of wrongful repudiatory retention had been concealed, that concealment might well be one factor in the decision whether to order return or not. In other cases, the settlement of the child might be so well established that notwithstanding the wrong done by the travelling parent, it is too late to disturb it. Such decisions are fact-sensitive ones which are properly left to the court of the requested State. The risk of the 12-month period running without the knowledge of the left-behind parent is in any event distinctly less fatal to his interests than the risk of the child's habitual residence being changed without his knowledge, or indeed with his knowledge but without him being able to invoke the Abduction Convention because the due date for return has*

not yet arrived. The latter risk creates a complete bar to return under the Abduction Convention; the former a discretionary one.

27. I was also referred to the dissenting judgments of both Lord Kerr and Lord Wilson which I have read carefully and referred to below.

Habitual residence

28. Mr Jarman referred me to the cases of *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening) [2013] UKSC 60, Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2013] UKSC 75, Re LC (Children) (Reunite International Child Abduction Centre intervening) [2014] UKSC 1, Re R (Children) (Reunite International Child Abduction Centre and others intervening) [2015] UKSC 35, and Re B (A child) (Habitual Residence: Inherent Jurisdiction) [2016] UKSC 4, 58. [2016] 1 FLR 56.*

29. The above cases establish the legal principal that habitual residence as a concept: "*corresponds to the place which reflects some degree of integration by the child in a social and family environment*". It is a concept without statutory definition and is a question of fact in each case. In considering the issue I must weigh all the circumstances of the case viewed through the prism of the children's circumstances rather than those of the adults.

30. Both Counsel referred me to the helpful summary in Re B(A Minor)(Habitual Residence)[2016] EWHC 2174 (Fam) where Hayden J set out the key propositions to be considered in these cases [para 17]:

i)The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A, adopting the European test).

ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred

throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, Re KL).

iii) In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': A v A (para 80(ii)); Re B (para 42) applying Mercredi v Chaffe at para 46).

iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (Re R);

v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (Re LC). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.

vi) Parental intention is relevant to the assessment, but not determinative (Re KL, Re R and Re B);

vii) It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (Re B); (emphasis added);

viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (Re B – see in particular the guidance at para 46);

ix) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (Re R and earlier in Re KL and Mercredi);

x) The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (Re R) (emphasis added);

xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (A v A; Re B). In the latter case Lord Wilson referred (para 45) those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move;

xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (Re R).

xiii) The structure of Brussels IIa, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, "if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former" (Re B supra);

31. Miss Baker also referred to the CJEU summary in HR v KO c512/17 : "*a child's place of habitual residence for the purpose of that regulation is the place which, in practice, is the centre of that child's life. It is for the national court to determine, on the basis of a consistent body of evidence, where that centre was located at the time the application concerning parental responsibility over the child was submitted."*

Hague Convention continued

32. The law in this area was reviewed by Black LJ in the case of ***Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)*** [2015] EWCA Civ 26, [2016] Fam. 1, [2015] 3 WLR 803, [2015] 2 FLR 1074. In that case Black LJ reminded us that these cases should be dealt with speedily and summarily. The aim is "to return abducted children as soon as possible to their home country restoring the status quo and enabling the courts there to determine whatever disputes there are about their future upbringing."

33. Black LJ suggested that the sensible place to start in these cases is with the Convention itself and its core provisions. Article 12 provides that:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

34. In relation to the meaning of "rights of custody" Art 5 of the Hague Convention provides as follows:

Article 5

For the purposes of this convention-

> (a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
>
> (b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

35. Article 13 continues:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested state is not bound to order the return

of the child if the person, institution or other body which opposes it return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable position.

Intolerability and Art 13(b)

36. Miss Baker referred me to the cases of Re L-S (A child) [2017] EWHC Civ 2177 and RS v KS (Abduction: Habitual Residence)[2009] EWHC 1494 (Fam).

37. I have also been assisted by the concise and useful summary of the law in relation to Art 13(b) set out by MacDonald J in ***BK v NK (Suspension of Return Order)*** **[**2016] EWHC 2496:

45. The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in *Re E (Children)(Abduction: Custody Appeal)* [2011] 2 FLR 758. The applicable principles may be summarised as follows:

i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.

ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.

iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.

iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.

v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that

the child will not be called upon to face an intolerable situation when he or she gets home (where, as in this case, Art 11(4) of BIIa applies, the court cannot refuse to return a child on the basis of Art 13(b) of the Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return). Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.

vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Art 13(b).

38. MacDonald J also refers to ***Re M (Abduction: Undertakings***) [1995] 1 FLR 1021 as authority for the principle that delay in appropriate circumstances can constitute the basis for consideration of whether the return of the child could amount to a situation which the child should not be expected to tolerate.

Lies

39. The basic direction of *R v Lucas* [1981] QB 720 has been adopted in family courts. If the court concludes that a witness has lied about one matter it does not follow that he has lied about everything. The judge must bear in mind that a witness may lie for many reasons, for example out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure.

40. In the criminal courts a lie can only be used to bolster evidence against a defendant if the fact-finder is satisfied that the lie is deliberate, relates to a material issue and there is no innocent explanation for the lie and it has become standard practice for judges in cases like this to give themselves a so-called *Lucas* direction. Bearing in mind the case of H-C(Children) EWCA Civ 136 and to the flaws exposed on appeal in the analysis and since lies form a component in this case I make it clear that I have reminded myself that it is imperative to keep these principles in mind throughout this case and to apply them to any relevant ‘lies’ or assessment of credibility.

The Father’s case.

41. The father's case is that the mother intended to remove the children on a permanent basis in July 2017 following a plan formed during the early months of that year. He submits that the first retention dates can be fixed by the purchase of a school uniform for R in August 2017 and her commencement of school in early September 2017. If I am not with him on that he submits that M's decision to wrongfully retain the children was concluded at latest by the end of December 2017/January 2018 as exemplified by the acts of her communicating with her Australian employer/ friend S by email in late December, her consultation with a solicitor on 21 December 2017 and that she started an intimate relationship with A in Spring 2018.

42. Mr Jarman submits that the mother was less than frank in her evidence in that she was vague, unable to answer questions and was over reliant on an irrelevant historical agreement made by the father that she could live in England. He submitted that she was evasive about her true intentions and excluded the father in early 2017 from her decision making process. Whether the retention was in August or December 2017 Mr Jarman submitted that the children had not become habitually resident in the UK. In August/early September they had only been here a short time.

43. Mr Jarman states that the father only consented to a visit to the UK because the maternal grandfather was terminally ill and he allowed the visit to be extended due to the death of the maternal grandfather. It is his case that F expected the children and their mother to return in February 2018 at the latest.

44. Mr Jarman also submits that the evidence does not support a finding that returning to Australia would place the children at risk of grave harm by placing them in an intolerable position. The applicant has set out the protective measures which he offers in order to mitigate the harm alleged under the Art 13(b) defence and he has offered undertakings which have not been challenged on grounds of adequacy. Mr Jarman

submits that they would amply cover the concerns which the mother has raised and points out she only requested two undertakings in any event, namely for F to agree not to pursue prosecution for abduction and not to seek to remove the children from her care.

45. If the stage is reached where my discretion is exercisable Mr Jarman submits that the children's welfare is to be considered through the prism of the objectives of the Convention and that I should weigh in the balance the fact that the children were born in Australia, their father lives there and that the Australian Court would be better placed to consider the children's future. The father's case is thus that I should exercise my discretion in favour of return.

The father's oral evidence

46. The father gave evidence via video link from Perth. The connection was good. He explained that he is now working as a manager at a large tourist attraction where he gives farming demonstrations. He confirmed that his tour guide work had kept him away from the family. It is what he was doing when he met the mother and they had shared the financial burden of raising a family. In these circumstances the mother remained at home and as such was the primary carer. He stated that she made the decisions about the children and he trusted her to do so. He currently lives about an hour from where the mother lived when she left.

47. The father stressed that the 7 moves were always discussed with the mother and never forced upon her. He agreed that a potential move to England had been discussed but said that the parents had "…got past that.". He had agreed that the mother should go to England when W was born for "about 4 or 5 months" but always thought they would return even though he had texted "Go or stay your choice." He explained that this referred to the mother rather than to her and the children.

48. The father said that he had been kept in the dark by the mother and had only about 40 photos of the children. He said "I've not seen much of W at all" and when he was asked why he hadn't spoken to them on the phone or sent cards he responded "It's irrelevant". He said that he had sent Xmas presents in 2017 but had sent them to the maternal grandmother's address. "I didn't check to see if they got them". He had been ill in early 2018. He had started work 2 months ago and had additionally worked 'spotting trucks' which had clashed with the ordered contact. He had been working away for about 14 years and described being in Perth as "a marvellous thing".

The Mother's Case

49. The mother's case is that the date of retention was no later than 27 March 2018 when she emailed the father to say that she did not intend to return to Australia. She states that the children had spent significant periods of their lives in England and had had frequent moves in Australia. She points out that the family moved 7 times from R's birth and that during their lives in Australia the father was regularly away for 8-12 weeks at a time. R certainly described her father as visiting the family in Australia rather than living with them when she spoke with Ms Jolly

50. Against this background the mother submits that the stability reached from the move to the UK in July 2017 meant that the children put down roots very quickly. She highlights the fact that the father appeared to recognise that in April when he wrote to her (on 18th) saying that "… you would have to be an idiot to think they wouldn't have settled in by now anybody would think the same…".

51. The mother also says that the application for summary return should be dismissed because the children have settled and that to return the children to Australia having spent so much time in England would place them in an intolerable situation (Art 13(b).

The mother's oral evidence.

52. The mother attended the hearing. She said that it had been very difficult to know what to do about a school place because they had moved around so much. It was an important step but she and the father never had that type of discussion. There was no deliberate decision to exclude him from the process and she described the father as uninterested in the process and leaving child care decisions up to her. She had sent the father photos of R's first day at school and he had responded with a thumbs up sign. She said that she had looked at all storage options for while she was away but had not made any decisions. "Storage was always the plan". She had continued her professional insurance, AHPR registration and RACGP membership, her car insurance and her gym membership. Her car was left at a friend's house. The lease on the house was ended but there was a plan to move in any event. She had spoken to S, her employer/colleague and he had been very understanding, saying that family came first.

53. Asked by Mr Jarman why she had said "I think I have to remain here" in January 2018" the mother said that was in the context of the father talking about going up North again or somewhere else and she could see the advantages of a settled base for the children. She had not looked at schools or properties in Australia but was still considering going back. She described the process as getting harder and harder. She had applied to be a medical member at the Tribunal service as that would give her flexibility and did not want to uproot the children.

54. Her current preference is to stay in England but if the Court orders that the children should return to Australia she would go with them. The place where they live is a small community and "…even before Christmas they were involved in it. The children

were involved in lots of extra-curricular activities and looking forward to dance shows, tap exams and events." In March she decided that she would not go back.

Discussion -Issues for determination and assessment of evidence

55. Having considered the written and oral evidence of the parties the issues for determination are firstly, what was the date of wrongful retention? Secondly, immediately prior to that date were the children habitually resident in Australia? If they were, can the mother establish (the burden is on her on the balance of probabilities to prove) a defence to immediate return under Art 13(b)? Finally, if a defence is made out how do I exercise my discretion in any event. Four key concepts underlie the Convention: wrongful removal, wrongful retention, rights of custody and return and I must consider the issues within the Convention provisions.

The mother's evidence – my assessment

56. The mother gave her evidence first as it is for her to prove her case. Her evidence was thoughtful, consistent and careful. I did not find her to be vague – she was as precise as she could be in the circumstances. She answered all the questions in a straightforward manner.

57. The mother was expertly questioned about all relevant matters by Mr Jarman. When asked about when she had applied for the school place in England she said that she had gone back over what she had and had produced the information about the confirmation of a place in April 2017. She said that the application could have been earlier in the year, possibly March or earlier. In my assessment this was an example of evidence which demonstrated she was making every effort to be open and honest with the court

and she was not afraid to give evidence which might potentially go her interest. I did not find her defensive in any way.

The father's evidence – my assessment

58. The father was in my assessment far from straightforward when he gave his evidence and was quite defensive. When asked about the number of moves the family had had he said he wasn't 100% sure and only agreed the 7 moves in Australia when taken to each one by Ms Baker. This was striking. Either he was so removed from family life that he simply had incomplete knowledge about family movements or he did not want to accept the figure as it may indicate that the children lacked stability in Australia which may be a relevant feature to habitual residence. Similarly, when asked about the fact that he had only spent time at Christmas with the family on a few occasions he said he wasn't 100% sure. Again, when taken to the evidence he accepted the factual proposition with reluctance. This came to the fore when the father was asked what he had thought when sent photos of R's "Big school fashion shoot". He said that although there was a uniform he thought that it was pre-school 'kindy' because children start school later in Australia. I am satisfied that any interested father would have raised questions or made comment about the photos if they didn't understand the concept of 'big school'. As it is, the evidence suggests that he didn't respond to the photos being sent on two occasions save for a 'thumbs up' and the mother's attempts to call him were unsuccessful. When this is coupled with the fact that he has been unable to take advantage of the telephone contact which has been ordered by the English court to take place on days and times when he said he was available due, he says, to taking temporary work 'spotting for trucks' ie as a banksman, it gives me a true flavour of his parenting style. He asked for the contact yet has missed 9 of the 15 ordered. He

complains that he has few photos of the children but it is clear he didn't spend very much time with them and when the mother sent photos he didn't really respond. I am driven to the conclusion that he has shown very little interest in the children rather than been shut out of their lives by their mother. I am of course not judging the merits of their competing cases on a welfare basis. These matters were properly examined in the context of what was communicated about the move.

59. The evidence is particularly relevant when the mother's actions in sharing- or not sharing – information with him is examined and when the centrality of him in the children's lives is examined in the context of habitual residence. I specifically reject his complaint that: "I'm not informed about what they are doing". I am satisfied that the mother has consistently promoted contact and sent photos of significant events such as their daughter losing a tooth and being visited by the tooth fairy. Even allowing for the fact that he has by his own admission spent too little time with them through work, which is entirely understandable, he has not really shown very much interest in their day to day lives even when given the opportunity. Many parents work away. The level of involvement in children's lives may be curtailed by their employment. This father's employment did not curtail that contact completely and there were obvious occasions when he could pursue the relationship.

Overall assessment.

60. I have great sympathy with both parents for the predicament they both find themselves in. I have not allowed that natural sympathy to interfere with the forensic assessment of their credibility but have determined that on the basis of their evidence as a whole and my ability as the trial judge to observe them and scrutinise what they say. I took account of the fact that the father gave evidence via video link in a different time zone

and made allowances for hesitation and delay in answering caused by that. Overall in my assessment the mother was by far the more credible and straightforward witness bearing the reasons why people may not be straightforward, including wishing to bolster their case or hide the truth..

Discussion: What was the date of retention?

61. I have carefully born in mind the decision of ***Re C*** and the speech of Lord Hughes. That case gives helpful guidance on the place which the habitual residence of the children occupies in the scheme of the Convention and the consideration of whether a wrongful retention of a child can occur even before the agreed time for return, whether by parental consent or court order, has yet to occur. Lord Hughes reminds us that the paradigm case of wrongful retention is when a parent refuses to return after an agreed period. In such a case the child will have remained habitually resident in the home state and the convention provides for swift return. At paragraph 12 of the judgment he outlines the fact that it is possible for a child in a retention case to have acquired habitual residence in the destination state. "It may particularly happen if the stay in the destination state is more than just a holiday and lasts long enough for the child to become integrated into the destination state." Lord Hughes points out that deliberate acts aimed at integrating a child into the destination state may be undertaken by a parent once he has decided not to honour an obligation to return to the state of origin. It is necessary to look at whether the acts can amount in themselves to a wrongful retention before a change of habitual residence has been achieved. In the event that there has been a change of habitual residence then that state is better placed to deal with the issue of custody to be determined and applications under the Convention will fail.

62. In ***Re C*** Lord Hughes discussed the concept of repudiatory retention where a parent repudiates the rights of the left behind parent and, instead of honouring the rights determines where the child lives unilaterally by denying the temporary nature of the stay. Once the act of repudiatory retention occurs the 12-month clock starts ticking, but the period is not a limitation period because it simply makes mandatory return discretionary after 12 months. Concealment of the repudiatory act may be a factor to weigh in the exercise of the discretion whether to return.

63. I allowed short evidence on this point by the parents because although oral evidence should be the exception not the rule in summary return cases, the dispute of fact in the case meant that in respect of the alleged relevant acts I needed to understand the evidence of both the mother and the father, conscious that I must avoid the hearing degenerating into speculative cross examination of the travelling parent as to her internal and undisclosed thinking.

64. At paragraph 51 in ***Re C*** Lord Hughes outlines some markers which I have specifically born in mind when considering this issue.

- There will be a subjective intention not to return the child

- A purely internal, unmanifested thought on the part of the travelling parent is a plan to commit a repudiatory act rather than the act itself.

- Some acts may amount to a repudiation even if they are not communicated to the left-behind parent.

- There must be some objectively identifiable act or statement, or combination of such, which shows the denial of the rights of custody of the left behind parent. A

declaration of intent to a third party might suffice but a privately formed decision would not.

- The exact date does not have to be identifiable as it may only be possible to state that a wrongful retention has happened by the end of a specified time.

65. The present case differs from ***Re C*** in that the mother accepts that there was a wrongful retention by mid to late March 2018. The date is relevant only in respect of the question of habitual residence. I have been asked to look at August 2017, December 2017 and March 2018 and have considered the evidence as a whole in the context of the bigger picture of these parents' lives, work and relationship.

66. In respect of the communications I have been asked to consider, including those to third parties, Mr Jarman reminds me to bear in mind the criticisms of HHJ Bellamy by Lord Justice Kerr in *Re C* in respect of a letter sent to the Home Office. The learned judge had failed to see the potential insight which the letter held to the mother's intention. The purpose of the letter and the end it sought to achieve, was entirely incidental. Mr Jarman rightly urges caution in respect of the mother's communications to S at the end of December 2017 and in January 2018 and I have born that caution in mind. Why would she have written that letter if she didn't have a settled intention to remain? That was a question never posed in Re C at first instance and the matter had to be remitted for hearing. In this case I have heard the mother's evidence and considered her written evidence in respect of these communications, their context and what she was considering and have also been able to consider her veracity.

<u>The application for and acceptance of the school place in early 2017</u>

67. Mr Jarman submits that the fact that the mother was in the UK for Christmas 2016 is significant. She returned to Australia in January and it is agreed that she applied online for a place for R at a school local to her parents' home in the UK. There was no discussion with the father about the school place and Mr Jarman submits that this was a deliberate and clandestine act denying the father's rights to be consulted about and involved in the choice of school for their daughter. He submits that this demonstrates her subjective intention to remove the children to the UK which was subsequently evidenced by several factors including the purchase of flights with a long backstop.

68. The mother points to the fact that she looked at a local school in Australia as well and she was in effect covering all bases. I reject the submission that she was somehow clandestine in what she did. The father was away at the time and in effect delegated parenting decisions to her. Yes, fathers have a right to be consulted but with those rights come responsibilities. This father exercised his parental responsibility on occasions that were few and far between. I accept the mother's evidence that she raised Australian schooling with him and he showed no particular interest, just as he had shown no particular interest in preschool. The mother properly acknowledged that applying for a school place was an important step in R's life but told me that she and the father simply didn't discuss those sorts of things. I accept her evidence that when she asked the father about nursery provision to provide day care in Australia when she was working he said it was "up to you" and also that so far as Australian schooling was concerned he said: "you decide". In addition, since the family had moved frequently, I think she was still unsure where they would be living. The children had spent lengthy periods of time in the UK and had attend the preschool facility at the English school. There was every possibility that they would be in England at some point and they would need to attend school. Taken out of context and put into a family

where the father was engaged and interested the actions may very well have been clandestine, but in these circumstances, taken both as an isolated event and as part of the bigger picture, I am satisfied that they were not. Equally, I accept that the future was a moveable feast so far as this mother was concerned and she had no particular plans.

69. I do not find that this application demonstrates that the mother had any subjective intention to move the children permanently nor that she was making plans to do so. I'm satisfied that she was keeping all options open and wasn't denying the father's 'custody rights' by her actions.

Enquiries about shipping and storage

70. On balance I am satisfied that the mother was making enquiries about the cost of moving to the UK or elsewhere in Australia. The safe storage that she enquired about and put in place does not point to a decision that she intended to leave. If she had formed that intention she could have simply shipped the possessions. The father would not have known and she would not have been committed to storage charges. A further pointer is that she did not sell her car. It remained parked at a friend's house and she has only recently sold it.

Purchase of flights with a backstop of 6 months

71. The mother said that she purchased Emirates flights with the longest backstop to give herself flexibility rather than as a recognition that she intended to remain permanently. She said that she purchased return tickets rather than single flights and she did so because although she did not know how long she would be away she intended to return. She had purchased return tickets for lengthy stays in the past and she had

always returned. I do not find that there is any significance in the purchase of the return tickets in this way in the context of this family and the way they lived.

72. I have gone back over these "pre departure" matters raised as evidence of deceit and planning. I have considered them not only individually but also together to see if they fit together like a jigsaw to determine a conscious plan carried out by the mother. I have born in mind the fact that she had discussed a possible move with the father in the past and he had not ruled it out. I do however think that if she were considering a permanent move she would have discussed it with him again. She had no reason to believe that he would object. The mother kept up her professional insurance, her car insurance and her gym membership. I have thought about why she might do so. Was she, for example, keeping them in case she was sent back by the court? I do not think this was something in her mind and I am satisfied on the evidence in this case these were not the acts of a woman planning to leave and not return.

The purchase of the school uniform in August 2017.

73. Mr Jarman submits that this is further evidence that the mother had no intention of returning to Australia. The mother's evidence was that the school were aware that this was a short-term enrolment necessitated by her father's illness. There is no corroborating evidence from the school of that fact. She gave evidence that she purchased only a few items at the time and I accept her evidence on that point. It was before the death of her father and she simply didn't know how long they would be there. She did nothing sinister or clandestine and proudly sent photos of the uniform to the father – with the school badge prominently displayed. He responded with a thumbs up sign.

R starting school on 4 September 2017

74. Mr Jarman submits that this is further evidence of the mother's intention because she did not tell the father that R had started school. The maternal grandfather died on 2 September and R started school on the 4th. It is conceded on behalf of the father that it was 'morally right' that the mother and children remain in the UK following his death to support the maternal grandmother and aunt through a very difficult period of mourning. He agreed to the mother and the children remaining for that purpose.

75. It is the father's case that he expected that the mother and children would return in February 2017 but it is clear to me that if that was his expectation he did not communicate it to anybody. There are no text messages saying that he thinks the family should return after Christmas. In many families it would be obvious that there was a clear expectation to return but this was a very unusual family. The mother and children had visited the UK for 6 months on a previous occasion without any agreement as to a return date. I am not satisfied that the father gave any particular thought to the children's welfare nor sought to discuss it with their mother. I accept the mother's evidence that she had visited a school in Australia because it may well have been that R attended school there. She would have visited it alone as he was working away. I accept her evidence that she tried to discuss schooling with the father but he showed no interest and left it up to her.

76. I listened carefully to the father's evidence that he missed the children and his partner and didn't want to work away. It was in my view unconvincing. Faced with the fact that he had visited the family only twice between January 2017 and June 2017 he at first said he was sure it had been more. I do not find that he had visited on additional occasions and preferred the evidence of the mother. He did not visit to say goodbye to the children and this was entirely consistent with his 'hands off' attitude as a father. In

my assessment he did not initiate or respond to conversations about the children. He didn't mark all their birthdays and said that it was hard because he was working away. I accept that he may have been out of communication on the relevant day but that does not explain why, unlike many parents in that situation, he didn't leave a card or gift in advance when he was at home or in communication so that his children could be reminded of him on their special day.

77. I similarly found his evidence about the lack of Christmas gifts sent to the children at Christmas 2017 to be disingenuous. He said that he had sent gifts but confirmed that he did not know that they had not been received because he didn't ask. Again, most parents would have said did R like the jewellery? Did W like the truck? If he had asked the mother would have said what jewellery/truck? Enquiries could have been made as to what had happened. I find that it is more likely that he didn't send any. His view, clearly expressed, is that being there on a certain day is irrelevant to a small child as it has no particular significance. He did not seem to have any appreciation that his son and daughter were in a family where Christmas was being celebrated and they would have known that he had not contributed.

78. This is not a case about good or bad parenting, and I make it clear that the only reason that I have considered this point is in respect of his credibility and in relation to the cross examination of the mother as to her failure to tell the father that she had bought a school uniform for R and that R had started school without the father knowing. I have born in mind that a person who has lied about one thing doesn't necessarily lie about others.

79. What had the mother done? Firstly I accept her evidence that she had only bought one skirt, one pullover and two aertex blouses for her daughter as she genuinely didn't

know how long they would be in the UK. I found her to be an honest witness and in this respect and was satisfied she was clearly telling the truth about a small aspect of everyday life. Secondly, I am satisfied that she didn't try to hide either the purchase of the uniform or the starting school. Thirdly I am satisfied that she texted the father on 31 August to say that R started school the following Monday. That really could not have been any more plain to him.

80. R commented to Miss Jolly that she had enjoyed her father's visits to the family home. She is not a child who believed that her father lived with them but worked away, a situation common to many children. She saw the situation as the family comprising her mother and brother with her father as a visitor. It is against this background that the mother cannot be criticised for not spelling it out to the father that the uniform was of [the primary school] or for spelling out that R was attending school rather than preschool or 'Kindy'. I am satisfied that he is not a father who seeks out such information or is particularly concerned about it. He left the choice of school to the mother 'on trust' and did not seek or expect to be involved. She did not hide the uniform purchase or the fact of school at all. Indeed the name of the school is clear from the badge on the sweater in the photo.

<u>The text on 20 December</u>

81. On 24 November the mother texted the father to say that she did not know what to do in a situation where her family couldn't move to Australia and he wouldn't move to England. He texted her on 5 December to say that she needed to sort out what she was going to do. It was W's birthday and the father had not sent him a card or attempted to call him. It's clear to me that things were becoming a little tense between the couple. On 20 December the mother sent the father a text which said that although she wasn't

angry she was "…just trying to work things out" She said that he was welcome to come anytime but said that she couldn't leave her mother and sister "right now".

82. Mr Jarman submits that the text, coupled with the mother consulting her solicitor the following day, demonstrate that she had by that time formed an intention to remain permanently and the text and her action in consulting a solicitor are objectively verifiable evidence to support this. I'm not at liberty to enquire as to the advice given at the meeting and nor is Mr Jarman. It's accepted that she was thenceforth aware of the Hague convention.

83. I have asked myself whether the contents and context of the text demonstrate that the mother at this stage was effectively saying that she would not return to Australia and whether she had by then formed a subjective intention to stay in the UK. I do not think that they do. I accept her evidence that she had no intention to deceive him and that she remained in a state of confusion about what to do. I am satisfied that she became increasingly frustrated with his apparent lack of interest and engagement with the children but that towards of the end of 2017 she was still trying to work things out in her own mind as to what the future held, particularly as she saw how settled the children had become.

<u>The email to S on 27th December</u>

84. On 27 December at 11.56pm the mother sent an email to her Australian colleague S. She said that she was missing work and was keen to return as soon as she could. "I had planned that to be January but am worried about my mum and sister…..My other big concern is the children's father and him wanting us to move away with him or have custody and part share of the kids on our return. I'm concerned they need to be stable and settled and when I return to Australia I may not be able to leave freely, if he

choses that. Hopefully [the father] and I can discuss it and have some sort of formal agreement in place whilst I am here so I know they'll be in a stable environment and we will be able to visit family here when we need. Sorry to mess you around. Things have become a bit more complicated since I planned to return in Jan,so I just wanted to keep you updated ASAP."

85. In my assessment this demonstrates that the mother was aware of the legal context of return. She was clearly worried about the issue of her being free to leave and that would indicate that she had concerns about the possibility of Hague Convention proceedings. She had seen a solicitor less than a week before. Such proceedings would only start however if she didn't go back and I have carefully considered whether that was by that stage her intention. She had not made enquiries about somewhere to move back to in January. Mr Jarman points to this being an objectifiable statement showing the denial of the father's custody rights and as such amounts to a repudiatory breach.

86. Countered against this is the fact that she still refers to a plan to return in January and to the fact that she misses her work and colleagues. In her oral evidence she said that "even by Xmas I could see how settled they were" in respect of the children so I think it was definitely something that she was starting to think about. In my assessment she was starting to consider what the future held. She had significant worries about returning to the father if he wanted them to move again or have more of a say in the children's lives but I do not find that at that point she had made her mind up. In my assessment she still had both options clearly in her mind, although the option of return to instability and an uncertain future was becoming of concern to her.

87. I therefore reject Mr Jarman's submission that by the end of December the mother had formed a clear intention to retain the children in England unlawfully. Her thoughts

were internal unmanifested considerations and I do not find that at that time she had formed a plan to commit an act of unlawful retention. In her mind things were "complicated" but I do not find that they were concluded.

The period between January and the end of March 2018

88. On 16 January the mother once again emailed her colleague S. She said that things had been 'pretty busy' and apologised for not keeping in touch. She said that she knew that she had to separate from the father. She reported that the father was being difficult and said that she did not feel that he understood her need to be away or accept the separation. She stated:"I am concerned as to what may develop, and regarding the kids. As you know it has been primarily me that has brought them up so far. I think I have to remain here for now until at least things are settled, in the interest of the children, where they and I have family support, and are happy and in a routine". The mother also tells S that she has applied to go on the GP scheme in the UK as she needs to earn some money and asks S if he will be a referee. "My intention was to be back by now but I don't think I can for the sake of the kids".

89. The mother emailed S again on 11 March just before she returned to the UK.. She said that she had been over to Australia to talk to the father but she was heading 'home to the kids' that day.

90. Miss Baker effectively conceded that on that date her client had formed an intention to remain in the UK. There can be no doubt that she knew that the father wanted her to return to live with him and to resume their life in Australia, or at least to return with the children. She saw England as home and I am satisfied that is she were asked on that day "Do you intend to return to Australia " she would probably have said no. I use

the word probably because I am sure that she was still thinking about the future. The days which followed consolidated the position.

The email of 27 March

91. This email followed an email from the father on 18 March where he acknowledges that she has told him she wants to stay in England. He acknowledges that he is starting to understand that she does not want to be with him which is difficult for him because he loves her. He tells the mother to send him the email about the future which she had said she would do "I will say it once again because I love you very much I love R and W very much. I will not be split up from my children. So you tell me how it's going to work."

92. The mother replied that she had found it a difficult email to write. She stressed that the children had been settled "…for some time" and that they have lots of friends and a good social life. She describes England as her home and states that she is happy and has good work opportunities, with lots of close support and compares that to Australia where she has no home. Although she does not say she will not return there is a clear theme that she won't. The father sought advice from 'Mark' on the email. In my assessment they both knew that the possibility of a return from the mother's point of view had ended. If asked would she return the children I am confident she would have said no.

The recital recorded on 22 August 2018.

93. In the order of 22 August 2018 it is recorded that at the time she came to travel to the UK in July 2017 the mother had no intention to return to Australia and no intention of remaining in the UK. The mother's evidence is that she did not have any particular

plans at the time. Her possessions were in storage, her job was on hold, her father was seriously ill, she had a partner who had visited the family only twice since she returned after Christmas 2016. Mr Jarman submits that the recital demonstrated the mother 'playing to the gallery' and calls into question her credibility given that she was fully conversant about the Hague Convention and had been living in the UK for over a year.

94. Further, he submits that the statement of 'no intention to return' is a concession which is in effect supported by the other evidence in relation to the flight tickets and the enquiries about shipping. I have already considered this above. I am satisfied that she was not 'playing to the gallery' and that her evidence was of genuine openness of intention. She had not decided that she was going to England on a permanent basis nor had she made plans for her return. It was open ended and she did not have a firm view as to what the future held. I have considered whether this correspondence or anything after the mother took legal advice on 21 December was self serving and intended to provide evidence of a false intention. I am satisfied that it was not. It is entirely consistent with her actions at each stage and I found her to be a credible witness.

Finding on the date of repudiation.

95. I have rejected Mr Jarman's submissions that the repudiation occurred in August 2017 or by the end of December 2017. I have examined the mother's other correspondence in early 2018 and do not find that she had formed a subjective intention not to return or that there were any supportive independent acts to demonstrate her intention at that time. My decision in respect to the date of repudiation is that this occurred by the end of March 2018. The subjective decision was formed between the 11th and 27th as the mother came back to the UK, found that she was pregnant and decided that she was

not willing to return the children. The objectively verifiable event which shows this is the email of 27 March.

Discussion:Were the children habitually resident in Australia immediately prior to that date?

96. Lord Kerr gave a dissenting judgment in ***Re C***. He raised the issue of whether it should be possible for a child's habitual residence to change once the time of wrongful retention 'begins' because it could enable habitual residence to be acquired by the perpetration of deception on the left behind parent. At paragraph 64 he demonstrates his misgivings and postulates the situation where a parent conceives a determination not to return and doesn't communicate it to anyone and it is not until some months later that he takes action which clearly demonstrates that he has no intention of returning them. Evidence then emerges that this was his intention from the outset. "Is the period between his first determining not to return the children and the later 'event' reckonable in the assessment as to whether they have acquired habitual residence in the country of their paternal grandparents? If we say that the retention only becomes wrongful when it becomes manifest, how is the claim by the father in my example that the children have become habitually resident in his parents' country to be resisted?"

97. I have carefully considered whether that type of situation has arisen in this case. It would indeed be of concern if a parent could deliberately thwart the habitual residence requirement of the Hague Convention by a process of stealth. I acknowledge that one interpretation of what the mother did was that she cunningly planned to get the children over to England for as long as possible so that they would be habitually resident here and she would have a bar to any Hague Convention application.

98. I took time to assess the mother when she gave her oral evidence. It seemed to me to be entirely credible. I asked myself whether it was a cunning plan put into action in January 2017 and carried out in the following months. The mother is an intelligent woman but I find that she has a far more 'fluid' personality rather than being a person who makes firm plans. An example of this aspect of her personality is demonstrated by the return to Australia in 2016 with the children when it was far from clear where the father would be working and they had nowhere to live. It was also far from clear when she came to the UK how long she would be in England. Her return was prompted by lack of finance rather than anything else. There was a distinct lack of planning in respect to the visit.

99. I have already found that the mother was an honest witness and have rejected the notion that she was scheming to achieve a move to England in 2017. I revisited that in my consideration of the issue of habitual residence. I reiterate that I do not find that she attempted to achieve habitual residence by stealth. I am satisfied that the process of family life, plus the changes brought about by the loss of her father meant that she and the children became habitually resident in the UK by a natural process of integration rather than by a plan.

100. A relevant factor in my consideration of this was the return by the mother to Australia in March 2018. Mr Jarman suggested that the reason for her return was to try to negotiate with the father and that her failure to take the children on the return flights demonstrated her unwillingness to return. I accept the mother's account that she could not go during February (indeed the father said that he was ill) and that she would have taken the children at Easter but the father insisted she went in March alone. I am satisfied that he was by that stage very concerned about their relationship and wanted

to see her to rekindle the relationship. He was far less concerned to see the children. This fits with his overall commitment to their lives and his pursuit of contact with them. The mother knew she was potentially risking court proceedings in Australia but she nonetheless went. She candidly said that her trip was against legal advice. I am satisfied that one of the most significant reasons she went was because she had not made up her mind about the future. It was clear however that by the end of that trip she was going 'home' England and that her own, and that of the two children's habitual residence had changed to the UK.

101. The question for me is when did the change occur? When did the seesaw (Lord Wilson in ***Re B (A child)***) of habitual residence features move from Australia through the horizontal plane to tipping over to the balance to England? When did the Australian roots come up and the English roots go down? I am assisted in this determination by looking at the suggestions made by Lord Wilson in *Re B*

102. The level of integration in Australia is my starting point. If a child has a deep integration in the old state that may lessen the speed of integration into the new state. For these children there was a clear integration in Australia. Both had attended daycare. They lived with their mother who had tried to settle in Australia and was in the process of applying for citizenship.

103. The depth of their roots was in my assessment rather shallow. The sheer distances involved in seeing members of the paternal family meant that there were no close family ties. That was not due to the mother keeping them away. She states, and I have no reason to doubt, that she would have welcomed support when she the father was away and she was both working and caring for two small children. The reality of the situation was however that they were too far away to be of any practical assistance.

The father said in these proceedings that if the children were returned he had a support network to assist with their care. A brief examination of that network when he was questioned by Ms Baker amply demonstrated that the individuals concerned had either never met the children or had not had any significant role in their lives. I find that it is significant that both children spent 6 months at their maternal grandparents' home in 2015. They attended preschool and formed friendships with children that they played with once again when they returned in 2017. R had the same teacher who now teaches W. They undertook extra curricular activities and went to birthday parties and social activities with the friends they met. They spent a good deal of time with the maternal family. They had the close extended family ties and bonds which were simply not available in Australia.

104. This is significant because it provided the 'rooting medium' into which the children were placed in July 2017. They had relationships which had budded with children in the past which could start to grow and flourish. They had family bonds which were already good and were strengthened during the closeness that the bereavement brought. They were not put into a strange environment with strangers to grow accustomed to. There were some real ties in existence which I am satisfied grew closer and faster as a result.

105. The level of pre planning may achieve a faster integration in some cases. In this case the element of pre planning which did assist was the schooling because there was no disruption or hiatus in respect of the stay post August. Both R and W started back in education on 6 September. One thing I have considered is the fact that M's possessions and the children's familiar things were to a greater extent in storage. This holds some significance and may have slowed the pace of integration.

106. Where all the central members of a child's life move with him the greater the potential for a swifter integration and where central figures remain and continue the link with the old state the slower the probable pace. The central family members for these children when they came to England in 2017 were each other and their mother. Their father was a much less central figure because he was away so much and because he did not always prioritize them above other commitments. He wasn't always there for significant events and he didn't promote himself as a 'hands on' father when he had the opportunity. R told Miss Jolly that she had enjoyed being with her father when he visited them in Australia. She sees her family unit as her mother, Aunty F and her brother W.

107. The mother does not seek to persuade me that by August/early September 2017 the children were habitually resident in the UK. I am satisfied that if there had been a wrongful retention at that time the children were still habitually resident in Australia. They were living in a temporary residence in the UK and the maternal grandfather was alive until 2 September 2018.

<u>The period up to Mid March 2018</u>

108. Following the shock of the maternal grandfather's death the mother and her sister and her mother were in a period of mourning. I am satisfied that the few weeks that followed were of intense closeness and the children were no doubt involved in this. I accept the mother's evidence that by Christmas time she could see how settled the children had become. The process is however a slow one. As Lord Hughes explained in ***Re C*** if the stay in the destination state is more than just a holiday and lasts long enough for the children to become integrated into the destination state they can acquire habitual residence.

109. I am satisfied that the children were settling in the run up to Christmas 2017 but during that period the mother herself was still contemplating return in January and the reason for the stay had focussed on helping the family to get through Christmas. It is significant that they moved from a holiday let to more permanent accommodation by the end of August and I am satisfied that the process of putting down roots was underway. W has spent over half his life in the UK and this was a significant time in his development. As the weeks passed the children became involved more and more in community life. R has judo classes, ballet, and dancing classes and is in a choir. W goes swimming and plays 'little kickers' football. R had attended ballet in Australia and the children used to go swimming there.

110. It seems to me that Christmas 2017 was a significant time in terms of integration. The children spent Christmas 2016 in England and the last Christmas where their father had been present in Australia was 2015. They had yet again a period with extended friends and family over the 2017 holiday and then re-joined education in early January. The mother's sister, F, is close to both children and had maintained contact with them when they were in Australia. R certainly recorded Aunty F as a significant person in her life when she did a playgroup activity in Australia when she was 3. I have the document in the bundle and it shows R even thought she lived in England. In her statement Aunt F records that by Christmas 2017 R was sleeping through the night in her own bed and was enjoying school, going to parties and sharing her experiences with the family. The children's grandmother describes them looking forward to going back to school (and in W's case 'Rockets') after Christmas. Both were increasing their activities.

111. In England the children have remained in one home where they could put down roots which must be of great significance to them. Whereas in Australia the father was there for R's fourth birthday but sadly not for any of W's birthdays, the children have had close birthday celebrations with friends and family over the years in England so their time in England has enabled them to fit back into that close family and become integrated into the community much more quickly. They were starting to look forward to things later in the year and their mother had obtained employment and started to widen her social circle which will have been significant for them. Whilst the father told the Cafcass officer that he didn't feel that the mother was unhappy and isolated in Australia it is significant in my assessment that she came here when W was born because, I find, she simply had no or very little support in Australia.

112. The Cafcass report shows R's friendship circle is flourishing and the range of activities she is taking part in have grown. She told Miss Jolly that she had a few friends in Australia in day care but they could not visit her often. The only family she thought she had in Australia was her dad who she enjoyed spending time with. The only other person she missed in Australia was one of her mother's friends. In her eyes she, mummy and W felt a little lonely when they were there. This contrasted to the fact that she now lives close to her grandma and is very settled into her big school. I am satisfied that the connection which R and W felt to Australia was minimal.

113. I find that by late December/ early January 2018 the children were habitually resident in England, had firmly integrated and had put down firm roots. [The area where they live] was the centre of their existence. Their Australian roots had come up and the seesaw had tipped. They were stable in their home, social life and schooling, which was a contrast for them. As a consequence, when the mother decided that she would

not return to Australia with the children in March the children were habitually resident in England and the father's Hague Convention application in August must fail. As a result of this determination I have not gone on to consider the mother's quasi-settlement defence which is otiose.

HHJ Hillier
18 October 2018

See also Appeal B4/2018/2674 - G-E (Children) - Handed down 1 March 2019