THE HIGH COURT

RECORD NO: 2017/3 HLC

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991

AND IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

IN THE MATTER OF C.M., A MINOR

A.M.

Applicant

AND

S.McG.

Respondent

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on the 5th May, 2017

1. This is a ruling on a motion by the applicant for leave to serve an amended Special Summons. Having heard argument on the motion on the 26th April, 2017, I indicated on the 3rd May that I would accede to the application and give a written ruling setting out my reasons as soon as possible thereafter.

2. The trial of the matter is currently listed for two days on the 15th and 16th May, 2017, although it is now appears inevitable that this hearing date will have to be vacated as a result of the Court's ruling on the amendment of the pleadings. The motion to amend the pleadings issued on the 7th April, 2017, in circumstances which will be described below.

3. Counsel for each of the parties had a fundamentally different approach to the question of whether and when the Court should exercise a discretion to amend the pleadings in a Hague Convention case. Counsel on behalf of the applicant relied on Order 28, rule 1 of the Rules of the Superior Courts, and the principles set out in the authorities thereon, including such cases as *Croke v. Waterford Crystal Ltd* [2005] 2 I.R. 383, and *Woori Bank and Hanvit LSP Finance Ltd v. KDB Ireland Ltd* [2006] IEHC 156. In *Croke,* the rule was said to be based on the proposition that the interests of justice are best served if the real issues in controversy between the parties are before and can be determined by the court, subject to questions of real prejudice (unless the latter can be dealt with by costs orders or conditions). Counsel also drew attention to the comments of Clarke J. in the *Woori Bank* case. In the latter case, Clarke J., having referred to the fundamental principle set out in the *Croke* decision, commented as follows –

> "it is, of course, important to recollect that a party does not require any leave of the court to formulate its pleading (whether of claim or defence) in any manner it chooses in the first place. A party has a very wide discretion as to the manner in which it may plead its case or its response. Insofar as there are limitations, same stem from the rules of court which permit aspects of pleadings to be struck out in the unusual and limited circumstances where the pleadings may be found to be inappropriate by being, for example, vexatious, scandalous or disclosing no cause of action. Subject to those limitations a party is at large as to how it pleads. Where a party fails to include an appropriate plea it may be placed in a position of requiring a court order to amend. However, the starting point for a consideration of whether to allow the amendment should be to have regard to the fact that the party could have included the plea in the first place without requiring any leave from the court. Prejudice needs to be seen against that background. The prejudice that needs to be established must be a prejudice which stems from the fact that the proceedings have progressed on one basis and are now sought to be altered. The prejudice must stem, therefore, from the fact of the belated alteration in the pleadings rather than presence (if allowed) of the amendment itself."

4. Counsel on behalf of the respondent argued that the normal approach to the amendment of pleadings was not the appropriate approach in the circumstances, because proceedings brought under the Hague Convention involved wholly different considerations and involved, essentially, a summary procedure designed to return a child speedily to the appropriate jurisdiction if the child was found to have been wrongfully removed to, or retained in, this jurisdiction.

5. No authority was opened to me in respect of how the discretion to amend pleadings in a Hague Convention case should be exercised, and indeed the matter may not have been previously dealt with in any written judgment. I will accordingly deal with the matter as best I can by factoring in the special considerations in Hague cases, in particular the need for expedition and the best interests of the child, into the overall approach identified in the existing authorities on amendment of pleadings.

6. In the present case, it seems to me that a number of matters should be taken into account, as follows:

> (i) The overall timescale which forms the backdrop to the present application;
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> (ii) The nature of the amendment sought and the manner in which it arose in these proceedings;
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> (iii) Whether the amendment seeks to introduce into the proceedings a legal argument which is bound to fail and/or falls outside the parameters of the Hague Convention;
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> (iv) The issue of whether any prejudice arises from the availability or non-availability of the argument that the child is "settled in its new environment" (Article 12);
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> (v) The impact on the child of further delay as well as the duty on the Court to deal with Hague cases expeditiously;
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> (vi) The argument as to prejudice based on costs.

The overall timescale which forms the backdrop to the present proceedings

7. The child the subject of the present proceedings was born on the 9th March, 2015, in the state of Illinois in the United States of

America. The applicant and the respondent, the parents of the child, were not married. The father, who is the applicant in these proceedings, completed a document entitled Voluntary Acknowledgment of Paternity on the day after the child's birth, the 10th March, 2015, and was duly recorded as the child's father on the child's birth certificate. The parents lived together with the child for a period and then separated in April, 2016.

8. On the 2nd May, 2016, the parents signed a Parenting Plan, which was notarised, but not the subject of court proceedings or a court order.

9. On the 18th or 19th June, 2016, the respondent took the child to Ireland and shortly afterwards communicated to the applicant that she would not be returning. The applicant says that he did not consent to this removal of the child from the jurisdiction. The respondent's case is that the applicant did not have custody rights for the purpose of the Convention at the time of the child's removal and therefore his consent was not required, and that the removal was not wrongful.

10. On the 28th June, 2016, the applicant brought proceedings concerning the child in the courts in Illinois. He was granted, on that date, an Emergency *Ex Parte* Order which: granted him "temporary possession" of the child; ordered the respondent mother to return the child to Illinois and to him; ordered local law enforcement to assist with same; reserved the respondent's parenting time on a temporary basis; and prohibited the removal of the child by either party from Illinois for a period in excess of two weeks in the event of return. On the respondent's failure to comply, the applicant obtained a Body Attachment Order, which ordered the respondent to attend an adjourned date of the 10th August, 2016, on which date she did not appear and was found in default. Accordingly, the applicant was granted leave to proceed with a default judgment of allocation and on the 27th September, 2016, was granted an order in relation to the parental responsibilities, parenting time and other matters in respect of the child which included, *inter alia*, an order granting him "sole decision making authority over the minor child."

11. On the 22nd December, 2016, the applicant made an application through the Central Authority in Illinois to the Irish Central Authority for the return of the child to Illinois pursuant to the Hague Convention. This was some six months after the child had travelled to Ireland with the respondent. A special summons issued on the 26th January, 2017, grounded on the affidavit of solicitor Chris Walsh of the same date. This was served on the 1st February, 2017.

12. The first return date before the Court was the 8th February, 2017, on which date the issue of obtaining an affidavit of laws with regard to Illinois was first mentioned, the applicant's counsel indicating that this would be sought on behalf of his client. The affidavit of the respondent was sworn on the 21st February, 2017, and the matter came again before this Court on the 22nd February, 2017, on which date it was adjourned for one week on consent. Counsel for the applicant again stated on that date that there would be issues to be determined in relation to the custody rights of the applicant under the law in Illinois. On the 1st March, 2017, the matter was adjourned for two weeks to allow for a replying affidavit to be filed by the applicant. Counsel for the applicant noted that an affidavit of laws would be required to establish the status of the father's custody rights under Illinois law. The applicant swore an affidavit on the 15th March, 2017.

13. The matter came back before the Court on the 22nd March, 2017, and at this stage it became clear that disagreement had arisen between the parties, flagged in *inter partes* correspondence, (1) as to whether an affidavit of laws was required at all and (2) whether some of the questions proposed by the applicant that the affidavit of laws would cover were relevant to the case as pleaded by the applicant. Counsel on behalf of the respondent argued, first, that arguments in relation to the wrongful retention of the child by the applicant after the date of the first court application in Illinois by the applicant (i.e. on or after the 28th June 2016) had not been pleaded on behalf of the applicant in the present proceedings, and therefore the affidavit of laws did not need to deal with matters of law arising out of those court proceedings; and secondly, that there was no need for an affidavit of laws at all as the case of *Martinez v Cahue* No 16-1609 (Court of Appeal, 7th Cir., 2016), was dispositive of the issues surrounding the custody rights of the father as of the 17th/18th June 2016, i.e. circumstances where the parenting of the child was governed by a private partnership document agreed by the parties. Counsel for the applicant contended that the issue of retention (as distinct from removal) was sufficiently pleaded, even though the details of date(s) of retention had not been pleaded, and that an application for the amendment of pleadings would be applied for, if necessary, if the Court found otherwise. It was also argued on behalf of the applicant that there were features in the present case which potentially brought it outside the remit of *Martinez v Cahue*, including that the present case involved a notarised agreement.

14. The Court made an interim and *ex parte* ruling on this issue on the 29th March, 2017, acceding to the application for an affidavit of laws on the basis of the case that had clearly been pleaded on behalf of the respondent, namely that the father had custody rights at the time of the removal of the child on the 18th June 2016. The Court further determined that the issue of wrongful retention on or after the 28th June, 2016, had not been directly pleaded by the applicant and that a decision was not being made at that stage as to how the Court would rule on any application for an amendment of the pleadings, although the Court would deal with this matter in early course if invited to do so. Consequent upon the latter finding, Counsel for the applicant applied on the same day to issue a motion to issued the pleadings.

15. On the 5th April, 2017, the case was adjourned on consent and the then hearing dates of the 26th and 27th May vacated. On the 7th April 2017, the present motion to amend the pleadings was issued on behalf of the Applicant. The Court heard argument on the motion on the 26th April, 2017, reserving judgment, and indicated its decision on the 3rd May, 2017. This was done in order to bring as much speed to the proceedings as possible by enabling the parties to know the result of the motion application and plan accordingly.

16. Some initial points may be made about the chronology, which is the backdrop to the present application. The first is that, as already noted, the application by the applicant pursuant to the Hague Convention was made some six months after the removal of the child to Ireland on the 18th/19th June, 2016. Once the proceedings were issued, the case moved with reasonable expedition, but because of that initial six-month passage of time, even if the hearing were to proceed in May, 2017, this would be almost one year after the child arrived in Ireland.

17. The second point that may be made about the timescale is that, as matters stand, because the application for the return of the child was made within the one-year period, the respondent will not be entitled at any hearing based on the present proceeding to invoke the defence in Article 12 of the Convention that the child is "settled in its new environment."

The nature of the amendment sought and the manner in which it arose

18. In essence, as seen above, the amendment sought is to enable the applicant to make the case not only that the child was wrongfully removed from Illinois on the 17th/18th June, 2016, but also, in the alternative, that the child was wrongfully retained in Ireland from a later date, being one of a number of dates, being dates on or after the 28th June 2016, the date of the issue of

proceedings by the applicant before the Illinois Court. These dates are identified in the draft amended pleadings as follows: the 28th June, 2016 (the date of the application); the 2nd July, 2016 (the date on which the respondent was served with the Illinois proceedings); the 19th July, 2016 (the return date); the 10th August, 2016 (a further return date); or the 27th September, 2017 (the date of final orders made by the Illinois court).

19. Counsel on behalf of the applicant argued that the issue of retention was in the case from the outset and that the proposed amendment would merely involve the addition of details of dates. Counsel argued that the term 'retention' had been used from the outset, albeit not directly in connection with the 28th June, 2016, or any later date; and also that all the facts relating to his Illinois court application had been pleaded from the very beginning. Counsel on behalf of the respondent, who vigorously opposed the amendment, argued that it would involve the introduction of a whole new dimension to the case, namely an argument that the proceedings brought by the applicant in Illinois somehow gave him (or the Court in Illinois) custody rights in relation to the child on or after the 28th June, 2016, such that retention of the child in Ireland after the 28th June, 2016, (or some later date) became wrongful even if the initial removal of the child from Illinois was not wrongful because he had no custody rights for the purpose of the Hague Convention at that time. Counsel argued that the case, as initiated and pleaded, relied squarely upon such custody rights as the applicant had on the 18th/19th June, 2016, whereas it was now sought to introduce possible custody rights under Illinois law which, if they came into being at all, did not do so until some date after the 28th June, 2016. Counsel argued that this was a substantial change to the case she was being required to meet at a very late stage in the proceedings. She also complained of the fact that, even in the amended pleadings, no single date was identified as the 'retention' date, but rather a series of alternative dates. She also pointed out that the applicant, having initiated the proceedings six months after the removal of the child to Ireland, had had ample opportunity to take legal advice as to how the case should be framed and pleaded, and that he should not be permitted to make amendments to it at this late stage.

20. As noted, the issue of whether the pleadings should be amended arose directly as a result of the Court's interim ruling of the 29th March, 2017, referred to above, concerning the affidavit of laws, but this in turn arose from the dispute between the parties which first broke out in correspondence concerning the affidavit of laws.

21. In my view, the proposed amendment would be more than a mere matter of detail because it would introduce a new dimension to the case and would enable the applicant to argue that, even if he did not have custody rights on the 18th/19th June, 2016 for the purpose of the Hague Convention, he (or perhaps the Illinois court) subsequently acquired custody rights which rendered the continued retention of the child in Ireland unlawful. However, it is also true that the facts relating to the court proceedings in Illinois were pleaded from the very outset so that it can at least be said that the respondent was on notice of the facts, if not the character of the legal argument, that the applicant wished to anchor on those facts. It also seems to me that the parties may have been at cross purposes as to what was within the scope of the pleadings; I can readily understand, from an examination of the pleadings, why the respondent's legal team would have thought that the case was premised on the fundamental question as to whether the applicant had custody rights as of 17th/18th June; on the other hand, given how the matter arose in correspondence, and following the court ruling, and having regard to the contents of Mr. Walsh's grounding affidavit supporting the present motion, I incline to the view that the applicant's legal team genuinely thought that the matter had been sufficiently pleaded to allow them to argue that there had been either a wrongful removal or a subsequent wrongful retention.

Whether the amendment seeks to introduce a matter which is bound to fail and/or outside the parameters of the Hague Convention

22. In substance, it was argued on behalf of the respondent that the additional dimension sought to be introduced into the case via the amended pleading was bound to fail in light of the decision in *Martinez v Cahue* No 16-1609 (Court of Appeal, 7th Cir., 2016). Further, it seems to me that it was also argued that the concepts being relied upon were outside the scope of the Hague Convention. Both of these arguments were strongly opposed by counsel on behalf of the applicant.

23. In *Woori Bank and Hanvit LSP Finance Ltd. V. KDB Ireland Ltd.* [2006] IEHC 156, Clarke J. referred to the right of a party to plead what he wants in the first instance, subject to matters being struck out on certain specific grounds, such as in the case of frivolous and vexatious pleas. He said that this fact should be borne in mind when considering an amendment application, and went on to say:

> "… the court should lean in favour of allowing an amendment if, in the words of Hynes, it is otherwise appropriate to do so, unless it is *manifest* that the issue sought to be raised by the amended pleading must necessarily fail. The Court should not, on a procedural motion to amend, enter into the merits of the issue sought to be raised save to the extent of asking itself whether the issue which would be required to be tried as a result of the amended pleading is one *which must necessarily fail* from the perspective of the party seeking the amendment." (emphasis added)

24. Having listened to the arguments of the parties regarding *Martinez v. Cahue*, and the applicability or non-applicability of the Hague Convention concerning 'chasing orders,' which arguments were necessarily telescoped because of the short and procedural nature of the application, I am not persuaded that the matter is so manifestly bound to fail or outside the scope of the Convention that the amendment should be refused for this particular reason. I am certainly dubious, in terms of what I have heard so far, as to whether the applicant could succeed in an argument based on the sought-for amendment, but I think it would be premature of me to take the view that the argument was necessarily doomed to failure.

The argument as to prejudice arising from the non-availability of the settlement defence under Article 12

25. It was argued on behalf of the respondent that one particular and important legal prejudice which would arise if the Court acceded to the application for the amendment of the pleadings related to the 'settlement' defence in Article 12 . It was argued that if the Court acceded to the present application and the trial had to be adjourned, this defence would not be available to the respondent at any adjourned hearing, which would then inevitably take place later than one year after the child's removal from Illinois; whereas if the Court rejected the amendment to the pleadings, the applicant would, if he wished to pursue the matter further, have to issue fresh proceedings based upon the retention argument, and the settlement defence would then become available to the respondent.

26. It seems to me that there is a flaw in this argument insofar as the applicant could, if this amendment application were rejected, still *issue* fresh proceedings within the one year time limit which relied upon arguments flowing from the proceedings before the Illinois courts on the 28th June 2016 i.e. the matters the subject of the proposed amendment. The relevant date for the purpose of the settlement defence is the date of issue of the proceedings, not the date of the hearing of the case. It may be observed that the one year dividing line for the purpose of the 'settlement' defence is a somewhat arbitrary line, insofar as an applicant who issues proceedings on the last day of the one year period thereby prevents the respondent from being in a position to rely upon the settlement defence, even though from the child's point of view, when the matter comes on for hearing, he or she will have been in the country well over a year; whereas the defence is available if the applicant issues proceedings one day after the one-year time limit.

The extent and impact of delay if the amendment were granted, and the purpose of the Hague procedure

27. It was accepted by both counsel that, if the amendment were granted, it was inevitable that the hearing dates of the 15th and 16th May, 2017 would have to be vacated, and that a hearing would be unlikely to take place before mid-to end of June 2017. This was in part, counsel for the respondent argued, because she would have to obtain her own affidavit of laws to deal with the matters arising. Counsel for the applicant disagreed in that aspect, saying that they would be satisfied with a joint affidavit of laws, but that this was not being agreed to. Counsel on behalf of the applicant also argued that any delay would be to the detriment of his client and not the respondent, since he was in Illinois, while the child continued to remain in Ireland with the respondent.

28. As regards the last point, the matter is perhaps not so simple, because as counsel for the respondent pointed out, while the immediate prejudice or detriment caused by a postponement of the trial date might be to the applicant parent, if the decision were ultimately to return the child to Illinois, the child could be seen to have suffered greater disruption by reason of the additional period of time that had passed and that the child spent in Ireland. Counsel for the respondent rightly emphasised the importance of the best interests of the child in the decision the Court has to make. The issue of delay can also be seen through the prism of the purpose of the Hague Convention machinery itself, which emphasises the need for speed in dealing with this type of case, for the purpose of deterring the unlawful removals and retention of children as well as seeking to ensure the best interests of the children themselves.

29. The ultimate impact upon the child of further delays is of considerable concern to the Court, as is the inevitable disruption of the timetable for hearing set by the Court having regard to the need for speed in Convention cases. However, the following considerations have ultimately prevailed in my decision. First, in the overall timescale, and in circumstances where the applicant delayed for six months before bringing an application under the Hague Convention, a further delay of approximately 6-8 weeks is not of the greatest order, particularly if the reason for the delay is that of ensuring that finality can be brought to the proceedings by allowing the applicant to argue the two separate aspects of his case which he wishes to (i.e. wrongful removal on the 18th/19th June 2016, and wrongful retention on a date after the 28th June, 2016), and which could have done if he had pleaded it in detail from the outset. Further, no matter what the Court does at this point, there may be further delays. If the present application to amend is refused, the refusal may form the basis of an appeal by the applicant in due course if he is unsuccessful in his substantive application. Alternatively, faced with a refusal to the amendment motion, the applicant might issue fresh proceedings based on the additional ground the subject of the sought-for amendment and either succeed in an application to have both proceedings heard together, or have a second set of proceedings heard at some later point. It seems to me that a delay of 6-8 weeks which may be occasioned by reason of the sought-for amendment of the pleadings now is potentially of a lesser order than some of the other delays that might arise if the application were refused. Therefore, while I am extremely mindful of the best interests of the child and the 'need for speed' in Hague Convention cases, it seems to me that acceding to the application at the present time may be the lesser of evils in terms of potential delays.

The argument as to prejudice from the point of view of costs

30. It was argued on behalf of the respondent that the introduction of an additional dimension to the case would necessarily increase the costs of the application in a situation where the respondent was, with difficulty, financing the proceedings from her own limited means and with the assistance of her family members, and in circumstances where the applicant was legally aided. The Court was referred to s.36 of the Civil Legal Aid Act, 1995 which provides:

> "(1) Costs awarded by a court or tribunal to a person not in receipt of legal aid (referred to subsequently in this section as "the successful litigant") against a person who is so in receipt (referred to subsequently in this section as "the unsuccessful litigant") shall not, save in accordance with subsection (2), be paid out of the Fund.
>
> (2) Where a successful litigant submits a bill of costs to the Board, the Board may make an ex gratia payment towards such costs of such amount as it considers appropriate, if it is satisfied of the following matters, namely that—
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> (a) the proceedings were instituted by the unsuccessful litigant,
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> (b) the successful litigant has taken all reasonable steps to recover his or her costs from the unsuccessful litigant in person,
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> (c) the successful litigant will suffer severe financial hardship unless an ex gratia payment is made,
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> (d) the ex gratia payment will not exceed the amount that would be allowed if the costs were taxed on a party and party basis, and
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> (e) the case has been finally determined."

It seems to me that the issue of costs may be dealt with at the conclusion of the case and in light of s.36, and that, all other things being equal, this particular issue should not be determinative of the present application, but is a matter to which the Court should be very alive at the conclusion of the case.

31. I have therefore decided to accede to the application for the amendment for the reasons set out in some detail above and which may be summarised as follows:

> (a) The amendment is being sought now, it appears, because the respondent's legal team genuinely thought it had been sufficiently pleaded, but the Court ruled otherwise on the 29th March, 2017;
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> (b) The general principle is that it is important to bring finality to cases and part of that may involve amendment of the pleadings to ensure that all issues which the parties consider to be relevant are dealt with at the hearing;
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> (c) This is subject to a principle that the amendment should not be granted where the legal issue sought to be thereby introduced is bound to fail; however, I am not persuaded at this point that this is the position here, notwithstanding that I have considerable doubts about the likelihood of the applicant succeeding on the additional ground, but of course this very provisional and preliminary view is before there has been detailed argument on the law and a closing of the affidavits in relation to matters of fact;
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> (d) The general principle is also subject to the principle that amendments should not be granted where there is

prejudice to the other party, caused by the *lateness* of the amendment (not the content of the amendment itself), which cannot be cured. In the present case, the primary prejudice is that of delay which may ultimately be to the detriment of the child (depending on the ultimate outcome of the case), but which also interferes with the Court's ability to comply with its duty to deal with such proceedings expeditiously under the Hague Convention scheme (which duty exists irrespective of the ultimate outcome of the case). This is a matter of serious concern, and one to which I have given considerable thought in deciding this application. On balance, it seems to me that even greater delays could be occasioned by the Court's refusal to grant the amendment than the granting of it, and that a delay of 6-8 weeks (which appears to be what is envisaged) is an evil worth enduring in order to ensure finality and prevent further delays at a later point.