

**ANDRA MOBBERLEY  
BARRISTER**

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**NOTE**

TO: Mr Axel Schmidt

FROM: Andra Mobberley, Barrister

DATE: 17 April 2017

SUBJECT: Advice on complaint to Commissioner of Police concerning abduction, and conspiracy to abduct, a young person under 16 and ancillary offences

**STATUS: LEGALLY PRIVILEGED ADVICE**

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## INTRODUCTION

1. You have asked for advice on making a complaint in New Zealand against Mr Simon Hopfengärtner and Mrs Lisa Hopfengärtner relating to the alleged abduction of Clara Larissa Schmidt (born 3 July 2007 in Monchengladbach, Germany) from Germany to New Zealand at the beginning of 2015 under s 210 of the Crimes Act 1961 (Crimes Act).
2. My advice on your request is contained in this Note.
3. As a preliminary comment, your complaint must be made cautiously. An allegation of abduction is serious. This advice will provide evidence that you have thought seriously about making a complaint.
4. There must be a transparent basis for making the complaint to the New Zealand Police. Extra caution is required as Mrs Hopfengärtner alleges that there is a history of complaints by you against her and her husband in Germany. It is essential to manage any perception that you are engaging in a campaign against them. Your complaint must be objectively justifiable and based on verifiable facts. The complaint will not be confidential and can be used as evidence in proceedings. These could include your Hague Convention application (the Application),<sup>1</sup> defamation proceedings, contempt proceedings, and applications for protection or restraining orders against you.
5. In preparing this advice I have relied upon the information that is included in the draft affidavit you have prepared for Ms Theron. I have not sighted the final version of your sworn affidavit. Please advise me if there are any changes. I have also relied upon the documents filed in your Application. I understand the Central Authority has provided the official versions of the German court documents. I also understand that you commissioned the certified translations from “TransNational (NZ) Limited”.
6. As a general rule, documents that are filed in the Family Court in New Zealand are confidential. As a precaution I have asked Mr Roots whether I am able to read and refer to those documents in preparing my advice to you. I understand that I am able to do so but these documents should not be made available to other persons or be circulated publically.
7. This Note is legally privileged. If you give this advice to another person, the legal privilege attaching to the content of the Note will be lost and you cannot rely on it unless you stipulate conditions to limit further circulation. In this electronic age that can be difficult to regulate.

## SUMMARY OF ADVICE

8. The New Zealand Commissioner of Police is responsible for the investigation and prosecution of crimes in New Zealand. I recommend that you make your complaint to him. I will prepare a draft letter for you.

### Complaint to the Commissioner or Police

9. Your complaint will need to demonstrate three preconditions to persuade the Commissioner of Police that a criminal investigation is warranted in New Zealand:
  - a. That New Zealand courts can exercise jurisdiction over the alleged crime(s).
  - b. That there is clear, compelling, and objectively verifiable evidence to suggest that a crime or crimes have been committed.
  - c. That a criminal investigation is in the public interest despite the Family Court already conducting proceedings to resolve the custody dispute over Clara.

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<sup>1</sup> *Schmidt v Hopfengärtner* FAM-2017-079-00008 - An application for the return of a child pursuant to the Convention on the Civil Aspects of International Child Abduction under The Hague Convention of 25 October 1980 (the Application).

## **Jurisdiction**

10. New Zealand Courts have jurisdiction over the substantive crime of abduction of a young person under 16 years committed with New Zealand's borders. They also have jurisdiction over a conspiracy to commit that offence. The courts have jurisdiction if the conspiratorial agreement was made in New Zealand. They also have jurisdiction if the agreement was made overseas, as long as the crime or any part necessary to its implementation, was completed in New Zealand.

## **Evidential basis**

11. Under s 210 of the Crimes Act, a young person under 16 years is abducted when a person deliberately or intentionally 'takes, 'entices', or 'detains' the victim to prevent access by another person who has legal 'possession and control' of the child. To 'detain' can mean 'to keep or hide'. The abductor must know that they do not have lawful care of the child and must not have a justifiable defence to their actions.
12. At present, on the basis of the information that is available, you could make a complaint to the Commissioner of Police that Clara was abducted by Mrs Hopfengärtner in New Zealand because she 'detained' or 'kept' Clara here to prevent you having access. Mrs Hopfengärtner admits that on 21 January 2015 she knew you had been granted custody of Clara. This could amount to the offence of 'abduction by detaining' under s 210(1) of the Crimes Act unless Mrs Hopfengärtner has a justifiable defence for her actions.
13. Mrs Hopfengärtner claims that she thought her appeal against the decision granting you custody needed to be resolved before you had lawful care of Clara. She effectively claims she disengaged with the appeal proceedings and so did not know the result. For her defence to be successful, the courts would have to believe that her defence is honest and reasonable.
14. It might also be possible to lay a complaint about other offences. However, information on three crucial dates is still missing:
  - a. The date that Mr and Mrs Hopfengärtner left Germany with Clara.
  - b. The first time that Mrs Hopfengärtner knew you had been granted sole parental custody of Clara.
  - c. The date that Mr and Mrs Hopfengärtner arrived in New Zealand.
15. These dates are essential to a precise legal analysis of the facts. They are necessary for determining whether there was a conspiracy between Mr and Mrs Hopfengärtner to abduct Clara in Germany or in New Zealand (Ss 210 and 310 of the Crimes Act). The dates will be important for the New Zealand Police so that they can decide how many separate charges to lay against Mrs Hopfengärtner.

## **Public interest**

16. Third, the Commissioner of Police will need to be convinced that there is a positive public interest in using criminal processes in a custody dispute. This will largely come down to a policy decision about the allocation of New Zealand Police resources. The Police may consider recourse to the criminal law inappropriate when the Family Court is already conducting proceedings under the Hague Convention to resolve the custody dispute over Clara. It will be important to demonstrate that this is a serious case of child abduction and requires the deterrent force of the criminal law.

## **Other offences**

17. You have also raised questions about whether other crimes have been committed by Mr and/or Mrs Hopfengärtner. These include whether Clara's inheritance money has been misappropriated by her mother, and whether there is an irregularity in documents submitted to Immigration New Zealand and to the Ministry of Education. The validity of these allegations will depend on factual

information and evidence that is currently being obtained. It would be prudent to wait until you have more information before you make a complaint to the Commissioner of Police on these matters.

### Cautionary Note

18. Your complaint must be made cautiously. An abduction allegation is serious and there must be a transparent and verifiable basis for making the complaint to the New Zealand Police.

### FACTUAL BACKGROUND

19. These are the key facts.<sup>2</sup>
20. On 3 July 2007, **CLARA LARISSA SCHMIDT** was born in Monchengladbach, Germany. You are her father. Her mother's name is Mrs Lisa Hopfengärtner (nee Gehringer). At that time, Mrs Hopfengärtner had custody of Clara from birth until 17 December 2014, when the District Court of Fürth in Germany awarded you sole custody. In July 2009, you and Clara's mother separated. She moved with Clara to another town in Germany.
21. In July 2010, Ms Gehringer met Mr Simon Hopfengärtner. In early 2011, Ms Gehringer moved to Fürth with Clara to live with Mr Hopfengärtner. Mrs Hopfengärtner informed you that you would not be allowed to see Clara again.
22. In 2013, Mr Hopfengärtner married Ms Gehringer (now known as Mrs Hopfengärtner). From 2011 to 2013 you had regular but limited contact with Clara, as was determined by various German court decisions.
23. On 16 September 2017, Clara attended school in Fürth for a short time.
24. On 20 September 2013, you went to pick up Clara from school for a 3-day visit that had been ordered by the court. However, Mr and Mrs Hopfengärtner had already picked up Clara and were about to drive off. You stepped in front of their car. The car hit you twice and you were injured.
25. You have advised that there seem to be different addresses for Clara at this time.
26. On 27 November 2014, an arrest warrant was issued for Mr Hopfengärtner for the vehicle incident. Mr and Mrs Hopfengärtner and Clara then disappeared. You have advised that the arrest warrant is still in place. I have checked the public Interpol website. No Red Notices (issued for wanted persons) have been issued in the name Hopfengärtner.
27. Earlier in 2014, Mr and Mrs Hopfengärtner and Clara moved to Costa Rica and then Scotland, before returning to Germany.
28. On 17 December 2014, the District Court of Fürth in Germany awarded you sole parental custody of Clara. According to Mrs Hopfengärtner, the family left Germany in December 2014 and has lived in New Zealand since January 2015.<sup>3</sup> On 20 March 2015, the District Court of Fürth issued a penalty order against Mrs Hopfengärtner because of her refusal to let you have access to Clara. On 18 October 2016, the District Court of Fürth issued a Surrender Decision for Clara. On 1 March 2016, a Senior Judicial Administrator for the Nürnberg-Fürth Public Prosecutors' Office informed you that an alert has been issued to help with the search for Clara.

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<sup>2</sup> I have taken these facts from the documents you have provided.

<sup>3</sup> Supra, note 1, Affidavit of Lisa Hopfengärtner dated 31 March 2017 paras 26, 28, and 50. Clara's report from Coroglen School shows that she was at that school in December 2015.

29. On 21 January 2015, Mrs Hopfengärtner lodged an appeal against the custody decision. On 31 May 2016, the appeal was dismissed in a decision of the Nürnberg-Fürth Higher Regional Court.<sup>4</sup> Your right to sole parental custody of Clara was confirmed.
30. In August 2016, you asked the German media for support to find Clara. After footage was broadcast you received a telephone call from one of Mrs Hopfengärtner's relatives who told you to search for Clara in New Zealand.
31. In September 2016, you contacted the German Embassy in Wellington to find out if the Embassy issued a passport for Clara. On 27 October 2016, the German Embassy in Wellington wrote to you and informed you that a new passport for Clara was issued on 4 March 2015.
32. On 6 December 2016, you filed the Application so as to have Clara returned to you in Germany. These proceedings are on-going. On 13 February 2017, the German Embassy declared Clara's passport invalid. The notice stated that the invalid passport must be returned to the German Embassy.
33. German courts have issued damages and costs orders against Mrs Hopfengärtner, requiring her to pay you EUR 21,086 in relation to the child abduction in Germany. They have issued three damages orders against Mr Hopfengärtner, requiring him to pay you EUR 10,871 for the vehicle incident in September 2013.
34. Legal processes are underway in Germany and in New Zealand relating to whether Mrs Hopfengärtner has misused the EUR 100,000.00 that Clara inherited from her great-grandmother and from you.
35. On 25 May 2016, you filed a request for prosecution and an arrest warrant was issued in Germany. On 31 May 2016, a further warrant was issued in Germany.
36. On 21 February 2017, Ms Patricia Bailey from the Ministry of Justice in New Zealand emailed you advising that:

A border alert has been obtained that prevents the removal of your daughter from New Zealand by any person. The alert activates on the child's name and date of birth rather than a passport. In other words, the alert prevents your daughter leaving New Zealand and travelling on any passport and is not limited to a German passport.
37. On 9 March 2017, you complained to the New Zealand Immigration Service concerning the validity of the visa applications made by Mr and Mrs Hopfengärtner. On 10 April 2017, you alerted the Minister of Education in New Zealand to the fact that Clara had been enrolled at school as Clara Hopfengärtner, not Clara Schmidt.

#### **REQUEST TO THE COMMISSIONER OF POLICE**

38. The New Zealand Commissioner of Police is responsible for the investigation and prosecution of crimes in New Zealand. He must act independently of any government ministers (section 6 (2) Policing Act 2008).
39. I recommend that you make your complaint to him.
40. Your complaint to the Commissioner will need to persuade him to investigate by demonstrating three preconditions:
  - a. That there is clear, compelling, and objectively verifiable evidence to suggest that a crime has been committed.
  - b. That New Zealand courts can exercise jurisdiction over the alleged crimes.

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<sup>4</sup> *Schmidt v Hopfengärtner*, Decision of the Nürnberg-Fürth Higher Regional Court 9 UF 149/15 201F 1835 AG Nürnberg-Fürth [from the Fürth District Court] (English Translation).

- c. That a criminal investigation is in the public interest despite the Family Court already conducting proceedings to resolve the custody dispute over Clara.

41. The second and third preconditions derive from the two stage 'Test for Prosecution' in the Solicitor-General's Prosecution Guidelines (Prosecution Guidelines): the evidential test and the public interest test.<sup>5</sup> The New Zealand Police follow the Prosecution Guidelines and they are a good basis for framing your request to the Commissioner of Police.

42. I consider the three preconditions below.

## **A JURISDICTION OF THE NEW ZEALAND COURTS**

43. The jurisdiction of the New Zealand courts in criminal cases is primarily territorial. Subject to a few specific exceptions, New Zealand courts have jurisdiction over crimes committed in New Zealand.

44. This general rule is expressed in s 6 of the Crimes Act which provides:

6. Subject to the provisions of section 7 of this Act, no act done or omitted outside New Zealand is an offence, unless it is an offence by virtue of any provision of this Act or of any other enactment.

45. There would be a basis for criminal charges for abduction of a young person under 16 years (s 210 Crimes Act) if the abduction began and continued in New Zealand.

46. Section 7 of the Crimes Act contains an exception to the general rule in s 6:

7. For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event.

47. The crime of conspiracy is one such exception to this rule. The offence of conspiracy to commit an offence was created by s 310, which provides:

310. [...] everyone who conspires with any person to commit any offence, or to do or omit, in any part of the world, anything of which the doing or omission in New Zealand would be an offence, is liable to imprisonment [...]

48. In this case, the Commissioner of Police would only consider an investigation if there is evidence of a crime committed in New Zealand or if there is evidence of a conspiratorial agreement overseas that was 'completed' inside New Zealand's borders.

## **B THE EVIDENTIAL TEST**

### **1 Abduction of a Young Person Under 16 (section 210 Crimes Act)**

#### **The Crime**

49. Section 210 Crimes Act provides:

#### **210 Abduction of young person under 16**

- (1) Everyone is liable to imprisonment for a term not exceeding 7 years who, with intent to deprive a parent or guardian or other person having the lawful care or charge of a young person of the possession of the young person, unlawfully takes or entices away or detains the young person.
- (2) Everyone is liable to imprisonment for a term not exceeding 7 years who receives a young person, knowing that he or she has been unlawfully taken or enticed away or detained with intent to deprive a parent or guardian or other person having the lawful care or charge of him or her of the possession of him or her.
- (3) For the purposes of subsections (1) and (2), —

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<sup>5</sup> Solicitor-General's Guidelines 2013, Section 5.

- (a) It is immaterial whether the young person consents, or is taken or goes or is received at his or her own suggestion; and
- (b) It is immaterial whether the offender believes the young person to be of or over the age of 16.
- (4) In this section **young person** means a person under the age of 16 years.

## Jurisdiction

- 50. New Zealand courts would have jurisdiction in respect of criminal charges for abduction of a young person under 16 years (s 210 Crime Act) if the abduction began and continued in New Zealand. It might also be possible to lay a complaint about other offences once more information comes to hand.

## The Elements of the Crime

- 51. The Commissioner may conduct an investigation if you can demonstrate that:
  - a. The defendant took, enticed, or detained a person under the age of 16 years;
  - b. The taking, enticement, or detention was deliberate or intentional;
  - c. The taking, enticement, or detention was from a person who had lawful care of the young person;
  - d. The defendant knew the other person had lawful care of the young person;
  - e. The taking, enticement, or detention was “unlawful”; and
  - f. It was done with intent to deprive a parent, guardian, or other person having lawful care or charge of the young person of possession of that young person.<sup>6</sup>

## *Taking away or detaining*

- 52. The courts have considered the difference between ‘taking away’ and ‘detaining’ a child or young person.
- 53. In *Wiley v R*, the Court of Appeal held that a ‘taking away’ for the purposes of s 210 of the Crime act might continue beyond the point where the defendant initially obtains possession of a young person. Whether ‘taking away’ has occurred and the length of time for which it continues was a matter of fact and degree.<sup>7</sup> ‘Taking away’ may be brief and may involve no great physical distance or may extend for a considerable period of time and involve the victim being taken from place to place.<sup>8</sup>
- 54. The Court held that a ‘bright line’ distinction between ‘taking away’ and ‘detention’ was inappropriate and artificial as the two concepts may be closely linked.<sup>9</sup> A ‘taking away’ may well also amount to the victim being detained at the same time.<sup>10</sup> However, they remain legally distinct and are treated as separate offences or as alternative ways of committing the crime of abduction.<sup>11</sup>

- [144] Factually, there may be a point of time at which a taking away ends and is thereafter more properly regarded as a detention. For example, the victim may be taken away to a particular place or destination and then confined at that place. While the journey to that place is continuing, it may be said that the taking away continues. If the victim is held or confined at that place thereafter, then he or she may be regarded as being detained.

<sup>6</sup> Adams on Criminal Law Westlaw NZ, Brookers Online, Thursday, 06 April, 2017 at 08:50 NZST.

<sup>7</sup> *Wiley v R* [2016] 3 NZLR 1, (2016) 27 CRNZ 668 at [140] to [141].

<sup>8</sup> Supra note 7 at [141].

<sup>9</sup> Supra note 7 at [142].

<sup>10</sup> Supra note 7 at [142].

<sup>11</sup> Supra note 7 at [142].



55. In *R v Hou*<sup>12</sup> and in the Australian case of *R v Davis*,<sup>13</sup> the victims were held in a car against their will and were driven from place to place. In *Hou*, the Court of Appeal categorised this as being detained and held that the detention continued while the complainant was ‘carried off’ in the car.<sup>14</sup> The Australian Criminal Court of Appeal in *Davis* similarly considered the words ‘take or detain’ to be interchangeable.
56. Conversely, a person may be detained without being taken away, as occurred in *R v Tauiilili*.<sup>15</sup> In that case, a father had lawfully ‘obtained possession’ of his daughter under an access arrangement but had detained her by refusing to return her at the end of the agreed access period. The defendant unsuccessfully argued that he had a good faith defence.

## Good Faith Defence

57. Section 201A of the Crimes Act provides a potential ‘good faith’ defence to a charge for abduction under s 210:

### **210A People claiming in good faith right to possession of young person under 16**

A person who claims in good faith a right to the possession of a young person under the age of 16 years cannot be convicted of an offence against section 209 or section 210 because he or she gets possession of the young person.

58. The Court of Appeal prescribed limits on the availability of the ‘good faith’ defence in *R v Tauiilili*.<sup>16</sup> In that case, the Family Court made a custody order in the mother’s favour. The father was granted access every second weekend. One Friday evening the father collected the child in accordance with the agreed access arrangement. He did not return her on the Sunday. He took her from Christchurch, where the mother lived, to Wellington, where he had family. He relied on a ‘good faith’ defence and claimed that the child complained to him that she was being ill-treated by the mother and others while in the mother’s care. He had reported his concerns to the Department of Social Welfare but nothing had been done. He decided to keep her with him at least until matters had been resolved to his satisfaction.
59. The Court of Appeal held that the good faith defence may not be relied on by a person who obtains possession of a child in circumstances giving rise to a claim of a good faith right to possession but who subsequently acts in a way which may amount to an offence against s 210(1)(a).<sup>17</sup> The Court held that the father initially had the right to ‘possess’ the child under the access arrangement. The ‘detaining’ began from the point the father failed to return the child to the mother at the end of the agreed period of access.
60. The Court of Appeal also considered the ‘good faith defence’ in s 210A of the Crimes Act in *R v Lichtwark*.<sup>18</sup> This case involved a four-year-old boy. He lived with his parents, but the family situation was being overseen by the Department of Child Youth and Family Services (“CYFS”).
61. Subsequently, the Hamilton District Court granted custody of the child to the Chief Executive of CYFS. The child’s parents went on holiday to Australia. CYFS placed the child in the care of his grandparents. The child’s parents returned from Australia. CYFS informed them that the grandparents were now his caregivers but that arrangements would be made for the parents to visit the child from time to time.
62. For the next three months or so the parents unsuccessfully tried to get permission through CYFS to see the child. They tried to take the child from his grandparents. An argument developed. The parents took the child and drove him to Hamilton and then to Morrinsville and later to Raglan. Eventually they handed the child back to the Police.
63. The father was convicted of abducting the child.

<sup>12</sup> *R v Hou* CA 293-04, 22 February 2005.

<sup>13</sup> [2006] NSWCCA 392.

<sup>14</sup> Supra note 12 at [12]. This case concerned s 209 of the Crimes Act, which also uses the term ‘detains’ and so is relevant by analogy.

<sup>15</sup> *R v Tauiilili* (1996) 14 CRNZ 294.

<sup>16</sup> Supra note 15.

<sup>17</sup> Supra note 15 at 309, line 16.

<sup>18</sup> [2007] NZCA 542.

64. The Court of Appeal provided some guidance on the approach to be taken to s 210:<sup>19</sup>
- [19] If [the father of the child] considered that he was “lawfully” entitled to take this child away from the designated caregivers he had to point to whatever “possessory” right he considered he held in this case. Then if a defence of that character was raised, it was for the Crown to displace that alleged right, to the criminal law standard.
- [20] In this instance, the position in law was absolutely plain. Custody of the child was with the Chief Executive of CYFS, and by a proper process of delegation officers of that department had made arrangements for the care of the child. The hard fact of the matter is that [the father of the child] was without any “possessory rights” at the relevant time.”
65. The case is authority for the proposition that if a party claims ‘possession’ of a child, it must be justified.
66. The Court of Appeal also considered the requirements of proving a ‘good faith’ defence under s 201A of the Crimes Act. The Court of Appeal commented:<sup>20</sup>
- [28] In short, what this case was all about was that although [the father of the child] did not have lawful rights to possession of [the child], it might have been arguable that he genuinely thought he did have such rights.
67. The Court did not decide whether the belief has to be both honest and reasonable but commented that:<sup>21</sup>
- [31] The arguments may well be that on the one hand, in the criminal law both honesty and reasonableness are sometimes required. On the other hand, this is a rather special situation and the test should be simply one of honest belief in the right to “possession” – itself a somewhat bizarre term in this sort of context. “Reasonableness” would then be only an evidential indicator towards honesty or otherwise.
68. The Court of Appeal decided that the starting point in this case was to identify whether, as a matter of evidence, the father of the child ever said what his belief was and whether that was reasonable and credible.

### **Abduction of a Young Person Under 16 Years – The Evidential Test**

69. I have assessed whether there is evidence that is sufficient to support the allegation that Clara was abducted in New Zealand. The evidence set out below is available from objectively verifiable sources currently available to me.

### ***The defendant took, enticed, or detained a person under the age of 16 years***

#### Age restriction

70. Clara is ten years old on her next birthday on 3 July 2017. She satisfies the age restriction for this offence.

#### Persons responsible for actus reus

71. Mrs Hopfengärtner confirms that both she and her husband were responsible for bringing Clara to New Zealand in January 2015 and are responsible for the fact that she still live here:<sup>22</sup>
26. After leaving Germany for the last time in December 2014 we travelled and in 2015 we arrived in New Zealand and have remained in New Zealand until today, with the exception of a six-week holiday from April to May 2015.

<sup>19</sup> *R v Lichtwardt* [2007] NZCA 542 at [19]-[20].

<sup>20</sup> Supra note 19 at [28].

<sup>21</sup> Supra note 19 at [30] and [31].

<sup>22</sup> Supra, note 1, Affidavit of Lisa Hopfengärtner dated 31 March 2017 paras 26 and 28.

[...]

### **Life in New Zealand**

28. We arrived to New Zealand in Christchurch but after our travels to the North Island did not decide to return to Christchurch. Since March 2015, we have been living in the Coromandel Peninsula. During this time, we moved house only once, sometime around February 2016. The house we are currently in is only a 20-minute drive from the previous house and has an Orchard.

72. Mrs Hopfengärtner and her husband are the correct individuals to investigate.

### **Took, enticed, or detained**

73. Consistent with the definitions in the case law, Clara was ‘taken away’ from Germany when Mr and Mrs Hopfengärtner took her out of the country. Clara may have been ‘detained’ at the same time. If not, she has been ‘detained’ by Mr and Mrs Hopfengärtner since they arrived in New Zealand, because they have kept her here.

### ***The taking, enticement, or detention was deliberate or intentional***

74. There is clear evidence that Mr and Mrs Hopfengärtner deliberately and intentionally flew to New Zealand with Clara and her sister. In her affidavit for the Application Mrs Hopfengärtner states:<sup>23</sup>

54. We all travelled on our legal passports as I officially and without false pretences obtained a passport at a German embassy - we are using our legal names and have obtained our legal status in NZ. We have never lived a life of deception or anything of the like. We travelled to New Zealand legally and are open about our story and our German background with friends in New Zealand.

75. Mr and Mrs Hopfengärtner have both filed affidavits in the Hague Convention proceedings advising that they have no intention of returning to Germany [Affidavit of Lisa Hopfengärtner dated 31 March 2017, paras 59-60 and 67-68; Affidavit of Simon Hopfengärtner dated 31 March 2017, para 18].

### ***The taking, enticement, or detention was from a person who had lawful care of the young person***

76. Mrs Hopfengärtner had lawful custody of Clara until 17 December 2014, and you only had a right of access. As of 17 December 2014, you had lawful custody of Clara. The District Court decision was sent to Mrs Hopfengärtner’s lawyer on 23 December 2014.<sup>24</sup> You have advised that under German law the custody decision was effective on that date.

### ***The defendant knew the other person had lawful care of the young person***

77. At sometime between 17 December 2014 and 21 January 2015, Mrs Hopfengärtner became aware that she lost custody. The New Zealand courts may ‘deem’ Mrs Hopfengärtner to have known you had custody of Clara on either 17 December 2014 (when the court decision was made) or 23 December 2014 (when the court decision was sent to her). If not, she admits she knew by 21 January 2015 when she filed an appeal against that decision but effectively admits to being disengaged from the appellate proceedings and disinterested in the outcome:<sup>25</sup>

51. I filed the appeal with the court against the sole custody decision of the District court [...]

78. At some time in January 2015, Mr and Mrs Hopfengärtner 2015 arrived in New Zealand with Clara and her sister Lotte. The date of their arrival has not been confirmed. Mrs Hopfengärtner

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<sup>23</sup> Supra, note 1, Affidavit of Lisa Hopfengärtner dated 31 March 2017, para 54.

<sup>24</sup> Supra note 4, page 12.

<sup>25</sup> Supra note 1, Affidavit of Lisa Hopfengärtner dated 31 March 2017, para 51.

can still be guilty of abduction based on events that occurred after they entered New Zealand. By her own admission, Mrs Hopfengärtner knew you had been granted custody at least by 21 January 2015 and intentionally kept Clara from you from that date. This is sufficient to prove a charge of abduction. From that point in time, Clara was abducted because she had been 'detained' (i.e. kept away from you) by Mr and Mrs Hopfengärtner. New Zealand courts would have had jurisdiction over this offence as soon as the family entered at the border.

***It was done with intent to deprive a parent, guardian, or other person having lawful care or charge of the young person of possession of that young person***

79. Mrs Hopfengärtner limited or embargoed your access to Clara for many years:<sup>26</sup>

Although the respondent, after the couple's separation in 2009, initially enabled contact between the applicant and daughter Clara in Moenchengladbach, she increasingly restricted contact over the years and finally prohibited further contact by residing together with the daughter and her current family at an unknown location.<sup>27</sup>

While initially supporting contact with the father after the separation, she later ignored court decisions and did not allow the Applicant to have access to the child.<sup>28</sup>

80. In the Decision of District Court Fürth, Germany from 17.12.2014, page 2, notes:

Since 2010, the parties to the proceedings have been in a dispute over the contact the claimant has with his daughter. While the claimant [applicant] seeks to have regular contact with his daughter, the defendant [respondent], for years, has been trying to completely thwart his right of access where possible. ... None of the ordered Right of Access arrangements were ever fully adhered to by the defendant [respondent].

81. This is demonstrated by a multitude of court decisions and agreements concerning the right of access that you refer to in your email to me:

Access Agreement, District Court Ansbach, Germany, 08.07.2010 (Az 1 F 636/10); Access: 6 days / month in Mönchengladbach, Germany; Agreement, District Court Ansbach, Germany, 14.04.2011 (Az 1 F 310/11); Access: Access: 6 days / month in Mönchengladbach, Germany; Access Agreement, Higher Regional Court Nuernberg, Germany, 06.02.2012 (Az 9 UF 1266/11); Access: 5 days / month in Mönchengladbach, Germany; Court Decision, District Court Fürth, Germany, 09. Juli 2013 (Az 201 F 970/12); Access: 3 days every 2 weeks 14 in Mönchengladbach and in Bayaria and 50% of school vacation; Court Decision, District Court Fürth, Germany, 06.12.2013 (Az 201 F 970/12); Access: 3 days in a month in Mönchengladbach, Germany and 50% of school vacation; Court Decision, Higher Regional Court Nuernberg, Germany, 28.03.2014 (Az 9 UF 53/14 ); Access: 3 days in a month in Mönchengladbach, Germany and 50% of school vacation; Partly transfer of the custody for the child to a third party Doris Zimmermann to ensure access of Clara to her father.

82. You have also referred to expert reports which describe the difficulties in the right of access: Dr. Marianne Schwabe-Höllein (University of Regensburg) 31.01.2013; Prof. Dr. Karl Westhoff (University of Dresden) 05.03.2013; and Prof. Dr. Karl Josef Kluge (University of Cologne) 29.05.2013.

83. Mrs Hopfengärtner admits that she and her husband kept their location a secret. In her affidavit for the Application she states:<sup>29</sup>

I acknowledge that my husband and I did not tell anyone where we were going when we left Germany. The reason for that was most of all that our family and friends had already been dragged into unbearable situations based on the false testifying of the applicant.

84. There is clear evidence that, for whatever reason, they intended to prevent Clara from seeing you.

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<sup>26</sup> Supra note 4.

<sup>27</sup> Supra note 4, page 1.

<sup>28</sup> Supra note 4, page 12.

<sup>29</sup> Supra note 1, Affidavit of Lisa Hopfengärtner dated 31 March 2017, para 53.

***The taking, enticement, or detention was ‘unlawful’***

85. In determining whether the abduction was ‘unlawful’ the courts would take into account any legal justification she might put forward. This includes the serious allegations that Mrs Hopfengärtner has made against you. She states that you frequently threatened her, were violent with her, and that you have ‘waged a war’ against her. She states that you are aggressive and abusive to her, to family (including her 81-year-old grandmother) and to her professional colleagues, and that you have engaged in relentless litigation, stalking, and writing letters to friends and neighbours.<sup>30</sup> I note that you also refer to a rape allegation in your email correspondence.
86. The courts may consider whether there is a factual basis for an allegation that Mrs Hopfengärtner needed to hide Clara from you to keep her safe. It will be a matter of evidence as to whether her other claims can be proven.

***Good faith defence - s 210A of the Crimes Act***

87. If Mrs Hopfengärtner can show she had the legal right to ‘possess’ Clara, she may have a defence to an abduction charge.
88. In her affidavit for the Application Mrs Hopfengärtner states:<sup>31</sup>
50. [...] I left Germany [...] at the end of 2014. I entered New Zealand in January 2015. This is important as we left Germany in 2014, significantly before the decision was made and most importantly, while I was still holding sole custody of Clara.
51. I filed the appeal with the court against the sole custody decision of the District court but stopped responding in this case when I wasn’t able to access the information anymore and the psychologist stated he would rather decide based on the 2-year-old file than telephoning or emailing me.
52. As the surrender decision was only issued in October 2016, I don’t see how the custody decision was valid before the decision of the High Court.
89. Mrs Hopfengärtner effectively claims that she initially thought she had a legal basis for taking Clara. Even if Mrs Hopfengärtner initially had custody of Clara, that changed (as a matter of law) when the District Court granted you custody.
90. The courts in New Zealand will consider the honesty and reasonableness of Mrs Hopfengärtner’s belief and the credibility of her assertions.
91. Mrs Hopfengärtner claims to have been ignorant about the implications of the District Court decision and then, became disengaged from the proceedings Section 25 of the Crimes Act in New Zealand provides for this situation:

**25 Ignorance of law**

The fact that an offender is ignorant of the law is not an excuse for any offence committed by him or her.

92. Mrs Hopfengärtner also states that she thought her appeal against the decision granting you custody needed to be resolved before you had lawful care of Clara. The courts would look at all of the facts to determine whether this was credible.
93. Mrs Hopfengärtner seems to have disengaged from the court proceedings in Germany and claims that she did not know the result of her appeal. For her defence to be successful, the courts would have to believe that her explanation was honest, credible and reasonable.

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<sup>30</sup> Supra note 1, Affidavit of Lisa Hopfengärtner dated 31 March 2017 paras 6 to 19.

<sup>31</sup> Supra note 1, Affidavit of Lisa Hopfengärtner dated 31 March 2017, paras 50 and 52.

94. As it was her appeal, it would be reasonable to infer that Mrs Hopfengärtner would be interested in, and aware of, the outcome. The courts would take into account evidence that she consciously and intentionally ignored the proceedings and wilfully avoided being advised of or making enquiries about the outcome, if that was the case. I discuss this further below in relation to s 210A of the Crimes Act.
95. If Mrs Hopfengärtner's appeal had been successful she would, without doubt, have known about and relied on the decision.
96. She had been engaged until at least March 2016 and the decision followed shortly after that. Her lawyer filed a written pleading for the appeal on 21 January 2015 and in a letter dated 1 March 2015, signed "p.p. Charlotte Weber". Mrs Hopfengärtner gave her reasons for the appeal to the Higher Regional Court Nürnberg.<sup>32</sup> You have advised that on 17 March 2015, the respondent delivered her German address for further correspondence. Mr and Mrs Hopfengärtner were living in New Zealand when the Nürnberg-Fürth Higher Regional Court was considering her appeal and, until three months before the decision was issued she was actively participating in the appeal process. Presumably, she had a lawyer acting for her, and may well have had to pay the lawyer's fees.
97. The courts would also take into account whether this disengagement from Europe was partly related to the European arrest warrant issued against Mr Hopfengärtner; to the proceedings against Mrs Hopfengärtner for 'breach of trust' for misappropriating Clara's EUR100,000.00 inheritance money; to the costs award against Mrs Hopfengärtner requiring her to pay you EUR 21,086 in relation to the child abduction in Germany; and to the three damages orders against Mr Hopfengärtner, requiring him to pay you EUR 10,871 for the vehicle incident in September 2013.
98. It is arguable that Mrs Hopfengärtner could easily have contacted her lawyer to find out the result of the appeal and deliberately did not do so, in order to remain ignorant of the outcome. Even so, Mr and Mrs Hopfengärtner would both have known that you had sole parental custody of Clara when they received your Application, and at the latest when the decisions of the German courts were filed by the Central Authority.
99. New Zealand courts are likely to infer that Mrs Hopfengärtner knew you had custody of Clara when, or shortly after, they arrived in New Zealand. Mr and Mrs Hopfengärtner would both have known that you had sole parental custody of Clara when they received your Application, and at the latest, when the decisions of the German courts were filed by the Central Authority. She had no right to 'possess' Clara at that time and so is unlikely to be able to rely on a 'good faith defence.
100. The case of *Tauiliili* is relevant (see above). Even if Mrs Hopfengärtner initially had the right to 'possess' your daughter under the previous custody arrangement, the 'detention' began from the point that she failed to return Clara to you when she knew you had been granted sole custody. From the moment that Mrs Hopfengärtner knew that the District Court had granted you custody, she cannot demonstrate a lawful right to 'possess' Clara. Clara was 'detained' from that date and continues to be 'detained' today.
101. New Zealand courts are highly unlikely to permit Mr and Mrs Hopfengärtner to rely on a good faith defence in these circumstances. That will only change if she is successful in the Application process.

### **Conclusion – Abduction of a Young Person Under 16 Years**

102. In my view, the New Zealand courts are likely to find that Mrs Hopfengärtner knew you had custody of Clara, at least from 21 January 2015.
103. Clara was 'detained' (or kept) in New Zealand from the time her mother knew you had sole custody. From that point in time, New Zealand courts had jurisdiction over the offence. It is

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<sup>32</sup> Supra note 4, page 5.

unlikely that Mrs Hopfengärtner can rely on a 'good faith' defence from that point.

104. At present, on the basis of the information that is available, you could make a complaint to the Commissioner of Police that Clara was abducted by Mrs Hopfengärtner in New Zealand because she 'detained' or 'kept' Clara here to prevent you having access. Mrs Hopfengärtner admits that on 21 January 2015 she knew you had been granted custody of Clara. This could amount to the offence of 'abduction by detaining' under s 210(1) of the Crimes Act unless Mrs Hopfengärtner has a justifiable defence for her actions.

### **Party or principal offender**

105. It is unclear whether Mr Hopfengärtner would be viewed as a principal or a party to the alleged abduction. This will depend on the evidence that the Police obtain about the extent of his participation during their investigation.

## **2 Conspiracy to Abduct a Young Person Under 16 Years**

106. It might also be possible to lay a complaint that there was a conspiracy to abduct Clara to prevent you from seeing her. However, information on three crucial dates is still missing:
- a. The date that Mr and Mrs Hopfengärtner left Germany with Clara.
  - b. The first time that Mrs Hopfengärtner knew you had been granted sole parental custody of Clara.
  - c. The date that Mr and Mrs Hopfengärtner arrived in New Zealand.
107. These dates are essential to a precise legal analysis of the facts. They are necessary for determining whether there was a conspiracy between Mr and Mrs Hopfengärtner to abduct Clara in Germany or in New Zealand (ss 210 and 310 of the Crimes Act). The dates will be important for the New Zealand Police so that they can decide how many separate charges they could potentially lay against Mrs Hopfengärtner.

### **The Crime**

108. Conspiracy is defined in s 310 of the Crimes Act:

#### **310 Conspiring to commit offence**

- (1) Subject to the provisions of subsection (2) of this section, everyone who conspires with any person to commit any offence, or to do or omit, in any part of the world, anything of which the doing or omission in New Zealand would be an offence, is liable to imprisonment for a term not exceeding 7 years if the maximum punishment for that offence exceeds 7 years' imprisonment, and in any other case is liable to the same punishment as if he had committed that offence.
- (2) This section shall not apply where a punishment for the conspiracy is otherwise expressly prescribed by this Act or by some other enactment.
- (3) Where under this section any one is charged with conspiring to do or omit anything anywhere outside New Zealand, it is a defence to prove that the doing or omission of the act to which the conspiracy relates was not an offence under the law of the place where it was, or was to be, done or omitted.

109. Adams on Criminal Law summarises the 'essence' of conspiracy as:

The agreement to commit a substantive offence. The agreement need not be carried to fruition, indeed no steps to implement it need be taken, but there must have been an intention that such steps would be taken.<sup>33</sup>

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<sup>33</sup> Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Westlaw) at [CA310.01 and CA310.04].

## Jurisdiction

110. New Zealand courts have jurisdiction over conspiracies where the agreement to commit a substantive offence is made in New Zealand and carried out in New Zealand.
111. They also have jurisdiction over cases where an agreement is made in a foreign country, if one act or omission, forming part of an offence, or any event necessary to the completion of any offence, occurs in New Zealand. An agreement to a conspiratorial act made outside New Zealand is justiciable in New Zealand if it is implemented here.
112. The commentary in Adams on Criminal Law explains:

A conspiracy is frequently stated to be complete on the making of the agreement to commit an offence [...]

“Complete” in this sense means simply that all that is necessary for the offence has occurred. It does not mean that the offence is “completed” in the sense that it is over: *R v Johnston* (1986) 2 CRNZ 289 (CA), at 291, where it was said, at 290–291:

‘a conspiracy does not end with the making of the agreement. The conspiratorial agreement continues in operation and therefore in existence until it is ended by completion of its performance or abandonment or in any other manner by which agreements are discharged: *R v Sanders [conspiracy]* [1984] 1 NZLR 636; *Director of Public Prosecutions v Doot* [1973] AC 807.’<sup>34</sup>

113. The Court of Appeal decision in *R v Sanders* is the leading authority on whether New Zealand courts have jurisdiction over conspiracies where an agreement is reached overseas but the substantive crime in ‘completed’ in New Zealand.<sup>35</sup>
114. The case involved a conspiracy to import heroin into New Zealand. Miss Sanders and her boyfriend *Laurent* lived in Australia. They decided to pool their money so that Laurent could go to Thailand to purchase heroin, which he would then take to New Zealand to sell. Laurent purchased heroin and flew to Auckland. Ms Sanders went to the airport to meet him. Laurent was arrested by the Police and was found concealing heroin.
115. The Court of Appeal considered whether the conspiracy was ‘complete’ in Australia, and therefore, outside the jurisdiction of the New Zealand courts. The Court focussed on the interpretation of s 7 of the Crimes Act as follows:

[...] the very words of s 7 “where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand” contemplate that not all acts or omissions forming part of the offence need be committed in New Zealand; some, perhaps almost all, may occur outside. It is sufficient if one act or omission forming part of the offence or “any event necessary to the completion of any offence” occurs in New Zealand. In the use of these words s 7 effectively recognises that the ingredients of a crime may be satisfied by activity that continues on from some earlier starting point.<sup>36</sup>

116. The Court of Appeal held that it had jurisdiction in conspiracy cases where an agreement is made in a foreign country, if one act or omission, forming part of an offence, or any event necessary to the completion of any offence, occurs in New Zealand.

## Case Law on Conspiracy

117. The case law on conspiracy in New Zealand can be distilled as follows:<sup>37</sup>
- a. The crime is complete when the agreement is made<sup>38</sup> although it may continue until

<sup>34</sup> Supra note 34.

<sup>35</sup> *R v Sanders* [1984] 1 NZLR 636 at 640.

<sup>36</sup> Supra note 36 at 639 – 640.

<sup>37</sup> The Laws of New Zealand, Criminal Law, Part V, Offences (19) Clause 96.



abandoned or its object is completed.<sup>39</sup>

- b. The *mens rea* necessary for a conspiracy requires an intention to achieve a design held in common with at least one other person.<sup>40</sup> The intention must be ‘common to the mind of the conspirators and the manifestation of that intention by mutual consultation and agreement among them’.<sup>41</sup>
- c. The *actus reus* of conspiracy is the agreement between two or more people to put their common design into effect.<sup>42</sup> More than mere intention is required.<sup>43</sup>
- d. The agreement must be made prior to the commission of the acts that make up the full offence and the object of the conspiracy.<sup>44</sup>
- e. Although a conspiracy is complete on the making of the agreement, it continues while there are two or more people still intent on bringing the common design into effect.<sup>45</sup>
- f. The accused’s agreement must further the commission of the crime or have a causal effect on its commission before he or she can come within the scope of the conspiracy.<sup>46</sup>
- g. It is not necessary to prove a connection between a conspiratorial agreement and the commission of any agreed offence.<sup>47</sup>

118. Proof that an agreement has been reached can come from an admission from one or more of the conspirators. Otherwise, proof of the agreement will need to be established by drawing inferences from the evidence that is available.

### Conspiracy – The Evidential Test

119. I have assessed whether there is evidence available from objectively verifiable sources to suggest that Mr and Mrs Hopfengärtner reached an agreement to abduct Clara *either* in Germany *or* in New Zealand.

120. In my view, there is a factual and legal basis for a cautiously worded complaint alleging that, to keep Clara from you, Mr and/or Mrs Hopfengärtner:

- a. Entered into a conspiratorial agreement to abduct Clara in Germany. Then, the substantive crime was ‘completed’ in New Zealand.
- b. Entered into a conspiratorial agreement to abduct Clara in New Zealand.

### Agreement in Germany

121. The key issue will be whether Mr and Mrs Hopfengärtner knew you had been granted sole custody of Clara before they left Germany, and if not, whether they had decided to implement a contingency plan in case that happened. Inferences for and against the proposition that a conspiracy was entered into in Germany, could be drawn from the factors set out below, considered both separately and in combination.

122. Mr and Mrs Hopfengärtner left Germany without telling you. They appear not to have informed the court they were leaving and or say where they were going.<sup>48</sup> Mrs Hopfengärtner accepts that she and her husband did not tell anyone where they were going. She says this was because she

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<sup>38</sup> R v Gemmell [1985] 2 NZLR 740 (CA) 743.

<sup>39</sup> Supra note 36.

<sup>40</sup> Supra note 39 at 734 - 745 paras 18 - 29.

<sup>41</sup> Supra note 39 at 734 - 745.

<sup>42</sup> Supra note 39 paras 10 - 12.

<sup>43</sup> Gary Turkington and Ian Murray (eds) *Garrow and Turkington's Criminal Law in New Zealand* (online loose-leaf edition, LexisNexis) at [CRI310.4].

<sup>44</sup> R v Richards [Conspiracy] (1992) 9 CRNZ 403.

<sup>45</sup> Supra note 36 at 639 - 640.

<sup>46</sup> Supra note 45 at 411.

<sup>47</sup> See also R v Morris (Lee) [2001] 3 NZLR 759 (CA).

<sup>48</sup> Supra note 4, page 2.

was protecting her wider family and colleagues from you.<sup>49</sup>

123. New Zealand courts would have no jurisdiction over an abduction that occurred in Germany. So, New Zealand Police may consider that the state of Mr and Mrs Hopfengärtner's knowledge at that time is only relevant if New Zealand Police investigate whether there was a conspiracy to bring Clara to New Zealand.
124. The timing of their departure from Germany will be a relevant, but not necessarily a determinative, factor. As discussed above Mrs Hopfengärtner states in her affidavit that they left Germany in December 2014. She emphasises that this was before the District Court delivered its decision granting you sole custody of Clara.<sup>50</sup>
125. However, it may be irrelevant whether they left Germany before or after the District Court granted you custody of Clara. There may be evidence that they put a contingency plan in place in case you were granted sole custody of Clara.
126. There is no direct evidence available to me to confirm whether Mrs Hopfengärtner may have been informed about the District Court's decision granting you sole custody of Clara before they left Germany. However, there is evidence from which this case be inferred.
127. You have advised that Mrs Hopfengärtner was an active participant throughout the Family Court procedure (Email dated 16 April 2017). This evidence includes:
  - a. The English translation of the decision of the Nürnberg-Fürth Higher Regional Court notes (at page 4) that Mrs Hopfengärtner did not appear at the oral Family Court proceedings in the District Court Fürth on 26 November 2014. However, she was represented by a lawyer.
  - b. You have advised that on 27 November 2014 there was an appointment at District Court at Fürth with Mrs Hopfengärtner's lawyer Mr Bernd Kreuzer.
  - c. You have advised that on 12 December 2014 the District Court at Fürth received an undated written statement from the Mrs Hopfengärtner.
128. On 17 December 2014, you were granted custody by the District Court of Fürth.
129. On 23 December 2014, Mrs Hopfengärtner's counsel was served with that decision. You have advised that under clause 172 ZPO of German Civil Law Procedure, decisions of the German courts are only served on counsel. The parties are not served personally.
130. Mr and Mrs Hopfengärtner may have been informed about the District Court's decision granting you sole custody of Clara before they left Germany. Mrs Hopfengärtner disputes this. In her affidavit for the Application she states:<sup>51</sup>
  50. The applicant has relied upon the assertion that I left Germany in 2015, however, I left at the end of 2014. I entered New Zealand in January 2015. This is important as we left Germany in 2014, significantly before the decision was made and most importantly, while I was still holding sole custody of Clara. I have never personally received any of the court orders, decision, arrest warrants etc that now form part of the applicant's application.<sup>52</sup>
131. If Mrs Hopfengärtner knew for certain that she had custody of Clara when they left Germany, then presumably it is because she had made enquires and quite possibly asked her lawyer. He withdrew from the case shortly afterwards.
132. The courts in New Zealand may want to know why she did not continue to make those

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<sup>49</sup> Supra note 1, Affidavit of Lisa Hopfengärtner dated 31 March 2017, para 53.

<sup>50</sup> Supra note 1, Affidavit of Lisa Hopfengärtner dated 31 March 2017, para 50.

<sup>51</sup> Supra note 1, Affidavit of Lisa Hopfengärtner dated 31 March 2017, paras 50-51.

<sup>52</sup> Supra note 1, Affidavit of Lisa Hopfengärtner dated 31 March 2017.

enquiries. She would have known that the District Court decision would be due. This may be sufficient for a court to conclude that she would have known about the custody decision unless she wilfully disregarded the court processes and failed to make those enquiries. The strength of the inference the courts can draw will depend on the strength of the evidence and the weight that can be given to it.

133. A court would take into account evidence that Mrs Hopfengärtner had an on-going and long-standing pattern of denying you access to Clara (as discussed above). A court would take into account evidence of their plan to travel to New Zealand; whether they travelled to other countries before they arrived in New Zealand; whether they purchased return or one-way air tickets; if they purchased return tickets, whether it demonstrates the intention to take a short holiday in New Zealand or to stay longer.
134. Other relevant evidence that a court would take into account would include information on whether they applied for visas or made arrangements for work, school, or general living before they arrived in New Zealand. This could include information on whether Mr Hopfengärtner made enquiries with professional registration bodies about working in New Zealand and whether their immigration papers contain false information.
135. A court would also weigh up the inference that Mr and Mrs Hopfengärtner left Germany to evade the arrest warrants and court judgments in Germany. Proof that Clara's assets were misappropriated would also be a significant consideration and may suggest conspiratorial agreements of a different nature. Any discussions they had with other people in Germany or New Zealand about why they intended to bring Clara to New Zealand would also be important.
136. There are more questions than answers on whether there is sufficient evidence to prove that Mr and Mrs Hopfengärtner made an agreement to abduct Clara in Germany. What is clear is that they decided to come and they hid her here to prevent you from seeing her.

### ***Agreement in New Zealand***

137. It would be easier to prove that Mr and Mrs Hopfengärtner made an agreement to abduct Clara in New Zealand. Clara was kept secretly in New Zealand. An agreement to detain her (by keeping her here) could have been made at several different points in time after they arrived in New Zealand or may have evolved over time. They clearly intended to stay. This is evident from the fact that Mr and Mrs Hopfengärtner have both filed affidavits in the Hague Convention proceedings advising that they have no intention of returning to Germany.<sup>53</sup>

### **Proof of the Substantive Crime**

138. Conspiracy is an inchoate offence. That means that it anticipates or is preparatory to a further criminal act. In this case, the conspiracy relates to the allegation that Clara has been abducted (s 210 of the Crimes Act). My assessment of evidential sufficiency for an abduction charge is set out above.

### **Conclusion on Conspiracy**

139. There are gaps in the evidence that would be required to prove a conspiracy in either Germany or New Zealand. The evidence of the agreement required to prove a conspiracy is based on inferences that can be drawn from Mr and Mrs Hopfengärtner's actions. This is to be expected as many of the facts will not be known until a full Police investigation has been conducted into the facts.
140. A formal mutual assistance request to German authorities may be required to get official copies of the judgment awarding you custody (although the versions sent by the Central Authority for the Hague Convention are useful in the meantime).

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<sup>53</sup> Supra note 1, Affidavit of Lisa Hopfengärtner dated 31 March 2017, paras 59-60 and 67- 68; Affidavit of Simon Hopfengärtner dated 31 March 2017, para 18.

141. A request to the New Zealand Commissioner of Police to request a Police investigation into a conspiracy would need to be phrased cautiously.

## **C PUBLIC INTEREST**

142. The Commissioner of Police would need to consider whether there is a public interest in investigating this case. He will need to be convinced that there is a positive public interest in using criminal processes in a dispute about the custody of a child and about who should have “possession and control” of the child. The Police may consider recourse to the criminal law inappropriate when the Application is already before the Family Court. It would be important to demonstrate that this is a serious case of child abduction and requires the deterrent force of the criminal law.
143. There is also a broader public policy issue in ensuring that New Zealand is not seen as a safe haven for people who are ‘on the run’ with children.
144. I understand that Interpol has activated a border alert for Clara to prevent her from leaving New Zealand. Presumably, even if Clara is returned to you, you may have to make a formal application to discharge the orders that prevent her from leaving New Zealand.

## **OTHER CRIMES**

145. There may also be a basis for a complaint to the New Zealand Police that Mr and/or Mrs Hopfengärtner being misappropriated Clara’s inheritance money while they were in New Zealand. There may be criminal law questions about whether she used false pretences to enrol Clara in two schools in the name Hopfengärtner. It is not unusual in New Zealand for children to use different names. The issue may be whether Mr and Mrs Hopfengärtner used this name to avoid paying international student fees.
146. You have written to the Minister of Education about this. When the information arrives I would be in a position to assess its implications.
147. Finally, you are waiting for information from Immigration New Zealand about whether the immigration papers filed by Clara’s mother in New Zealand contain accurate and necessary information. When the information arrives I would be in a position to assess the implications for you.

## **CONCLUSION**

148. I will prepare a letter to the Commissioner of Police for you to send requesting that he conduct an investigation into when, how, and why her mother and stepfather took Clara from Germany to New Zealand. It would be important to convince the Police that the family law processes are not sufficient and to demonstrate that this is a serious case of child abduction that requires the deterrent force of the criminal law.

Yours faithfully



Andra Mobberley  
Electronic Signature

## APPENDIX A – RELEVANT EXTRACTS FROM NEW ZEALAND LEGISLATION

### Crimes Act 1961

#### 6 **Persons not to be tried in respect of things done outside New Zealand**

Subject to the provisions of section 7, no act done or omitted outside New Zealand is an offence, unless it is an offence by virtue of any provision of this Act or of any other enactment.

#### 7 **Place of commission of offence**

For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event.

#### 210 **Abduction of young person under 16**

- (1) Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to deprive a parent or guardian or other person having the lawful care or charge of a young person of the possession of the young person, unlawfully takes or entices away or detains the young person.
- (2) Every one is liable to imprisonment for a term not exceeding 7 years who receives a young person, knowing that he or she has been unlawfully taken or enticed away or detained with intent to deprive a parent or guardian or other person having the lawful care or charge of him or her of the possession of him or her.
- (3) For the purposes of subsections (1) and (2), —
  - (a) It is immaterial whether the young person consents, or is taken or goes or is received at his or her own suggestion; and
  - (b) It is immaterial whether the offender believes the young person to be of or over the age of 16.
- (4) In this section **young person** means a person under the age of 16 years.

#### 210A **People claiming in good faith right to possession of young person under 16**

A person who claims in good faith a right to the possession of a young person under the age of 16 years cannot be convicted of an offence against section 209 or section 210 because he or she gets possession of the young person.

#### 310 **Conspiring to commit offence**

- (1) Subject to the provisions of subsection (2) of this section, everyone who conspires with any person to commit any offence, or to do or omit, in any part of the world, anything of which the doing or omission in New Zealand would be an offence, is liable to imprisonment for a term not exceeding 7 years if the maximum punishment for that offence exceeds 7 years' imprisonment, and in any other case is liable to the same punishment as if he had committed that offence.
- (2) This section shall not apply where a punishment for the conspiracy is otherwise expressly prescribed by this Act or by some other enactment.
- (3) Where under this section any one is charged with conspiring to do or omit anything anywhere outside New Zealand, it is a defence to prove that the doing or omission of the act to which the conspiracy relates was not an offence under the law of the place where it was, or was to be, done or omitted

**16 Responsibilities and independence of Commissioner**

- (1) [...]
- (2) The Commissioner is not responsible to, and must act independently of, any Minister of the Crown (including any person acting on the instruction of a Minister of the Crown) regarding—
  - (a) The maintenance of order in relation to any individual or group of individuals; and
  - (b) The enforcement of the law in relation to any individual or group of individuals; and
  - (c) The investigation and prosecution of offences; and
  - (d) Decisions about individual Police employees.