

SUPREME COURT OF QUEENSLAND

CITATION: *Lawrie & Anor v Hwang & Ors* [2012] QSC 422

PARTIES: **KEITH JOHN LAWRIE** by his litigation guardian **THE PUBLIC TRUSTEE OF QUEENSLAND**
(first plaintiff)
LAWMAR PTY LTD
ACN 009 775 866
(second plaintiff)
v
KUMOK HWANG
(first defendant)
SUNCORP-METWAY LIMITED
ACN 010 831 722
(second defendant)
GOLDPEARL PTY LTD
ACN 154 717 281
(third defendant)

FILE NO/S: SC No 9495 of 2012
SC No 9404 of 2012

DIVISION: Civil

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 18 December 2012

DELIVERED AT: Brisbane

HEARING DATE: 5–7 December 2012

JUDGE: Philippides J

ORDER: **Order as per draft judgment as initialled**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – FOLLOWING TRUST PROPERTY – GENERALLY – where transactions transferring substantial amounts from various accounts – where first plaintiff suffered from mental impairment – whether first plaintiff lacked capacity and authority to make decisions regarding financial matters – whether first defendant acted dishonestly – whether first defendant exerted undue influence – whether third defendant knowing recipient of the funds – whether first and third defendants are constructive trustees – whether concurrent orders should be made

COUNSEL: D B O’Sullivan with S J Webster for the plaintiffs
G Shoebridge for the first defendant (by leave to make limited submissions)

No appearance for the second and third defendants

SOLICITORS: The Official Solicitor to the Public Trustee of Queensland for the plaintiffs
 No solicitors on the record for the first defendant
 No appearance for the second and third defendants

PHILIPPIDES J:

Background

- [1] The present proceeding is brought by Keith John Lawrie (“Mr Lawrie”), by his litigation guardian, the Public Trustee of Queensland as first plaintiff and Lawmar Pty Ltd (“Lawmar”) as second plaintiff.
- [2] Mr Lawrie is 82 years of age, being born on 18 October 1930. Lawmar was the corporate vehicle through which he as director conducted various business enterprises.
- [3] The proceeding is brought against the first and third defendants (the claim against the second defendant is no longer pursued). The first defendant, Kumok Hwang (“Ms Hwang”) was born on 25 November 1957, being 55 years of age and of South Korean descent. The third defendant, Goldpearl Pty Ltd (“Goldpearl”) was incorporated on 9 December 2011, with Ms Hwang as its sole director and shareholder.
- [4] The claims involve transactions transferring very substantial amounts totalling some \$3 million which were transferred from Lawmar bank accounts. These transactions include a transaction on 8 November 2011 purporting to terminate a term deposit account held by Lawmar and to authorise the transfer of \$2,640,030 held in that account to a joint account in the names of Mr Lawrie and Ms Hwang and subsequent transfers to other accounts. Additionally, they include various transactions from June 2011 to January 2012 involving accounts held by Lawmar amounting to \$361,451.36 (together the relevant transactions).
- [5] Concurrent claims are made for a declaration of constructive trust, and for money orders. The constructive trust claim is said to arise by reason of Ms Hwang’s fraud, by reason of her undue influence and by reason of Mr Lawrie’s lack of capacity and authority. The money judgment sought is to give effect to three distinct claims:
 - (a) an account by Ms Hwang as constructive trustee, for the value of the money received;
 - (b) money had and received by Ms Hwang to Lawmar’s use;
 - (c) equitable compensation for undue influence by Ms Hwang over Lawmar.
- [6] In respect of the claims brought against Ms Hwang and Goldpearl, judgment is sought on behalf of Lawmar only, on the basis that it is the entity which, it is claimed, the relevant funds were derived from.
- [7] As to Mr Lawrie’s mental incapacity, it is pleaded that since at least May 2011, Mr Lawrie had a frontal cerebral infarct that affected his planning, judgment and insight, and a parietal lesion that has affected his visuospatial skills and memory.

Since that time, he suffered from impaired short term memory function, impaired ability to make judgments about matters (other than simple matters), and dementia. He was therefore vulnerable to abuse and under a disability at the material times. He ceased to have capacity to act as a director of Lawmar from no later than May 2011. Mr Lawrie did not have the ability to understand the nature and effect of the relevant financial transactions even if they had been explained to him. (See Amended Statement of Claim (“ASOC”), paras [30]–[32].)

- [8] The plaintiffs pleaded that, at all material times, Ms Hwang knew or believed that Mr Lawrie suffered from the impaired short term memory and impaired judgment described above. Moreover, Ms Hwang knew or believed that Mr Lawrie was vulnerable to the manipulation and control of others, and that he did not have sufficient mental capacity to understand the nature and effect of the relevant transactions. On and from 24 August 2011, Ms Hwang knew that the Public Trustee of Queensland had been appointed as administrator for financial matters for Mr Lawrie for the purpose of safeguarding his assets. (See ASOC paras [33]-[35].)
- [9] The primary facts pleaded in relation to the fraud claim against Ms Hwang are Mr Lawrie’s mental incapacity and Ms Hwang’s knowledge of that incapacity.
- [10] It is pleaded that, notwithstanding this, Ms Hwang caused Mr Lawrie to enter into, and received the benefits of funds associated with, the relevant transactions. (See ASOC para [35].)
- [11] As to undue influence, the plaintiffs claimed that Ms Hwang was in a relationship of influence over Mr Lawrie at the relevant times and exercised undue influence over him in respect of both the 8 November 2011 transactions and the other transactions. (See ASOC para [37].)
- [12] Ms Hwang and Goldpearl’s alleged receipt and use of the relevant funds from the plaintiffs’ accounts is pleaded in ASOC paras [36] and [55]-[58].
- [13] Lawmar’s claim against Goldpearl is said to arise from the first limb in *Barnes v Addy* (1874) LR 9 Ch App 244. That is, it is claimed that Goldpearl was the knowing recipient of trust funds from Ms Hwang and that it acquired three businesses in 2012 (Castellis Fresh Pasta, Indooroopilly; Metro Car Wash, Yeronga; and The Music Kafe, West End) using part of the proceeds received from Ms Hwang which it is claimed originated from Lawmar.

Evidence

- [14] Among the orders made by Dalton J for the conduct of the hearing were orders for evidence in chief to be given by affidavit. The plaintiffs relied on affidavits provided by the following:
- (a) Mitchell Lawrie, Keith Lawrie’s son, whose affidavit concerned Mr Lawrie’s mental capacity, his concerns about Mr Lawrie’s vulnerability to financial abuse, the behaviour of Ms Hwang and his father following Ms Hwang’s arrival in Australia, and the reasons for his application to appoint the Public Trustee in mid 2011.
 - (b) William Kirby, a long term friend of Mr Lawrie, and his former solicitor and business adviser, who explained the origins of Mr Lawrie’s involvement with Korea, and addressed the behaviour of Ms Hwang and Mr Lawrie following

Ms Hwang's arrival in Australia, his concerns about Mr Lawrie's mental state and vulnerability.

- (c) Steven Lee, a Korean solicitor retained by the Official Solicitor to assist the investigation, whose affidavit exhibited and explained Korean bank statements and payment instructions.
- (d) Jennifer Waldon, Director of Legal Services in the office of the Official Solicitor to the Public Trustee, whose affidavits exhibited relevant documents, including bank statements and payment instructions.
- (e) Jay Cross, employed by the Public Trustee as an Assistant Manager for client files, who is presently responsible for the management of Mr Lawrie's file.
- (f) Robert Moran, employed by the Public Trustee as the Director for Capability and Performance, who visited Mr Lawrie in August 2012 and spoke to him about his bank accounts and financial position.
- (g) Garry Sweet, a private investigator who was retained by the Public Trustee to assist in this matter, whose evidence concerned the current status of Goldpearl and related matters.
- (h) Kyung-Joon Choi, a managing partner of Kim Chang Lee, a Korean law firm retained by the Public Trustee, who undertook property searches in Korea concerning two mortgages granted by Ms Hwang over her properties in Korea after freezing orders and injunctions were made by this court.
- (i) Dr Nicholas John, a specialist geriatrician, who saw Mr Lawrie on 11 November 2011 pursuant to a direction made by the Queensland Civil and Administrative Tribunal ("QCAT") made on 24 August 2011, and again in November 2012 for the purposes of the present proceeding.

[15] Insofar as evidence led by the plaintiffs contained hearsay, that evidence will be admitted, no objection being taken to its admission into evidence. Insofar as necessary, the court directs that such evidence be admitted pursuant to s 127A of the *Evidence Act (Qld)* and r 476(1) of the UCPR.

[16] While an application to appear to be heard on a limited basis was made (see below) on behalf of Ms Hwang's Korean solicitors' instructing counsel, no evidence was led by Ms Hwang and Goldpearl.

Relevant chronology

[17] The following chronology is established on the affidavit evidence before the court.

Bank accounts of Mr Lawrie and Lawmar

[18] Mr Lawrie had been in the business of, *inter alia*, designing, constructing and operating floating marina berths.¹ Lawmar, which was set up in 1968, was the corporate vehicle used for his business ventures. He later sold his business interests and since 2006, Lawmar was the entity through which Mr Lawrie held substantially all of his liquid assets.²

¹ Affidavit of W Kirby, paras [6], [97], exhibit WK-21 (p 141).

² Affidavit of W Kirby, paras [9], [97], exhibit WK-21 (p 141).

- [19] In May 2011, Mr Lawrie had himself, and through Lawmar, approximately \$4.4 million on deposit.³ The majority of these funds were held with Suncorp-Metway Ltd (“Suncorp”) and comprised:
- (a) a term deposit in the name of Lawmar for approximately \$2.64 million, which was renewed from time to time;⁴
 - (b) three transaction accounts in the name of Lawmar (a Cheque Account no. 41594443, a Savings Account no. 451858041, and an Everyday Account no. 602511398), with a total of about \$400,000 standing to their credit (“the Lawmar Transaction Accounts”);⁵
 - (c) an account in the name of the “Lawrie Superannuation Fund” with an account balance of about \$1.5 million.
- [20] Additionally, Mr Lawrie had a personal account with Suncorp, which had a balance of \$28,870.45 on 1 June 2011.⁶

Concerns about Mr Lawrie

- [21] Since about 2008, Mitchell Lawrie and William Kirby had become concerned about changes in Mr Lawrie’s behaviour, including forgetfulness, and an apparent lack of insight and judgment, particularly concerning his financial affairs – about which he was formerly astute.⁷ In December 2010 an Enduring Power of Attorney was made appointing Mr Kirby as attorney for financial, personal and health matters.
- [22] Their concerns escalated in early 2011, when both men became particularly troubled about Mr Lawrie’s vulnerability to fraud. This followed an incident where a female Korean student, who had been living with Mr Lawrie for some time, apparently misappropriated substantial sums. Mitchell Lawrie’s and William Kirby’s concerns about Mr Lawrie’s vulnerability to fraud became acute in late May 2011. Mr Lawrie had returned from a trip to South Korea with Ms Hwang. Ms Hwang told both Mitchell Lawrie and Mr Kirby that she and Mr Lawrie were soon to be married. But Mr Lawrie appeared at times to his son and friend to have no clear understanding that she intended to marry him. According to them, she appeared to take an immediate interest in Mr Lawrie’s financial and business affairs.
- [23] Details of the events of May and June 2011 (which lead to the QCAT application) are set out in paras [24]-[58] of the affidavit of Mitchell Lawrie sworn 9 October 2012, and paras [49]-[66] of the affidavit of William Kirby. Of particular relevance in terms of their concerns are the events of the evening of 28 June 2011, referred to below.

³ See the “product snapshot” of Mr Lawrie’s accounts from May 2011, provided to Mr Kirby by Mr Lawrie: affidavit of W Kirby, paras [46]-[48], exhibit WK-4 (p 21); see also affidavit of J Waldon sworn 9 November 2012, exhibit JAW-4 (p 48).

⁴ See, e.g., the final statement of transactions: affidavit of J Waldon sworn 11 October 2012, exhibit JAW-22 (p 252).

⁵ See, e.g., account statements for the three Lawmar accounts: affidavit of J Waldon sworn 9 November 2012, exhibits JAW-3 (p 34ff), JAW-4 (p 48ff), JAW-5 (p 53ff).

⁶ See, e.g., account statements: affidavit of J Waldon sworn 9 November 2012, exhibit JAW-1 (p 17ff).

⁷ See affidavit of W Kirby, paras [30]-[37], [77], exhibit WK-13 (p 38); affidavit of M Lawrie sworn 9 October 2012, paras [7]-[23].

Instigation of QCAT proceedings in July 2011

- [24] On 1 July 2011, Mitchell Lawrie applied to QCAT for the appointment of an administrator for financial matters for Mr Lawrie.⁸ On 4 July 2011, he sought an urgent interim order appointing the Public Trustee as administrator.⁹

Korean marriage and other events in July 2011

- [25] Prior to the QCAT proceedings being instituted, Mr Lawrie had told Mr Kirby and his son Mitchell that he was to be married in Brisbane and the date of 7 July 2011 was mentioned. Mr Kirby strongly recommended to Mr Lawrie and Ms Hwang that Mr Lawrie undergo a medical assessment of his capacity before any marriage. However, some days after the application to QCAT was filed, Ms Hwang and Mr Lawrie travelled to Korea.
- [26] A marriage took place in Korea on 26 July 2011.¹⁰ On the same day as the marriage, a new bank account (110338908862) was opened in Mr Lawrie's name with Shinhan Bank in Korea ("Mr Lawrie's Shinhan Account").¹¹ As far as Mr Kirby was aware, Mr Lawrie had never had a bank account in Korea before, despite having had ongoing business interests in South Korea since 2006.¹²

QCAT interim order and other events in August 2011

- [27] In response to an enquiry by Ms Hwang on 22 August 2011, a QCAT officer informed Ms Hwang that the hearing would proceed on 24 August 2011 (the date that had been fixed for the hearing of the application for an interim order) even if Mr Lawrie and Ms Hwang were not present.¹³ Ms Hwang and Mr Lawrie returned from Korea the night before the QCAT hearing.
- [28] They attended the QCAT hearing on 24 August 2011. Also present were Mitchell Lawrie, Mr Kirby, and Ms Galvin of the Office of the Public Trustee.¹⁴ At the end of the hearing, QCAT made an interim order appointing the Public Trustee to be Mr Lawrie's administrator for financial matters. QCAT also directed that a medical assessment of Mr Lawrie be obtained.¹⁵ (Pursuant to the QCAT order, an appointment for Mr Lawrie's medical assessment was made by Mr Kirby for 26 September 2011, but it was subsequently cancelled at Ms Hwang's request and rescheduled for 11 November 2011.)¹⁶

⁸ Affidavit of M Lawrie sworn 9 October 2012, paras [59], [60], exhibit ML-7.

⁹ Affidavit of M Lawrie sworn 9 October 2012, paras [62]-[63]; exhibit ML-9.

¹⁰ Affidavit of W Kirby, exhibit WK-17.

¹¹ See affidavit of S Lee, exhibits SL-1, SL-2.

¹² Affidavit of W Kirby, para [107]. The plaintiffs contended that the inference to be drawn in the circumstances of this case was that Mr Lawrie's Shinhan Account was established at the direction of Ms Hwang, and for the sole purpose for which it was later used, being to receive Mr Lawrie's money transferred from Australia, and to facilitate its further disbursement, including to Ms Hwang directly (see below).

¹³ See affidavit of J Waldon sworn 11 October 2012, para [49], exhibit JAW-16 (p 244).

¹⁴ Affidavit of J Waldon sworn 11 October 2012, exhibit JAW-15. ("QCAT Transcript" (p 151)).

¹⁵ See affidavit of J Waldon sworn 11 October 2012, exhibit JAW-1.

¹⁶ Affidavit of W Kirby, paras [87]-[89], [92].

- [29] On 26 August 2011, \$10,000 was transferred from a Lawmar transaction account to a US bank account in the name of Ms Hwang.¹⁷

Marriage in Australia and other events in September 2011

- [30] On 22 September 2011, Mr Lawrie and Ms Hwang were married in Australia.¹⁸ On the same day, Mr Lawrie and Ms Hwang opened a new account with Suncorp in their joint names at its Brookside branch, namely account no. 453570070 (“Joint Account”). Mr Lawrie had previously been using his local branch at Chermside, where he was known, and where (as discussed at the QCAT hearing) the manager had put in place certain protocols for Mr Lawrie’s protection.
- [31] On 30 September 2011, Mr Lawrie and Ms Hwang attended upon Mr Pennisi, a solicitor, in respect of a transfer of Mr Lawrie’s home to Mr Lawrie and Ms Hwang as joint tenants. They had made no prior appointment to see Mr Pennisi, who was not told of the QCAT hearing or of the Public Trustee’s appointment. A transfer instrument was prepared and executed while they were present at Mr Pennisi’s offices. (Another document was provided to Mr Pennisi and placed on file, which was not executed, but the effect of which, if executed, would have been to gift by deed Mr Lawrie’s interest in the property to Ms Hwang.) Mr Pennisi had a Titles Office search conducted. By letter dated 4 October 2011 he advised that the transfer of the property could not be registered. This was because of the administrative orders that the Public Trustee had placed on the registered title to the property.

Dealings relating to the joint account in September-December 2011

- [32] In October 2011, Mr Lawrie indicated to Mr Kirby that he intended to go to Korea with Ms Hwang.¹⁹ During that period, bank statements provided by Suncorp record the withdrawals of money on a systematic basis from the Joint Account as follows:²⁰
- (a) between 5 and 28 October 2011, amounts of round numbers of Korean Won were withdrawn in Seoul as “visa cash advances” (incurring cash advance and currency conversion fees on each occasion);
 - (b) after 5 October 2011, the number of daily cash withdrawals increased, until there were about six withdrawals a day, every day. These reduced the account balance from \$59,810 (on 5 October) to \$24,490 (on 28 October), so that some \$35,320 was withdrawn in cash in Seoul over some three weeks.
- [33] Bank statements evidence that this money originated in Lawmar’s bank accounts with Suncorp, from where it had been transferred to the Joint Account.²¹
- (a) a \$15,000 deposit was made on 23 September 2011, transferred from one of the Lawmar transaction accounts (cheque account no. 41594443);²²
 - (b) a further sum of \$50,000 was transferred from the same account on 28 September 2011.²³

¹⁷ Ex. 3 (Tender Bundle), doc 44.

¹⁸ See affidavit of J Waldon sworn 11 October 2012, exhibit JAW-12 (p 137).

¹⁹ See affidavit of W Kirby, para [98].

²⁰ Affidavit of J Waldon sworn 9 November 2012, exhibit JAW-2 (p 27-33).

²¹ Affidavit of J Waldon sworn 9 November 2012, exhibit JAW-2 (p 26).

²² See affidavit of J Waldon sworn 9 November 2012, exhibit JAW-3 (p 39).

²³ See affidavit of J Waldon sworn 9 November 2012, exhibit JAW-3 (p 39).

- [34] The bank statements for the Joint Account reveal few transactions that obviously involve payment for ordinary living expenses, and those that are recorded are for small sums.²⁴ Much of the activity on the account involved significant cash payments:
- (a) a cash withdrawal of \$5,000 was made on 23 September 2011, the day after the account was opened;
 - (b) another cash withdrawal of \$5,067 was made at Mascot airport on 9 November 2011. The following day the sum of \$2,640,030 passed through the account en route to Korea;
 - (c) in December, cash withdrawals and “customer cheques” of round numbers were drawn on the account.

Transactions in November 2011 concerning Mr Lawrie’s personal account

- [35] On 1 November 2011, an amount of \$30,000 was transferred from Mr Lawrie’s personal account to a Suncorp account numbered 453592880 in the name of Kumok Hwang at the same Brookside branch where the Joint Account had been opened.²⁵ (In addition to Ms Hwang’s Suncorp account, Ms Hwang also held an account at the Brookside branch of the NAB into which money was subsequently paid.)
- [36] On 1 November 2011 a further amount of \$50,030 was transferred telegraphically from Mr Lawrie’s personal bank account via the Toombul branch of Suncorp and sent to Mr Lawrie’s recently opened Shinhan Bank account,²⁶ where it was received on 4 November 2011.²⁷

Dealings in November 2011 concerning the Lawmar Term Deposit

- [37] Although subsequently denied by Ms Hwang, I am satisfied that Mr Lawrie and Ms Hwang visited the Pitt Street branch of Suncorp together on 8 November 2011. (CCTV footage showing Ms Hwang and Mr Lawrie at the branch was tendered.²⁸ Credit card statements also suggest that on 8 November 2011, Mr Lawrie and Ms Hwang were staying at the Haymarket Hotel in Sydney, and that they returned to Brisbane on 9 November 2011.)²⁹
- [38] While at the Pitt Street branch on 8 November 2011, \$2,643,934.60 held in the Lawmar Term Deposit was arranged to be transferred to the Joint Account upon Mr Lawrie signing the withdrawal slip.³⁰ The statement for the Term Deposit account records that \$6,233.65 was charged as a “breakage cost” in connection with this transfer.³¹
- [39] Once in the Joint Account, the documents in evidence record that an amount of \$2,640,030 was transferred telegraphically to Mr Lawrie’s Shinhan Account.³² The

²⁴ See account statements: affidavit of J Waldon sworn 11 October 2012, exhibit JAW-14 (p 143ff).

²⁵ Affidavit of J Waldon sworn 11 October 2012, paras [57], [59], [60], exhibit JAW-20 (p 250).

²⁶ Affidavit of J Waldon sworn 11 October 2012, paras [61]-[62], exhibit JAW-21 (p 251).

²⁷ Affidavit of S Lee, exhibits SL-1, SL-2.

²⁸ It was also tendered at a hearing before de Jersey CJ on 11 October 2012.

²⁹ Affidavit of J Waldon sworn 11 October 2012, exhibit JAW-8 (p 78-79).

³⁰ Affidavit of J Waldon sworn 11 October 2012, exhibits JAW-14 (p 150), JAW-22 (p 252); Ex. 3 (Tender Bundle), doc 35.

³¹ Affidavit of J Waldon sworn 11 October 2012, exhibit JAW-22 (p 252).

³² Affidavit of J Waldon sworn 11 October 2012, exhibits JAW-14 (p 150), JAW-23 (p 253).

amount was received into that account on 12 November 2011.³³ Mr Lawrie signed a banking instruction for the transfer from the Joint Account.³⁴

Other events in November 2011

- [40] On 11 November 2011 (some three days after the termination of the Lawmar Term Deposit and withdrawal of those funds on 8 November 2011), Mr Lawrie was examined pursuant to the direction made by QCAT on 24 August 2011, by Dr John, who provided a report to QCAT dated 16 November 2011.
- [41] Credit card statements suggest that on 12 November 2011 (the day after the consultation with Dr John), Mr Lawrie and Ms Hwang flew to South Korea.³⁵
- [42] The bank statements for Mr Lawrie's Shinhan Account record that on 16 November 2011, 2.5 billion Korean won (about A\$2.185 million) was transferred from that account to account no. 110316954360, being Ms Hwang's account with the Shinhan Bank.³⁶
- [43] Credit card statements suggest that about a day later, Mr Lawrie and Ms Hwang flew from Korea to the United States where they visited Las Vegas and Los Angeles between about 17 November 2011 and 27 November 2011.³⁷ A further marriage ceremony appears to have taken place in Las Vegas.³⁸ On about 27 November 2011 they travelled from the United States back to South Korea.³⁹ Mr Lawrie and Ms Hwang returned to Brisbane on 5 December 2011.⁴⁰

Events in December 2011

- [44] On 7 December 2011, Mr Pennisi corresponded with Dr CK Davis, the Director of Geriatric Medicine and Rehabilitation at Prince Charles Hospital, Chermside seeking an assessment of Mr Lawrie. Dr Davis assessed Mr Lawrie on 16 December 2011 and provided Mr Pennisi with a report dated 22 December 2011.

Events in January 2012

- [45] On 5 January 2012, 800 million Korean won was transferred into Mr Lawrie's Shinhan Account. Shortly afterwards on 6 January 2012, A\$835,000 (the equivalent of \$999,941,235, Korean won) was transferred to Ms Hwang's National Australia Bank ("NAB") account at Brookside (account no. 125906023).⁴¹
- [46] On 27 January 2012, Suncorp blocked an attempted transfer of \$1.5 million to Korea, from the Lawrie Superannuation Fund account.⁴² This was attempted at the Suncorp branch located in Pitt Street.⁴³ Shortly after this attempted transfer was

³³ See affidavit of S Lee, exhibit SL-1.

³⁴ Affidavit of J Waldon sworn 11 October 2012, exhibit JAW-23 (p 253).

³⁵ Affidavit of J Waldon sworn 11 October 2012, exhibit JAW-8 (p 79).

³⁶ Affidavit of S Lee, paras [10], [14], exhibits SL-1, SL-2, SL-3.

³⁷ Affidavit of J Waldon sworn 11 October 2012, exhibit JAW-8 (p 79, 81).

³⁸ Ex. 15 (Record of Marriage).

³⁹ Affidavit of J Waldon sworn 11 October 2012, exhibit JAW-8 (p 81).

⁴⁰ Affidavit of J Waldon sworn 11 October 2012, exhibit JAW-8 (p 81).

⁴¹ See affidavit of S Lee, para [15] *sic*, exhibits SL-1, SL-2, SL-4; Ex. 3 (Tender Bundle), docs 4, 23.

⁴² Affidavits of J Waldon sworn 11 October 2012, exhibit JAW-25 (p 272).

⁴³ See Ex. 3 (Tender Bundle), doc 28.

blocked, by email dated 1 February, Mr Pennisi contacted Suncorp, seeking details of all restrictions on Mr Lawrie's accounts.

Lawmar's Transaction Accounts – February 2012

- [47] By 22 February 2012, Lawmar's three transaction accounts, which had totalled \$405,240.85 in May 2011,⁴⁴ had been reduced by a series of transactions from June 2011 to a total of \$3,540.15.⁴⁵ These transactions are dealt with in detail in Annexure 2 to the plaintiffs' submissions ("Annexure 2") and are dealt with further below. Some of these transactions (totalling \$361,451.36) form one component of the money judgment sought.

QCAT order of February 2012

- [48] On 23 February 2012, QCAT made a final order appointing the Public Trustee as administrator for "all financial matters" for Mr Lawrie.⁴⁶ It was declared that Mr Lawrie had capacity for "simple personal and financial matters". It was also formally noted that the Enduring Power of Attorney of December 2010 was revoked by the marriage on 22 September 2011.

Recent chronology

- [49] On 9 October 2012, being concerned that Ms Hwang had advised of her intention to leave Australia on 20 October 2012, the plaintiffs filed an *ex parte* application against Ms Hwang for a search order, a worldwide freezing order up to \$3 million, an order for the disclosure of assets, a temporary travel restriction order, and order for the seizure of her passport.
- [50] The application was heard on 11 October 2012 by de Jersey CJ, who made orders in the terms of the application. As part of the execution of the order, on 11 October 2012 Ms Hwang was provided with material placed before the court (including a copy of all of the affidavits, the detailed outline of submissions and the CCTV footage taken by Suncorp's security camera recording the events at the Pitt Street branch of the bank on 8 November 2011). Many of the affidavits relied upon at the *ex parte* hearing and given to Ms Hwang on 11 October 2012 were relied upon in the present trial.
- [51] On the return date of 12 October 2012, Ms Hwang appeared through her solicitors (Porta Lawyers) and counsel. Her passport was delivered into the custody of the court and items seized pursuant to the search order were also placed into the custody of the court. Also on 12 October 2012, Ms Hwang gave evidence about her assets, including certain Korean real properties and her interest in Goldpearl, and was cross-examined, but the cross-examination was not able to be completed that day.
- [52] The Chief Justice made orders, *inter alia*, continuing the worldwide freezing order until judgment or earlier order, and granting an interlocutory injunction against the Korean real properties and her interest in Goldpearl and the assets of Goldpearl. It was also ordered that Ms Hwang's passport be returned to her by Friday 19 October

⁴⁴ See affidavit of W Kirby, para [48], exhibit WK-4.

⁴⁵ See affidavit of J Waldon sworn 11 October 2012, paras [29]-[30], exhibit JAW-7.

⁴⁶ See, e.g., affidavit of J Waldon sworn 11 October 2012, exhibit JAW-2.

2012, or when she complied with para 8(b) of the freezing order, requiring her to swear a comprehensive affidavit as to her assets worldwide.

[53] Ms Hwang filed an affidavit of her assets on 12 October 2012. It deposed to the following (with the asset/property itemised 1 to 17):

(a) Real Property in South Korea:

Asset	Approx Value in AU\$	Location	Mortgage	Ownership	
House	\$200,000.00	Seoul, South Korea	N/A	100% individually owned	#1
House	\$650,000.00	Seoul, South Korea	N/A	100% individually owned	#2
Commercial property	\$300,000.00	Seoul, South Korea	\$100,000.00	individually owned	#3
Commercial property	800,000.00	Seoul, South Korea	\$600,000.00	individually owned	#4

(b) Bank Accounts in South Korea:

Bank/ Institution	Approx Amount AU\$	Location	Acc Name	Active/Closed	
Shinhan Bank	\$10,000/\$20,000	South Korea	Kumok Hwang	Active	#5
Pusan Bank	\$0	South Korea	Kumok Hwang	Closed	#6
Shinhan Bank	\$400.00	South Korea	Kumok Hwang and Keith John Lawrie	Active (joint account)	#7

(c) Real Property in the United States of America:

Asset	Approx Value in AU\$	Location	Mortgage	Ownership	
House	\$100,000.00	1204 Pacific Street St Paul, Minnesota	N/A	100% individually owned	#8

(c) Bank Accounts in the United States of America:

Bank/ Institution	Approx Amount AU\$	Location	Acc Name	Active/Closed	
US Bank	\$5,000/\$20,000	United States of America	Kumok Hwang	Active	#9

(a) Business affairs in Australia in the name of Goldpearl Pty Ltd:

Asset	Approx Value in AU\$	Location	Mortgage	Ownership	
Castelli's Restaurant	\$178,000.00	Corner of Lambert and Clarence Road, Indooroopilly QLD 4068	N/A	100% owned by Goldpearl Pty Ltd	#10
Metro Car Wash	\$480,000.00	563 Fairfield Road Yeronga QLD	N/A	100% owned by Goldpearl Pty Ltd	#11
The Music Kafe	\$143,000.00	185 Boundary Street West End QLD 4101	N/A	100% owned by Goldpearl Pty Ltd	#12

(d) Bank Accounts in Australia:

Bank/ Institution	Approx Amount AU\$	Location	Acc Name	Active/Closed	
Commonwealth Bank	\$200.00	Australia	Kumok Hwang	Active	#13
National Australia Bank	\$10,000.00	Australia	Kumok Hwang	Active	#14
National Australia Bank	\$10,000.00	Australia	Goldpearl Pty Ltd	Active	#15

(e) Vehicles:

Make & Model	Approx Value in AU\$	Location	Registered in name of	Registered/ Unregistered	
Ford, 2001	\$1,500.00	Australia	Kumok Kwang	Registered	#16
Ford, 2003	\$2,000.00	Australia	Kumok Hwang	Registered	#17

(f) Personal loan made at the beginning of 2012 to Jin Marina in the name of Jason Jin for the sum of \$100,000.00.

- [54] The initial source of all bar the house and bank account in the USA were identified with an asterisk denoting that the initial source of funds was the \$2.64 million transferred on 8 November 2011 from the Lawmar term deposit account.
- [55] Ms Hwang's passport was returned to her from the custody of the court on 12 October 2012 upon an undertaking she gave to the court, to return to Australia by 26 October 2012.⁴⁷ The further hearing of Ms Hwang's evidence as to her assets was adjourned to a date to be fixed. The Chief Justice indicated to counsel for Ms Hwang, while she was in court and under oath, the seriousness of the undertaking given to the court and the "disastrous consequences" for Ms Hwang were she "to effectively abscond from the jurisdiction".⁴⁸
- [56] Ms Hwang did not return to Australia by 26 October 2012, as she had undertaken to do. Nor was any application made to have the undertaking varied, or evidence filed to explain the failure to return by 26 October 2012. Instead, notwithstanding the freezing order and injunction made on 12 October 2012, Ms Hwang signed a mortgage agreement on 26 October 2012, secured by one of the Korean residential properties and registered that mortgage in the Korean title registry. The mortgage was security for A\$105,000.⁴⁹
- [57] On 29 October 2012, the matter returned before Dalton J, at which stage Ms Hwang was again represented by counsel instructed by Porta Lawyers. Dalton J ordered that Ms Hwang attend at the Supreme Court of Queensland on 12 November 2012 for examination and cross-examination as to her assets and financial dealings. At that stage Dalton J was not advised (and the Public Trustee did not know) that, notwithstanding the orders made by de Jersey CJ, including restraining Ms Hwang from encumbering her property, she had just mortgaged one of her properties.

⁴⁷ During her cross-examination, Ms Hwang swore on three occasions that she would return to Australia.

⁴⁸ Transcript (12 October 2012) 1-28.

⁴⁹ Affidavit of K Choi, para [14].

- [58] By letter dated 31 October 2012, the Official Solicitor to the Public Trustee of Queensland wrote to Ms Hwang's then solicitors,⁵⁰ providing a list of further sums transferred from the plaintiffs' bank accounts between June 2011 and early 2012, and which totalled \$465,974. It was noted that this amount included \$97,068 in cash obtained from Suncorp bank branches in Brisbane between 21 June 2011 and 31 January 2012, and about \$35,000 in cash as Korean won removed in Korea during October 2011. It was also noted that most of a further \$500,000 in Korean won had been withdrawn as cash from Mr Lawrie's Shinhan Account between 14 November 2011 and 29 April 2012 (which represented the remainder of the \$2.64 million that had been left in Mr Lawrie's account after 2.5 billion won was transferred to Ms Hwang's account on 16 November 2011). They enquired as to how much cash Ms Hwang had and where it was, and what had become of the approximately \$935,900 not accounted for in Ms Hwang's affidavit of assets sworn on 12 October 2012 (viz. the difference between \$3,105,000⁵¹ transferred, and \$2,120,000 disclosed in Ms Hwang's affidavit of assets).
- [59] No response was provided to this letter.⁵² Instead, the evidence indicates that on 31 October 2012, Ms Hwang took out another mortgage on the properties she had bought in Korea, for a further \$105,000.⁵³ Upon discovering these mortgages, by letter dated and sent on Friday 2 November 2012, the Official Solicitor to the Public Trustee of Queensland wrote to Ms Hwang's solicitors, stating *inter alia* that Ms Hwang's conduct in creating two mortgages after the orders referred to appeared to constitute a contumacious contempt of court and requiring a full explanation by Monday, 5 November 2012. No explanation was provided, but on 5 November 2012, Ms Hwang's then-solicitors advised of their immediate withdrawal as solicitors on the record.
- [60] On 8 November 2012, de Groot filed a notice of address for service and became solicitors on the record for Ms Hwang.
- [61] At the hearing on 12 November 2012 (at which Ms Hwang had been ordered by Dalton J on 29 October 2012 to attend and give evidence), Ms Hwang did not appear. However, she was represented by Senior and Junior Counsel, instructed by de Groot. Affidavit material was filed on Ms Hwang's behalf including as to her ill health, exhibiting a certificate of hospitalisation and a medical certificate.⁵⁴ At that hearing orders were made for the joinder of Goldpearl as third defendant in these proceedings and for an expedited trial commencing 5 December 2012, with a timetable which provided, *inter alia*, for the filing of defences and affidavit material by 26 November 2012. It was also ordered that Ms Hwang attend the Supreme Court of Queensland at Brisbane at 10.00 am on 5 December 2012 to be examined and cross-examined as to her assets and financial dealings.
- [62] There was a further hearing, on 15 November 2012, in relation to access to documents seized during the execution of the search order carried out on 11 October 2012. Dalton J gave the plaintiffs leave to access and use the balance of the

⁵⁰ Affidavit of J Waldon sworn 7 November 2012, exhibit JAW-12.

⁵¹ This amount (of \$3,105,000) was calculated on the basis of transfers totalling \$465,974, not \$361,451.36 as now claimed.

⁵² It was subsequently forwarded to de Groot, who became the solicitors on the record on 8 November 2012. But again no response has been provided.

⁵³ Affidavit of K Choi, para [15].

⁵⁴ Affidavit of E Kim, paras [3]-[6], exhibit ERK-3; affidavit of E Lorimer, exhibit EAL-8.

documents seized under the search order made 11 October 2012. Ms Hwang appeared through counsel, Ms Brewer, who sought and was granted leave to withdraw from the hearing.

- [63] No defence or affidavits were filed by Ms Hwang or Goldpearl by 26 November 2012 as ordered by Dalton J.
- [64] On 3 December 2012, a document purporting to be a “notice of acting in person” was filed by Ms Hwang. It gave an address for service of a law firm in Korea (rather than an address within the jurisdictions as required by rules 986(2)(b) and 19(1)(a) *UCPR*), with the consequence that de Groot remained solicitors on the record (rule 986(3)), until given leave to withdraw (rule 991).
- [65] Also on 3 December 2012 there was also filed a document purporting to be a notice of intention to defend, and a document described as a “defence”.
- [66] Although Ms Hwang was ordered to attend court on 5 December 2012 to be examined and cross-examined as to her assets and financial dealings,⁵⁵ she failed to do so.
- [67] Upon application made by de Groot on 5 December 2012, leave to withdraw as solicitors was granted.

Application for leave to appear

- [68] On 5 December 2012, at the commencement of the hearing, Mr Shoebridge of counsel sought leave to appear on behalf of Ms Hwang instructed by her Korean law firm (HBL Law Firm). If granted leave, Mr Shoebridge advised that he would seek to make the following submissions:
- (a) Firstly, that the court take account of the document purporting to be a “defence” which had been filed on 3 December 2012, and to medical documents tendered before Dalton J.⁵⁶
 - (b) Secondly, Mr Shoebridge referred to four matters asserted in that “defence”:
 - (i) that Ms Hwang did not have funds to engage solicitors in Brisbane to defend herself and had not received all the court materials (para 65);
 - (ii) Ms Hwang’s denial of any fraud or undue influence (para 66);
 - (iii) an acknowledgment by Ms Hwang that she was present on 24 August 2011 when QCAT made its first order appointing the Public Trustee but did not understand what was going on (para 37).⁵⁷
- [69] The question of whether Mr Shoebridge ought to have leave to appear to make these submissions was reserved and the hearing proceeded.
- [70] The plaintiffs accepted that in the circumstances of the prima facie serious consequences for Ms Hwang in failing to comply with orders of this court and looking at the law in the manner most favourable to her, the court has a discretion whether to grant the leave sought, and will not automatically refuse to hear her until she has purged her contempt. In those circumstances, I consider it

⁵⁵ (Para 12 of the order of Dalton J made 12 November 2012), she failed to do so.

⁵⁶ Transcript 1-17, documents 46 and 47 in proceeding 9404 of 2012.

⁵⁷ Transcript 1-18.

appropriate (albeit unusual) to grant the leave sought so the submissions made will be received.

- [71] The court was asked to have regard to three documents filed on behalf of Ms Hwang, collectively called the “defence”. These documents do not conform to what could be considered a defence, and indeed, nothing has been filed in relation to the third defendant. Moreover, the assertions raised in these documents are not supported by any affidavit material.
- [72] As to the assertion that Ms Hwang lacked sufficient funding to engage practitioners who are qualified to act as legal practitioners in the jurisdiction, I note that Ms Hwang had previously retained both senior and junior counsel as well as local lawyers. She engaged counsel on 5 December 2012, who was instructed by a Korean law firm with Korean lawyers being present that day. Moreover, the assertion of lack of funds was not supported by any affidavit material that was sought to be filed.
- [73] As to the question of Ms Hwang’s health, I note that there was no evidence from the relevant medical officers who treated Ms Hwang as to the matters contained in the certificate of hospitalisation and the medical certificate. In any event, no contemporaneous report or explanation as to her health or as to any difficulty in Ms Hwang’s attendance at court on 5 December 2012 was filed or sought to be filed.
- [74] Nothing that Mr Shoebridge said was of assistance in the determination of the issues at trial or affected the outcome.

Plaintiffs’ submissions as to the claims made and orders sought

(a) Constructive trust

- [75] It was claimed that Ms Hwang held all traceable proceeds of moneys received by her from Lawmar’s bank accounts on constructive trust for Lawmar arising from:
- (i) Ms Hwang’s fraud;
 - (ii) Ms Hwang’s undue influence;
 - (iii) Mr Lawrie’s lack of capacity and authority.

(i) Fraud

- [76] It was submitted that the evidence supported the conclusion that Ms Hwang engaged in fraudulent conduct to cause the money to be transferred, in that she caused Mr Lawrie to sign the bank instruction for the transfer of the \$2,643,934.60 on 8 November 2011, and the \$2.5 billion (in Korean won) on 16 November 2011, and for him to effect the other relevant transactions set out in Annexure 2 in the knowledge that he was incapable of properly understanding what he was doing, and with a dishonest intention of obtaining the benefit of these moneys. In that regard, the plaintiffs relied by analogy on the test, considered in *R v Shanta Mani Naidu* [2008] QCA 130, [4], [5] which concerned a criminal charge of fraud.⁵⁸

⁵⁸ That case concerned a younger woman forming intimate relationship with older man suffering from dementia, and receiving \$371,000 claimed to be gifts. The victim had suffered a stroke, which had led to memory loss and confusion (at [29]), and had paid away a large proportion of his savings: at [64]. Reference was also made to *R v Hinks* [2001] 2 AC 241, 245 (woman befriending older man of

[77] It was argued that that dishonesty would cause Ms Hwang to hold moneys taken from Lawmar on trust for it. Reliance was placed on the statement of principle made by O'Connor J in *Black v Freedman & Co* (1910) 12 CLR 105, 110.⁵⁹

“Where money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character. If he pays it over to another person, then it may be followed into that other person’s hands. If, of course, that other person shows that it has come to him bona fide for valuable consideration, and without notice, it then may lose its character as trust money and cannot be recovered. But if it is handed over merely as a gift, it does not matter whether there is notice or not.”

(ii) *Undue influence*

[78] It was further contended that the strong inference was that Ms Hwang exercised undue influence over Lawmar, through her manipulation of Mr Lawrie, to cause the moneys to be transferred. It was submitted that also gave rise to a trust in favour of Lawmar in respect of the chose in action in the Joint Account: *Louth v Diprose (no 1)* (1990) SASR 438; *The Law of Rescission* (OUP, 2007) [29.34], [29.35]. Reliance was placed on Dr John’s expert report (referred to below) where he opined that Mr Lawrie was particularly vulnerable to influence by others.

[79] As to undue influence and unconscionable conduct against a company, reference was made to *Commonwealth Bank of Australia v Ridout Nominees Pty Ltd* [2000] WASC 37 where Wheeler J said at [59]:

“...one can imagine cases in which it would appear to be inequitable if a court were to refuse, as a rule of blanket application, to look behind a corporate structure. ... Because of equity’s focus on the conduct of the other party, it may be possible to deny reward to unconscionable conduct without unduly inhibiting commerce, if those dealing with the corporation are not permitted to rely upon transactions with it in circumstances where it is sufficiently evident to them that the person or persons who is or are the corporation’s effective decision makers suffer from a special disability or disadvantage which makes them unable to make a real judgment as to the best interest of the corporation. It may be thought inappropriate that a third party, having notice of such a disability, be permitted to insist on a transaction by reason only of the fact that it was made with a corporate entity.”

limited intelligence and accepting daily cash payments from his building society over eight months, claimed to be gifts); *Westpac Banking Corporation v Ollis* [2007] NSWSC 956, [31]-[32] (the defendant wrote numerous cheques knowing that the bank was paying them in error, in circumstances where the court found the money was obtained by fraud).

⁵⁹ Reliance was also placed on *Bank of America v Arnell* [1999] Lloyds Rep Bank 399 (recipient of money aware payer’s mistake due to fraud); *Robb Evans v European Bank Ltd* (2004) 61 NSWLR 75, [111], [113] (proceeds of credit card fraud); *Westpac Banking Corporation v Ollis* [2007] NSWSC 956, [18], [29]-[32] (exploiting bank error by writing ‘an avalanche’ of cheques); *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429, [40] (paying away money knowing it was received by mistake); *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230, [92]-[93] (proceeds of misappropriated cheques).

(iii) *Lack of capacity and authority*

[80] A further submission was made that the payment from the term deposit, and like payments, were made without Lawmar intending to make the payment, and in circumstances where Mr Lawrie had no capacity or authority to cause it to transfer away its money. This was said to be so because:

- (i) Mr Lawrie's conduct in signing a banking instruction to terminate the term deposit held in the name of Lawmar, and to transfer that credit balance to the Joint Account (and like transactions), constituted doing an act in relation to a financial matter within the meaning of section 33(1) of the *Guardianship and Administration Act 2000* (Qld), after the appointment of the Public Trustee of Queensland on 24 August 2011. By reason of the decision in *Bergmann v Daw* [2010] QCA 143, that act and subsequent acts were wholly void, for the only person having relevant capacity, was the Public Trustee.
- (ii) As a matter of fact Mr Lawrie lacked sufficient mental capacity to act as agent for Lawmar.
- (iii) By operation of the articles of association of Lawmar, Mr Lawrie automatically ceased to be a director of Lawmar once he lost capacity: article 1.05.01. The evidence suggested this was the case at all material times, and certainly when Mr Lawrie signed documents transferring the \$2.64 million of Lawmar's money on 8 November 2011.
- (iv) As to the payment from the term deposit into the Joint Account, and from there to Mr Lawrie's Shinhan Bank account on 8 November 2011, and also as to the payment from that account to Ms Hwang's Shinhan Bank account on 16 November 2011, it was contended that a plea of *non est factum* was available in respect of the three banking instructions signed by Mr Lawrie to effect these transactions. In respect of the relevant test of *non est factum*, reliance was placed on *Ford by his tutor Watkins v Perpetual Trustees Co Victoria Ltd* [2009] NSWCA 186, at [77], [85], [88] and it was submitted that that test applied by Dr John in his report. In that regard reliance was placed on para (f) of the report of Dr John dated 19 November 2012.⁶⁰

[81] It was submitted that, as the relevant payments were in the nature of a gift of Lawmar's money, Ms Hwang being the donee of the gift, she was obliged to hold the proceeds on trust for Lawmar, irrespective of her state of knowledge of the absence of intention or authority: *Law of Rescission* (OUP, 2007) [29.21]. However, it was accepted that there was authority that Ms Hwang had a personal equitable obligation to account for the money once paid away only if she knew of the lack of authority and capacity. It was argued that even so the evidence indicated that she plainly did know of Mr Lawrie's lack of authority and incapacity such that she became a trustee. Reference was made to *Lurgi (Australia) Pty Ltd v Gratz* [2000] VSC 278, [74];⁶¹ *Port of Brisbane Corporation v ANZ Securities Limited* [2003] 2 Qd R 661, 679-680.⁶²

[82] Further as to the status of the joint account, it was contended that Ms Hwang was in fact the only account holder of the Joint Account because the account was opened

⁶⁰ Affidavit of N John sworn 5 December 2012, p 32.

⁶¹ But see *Commonwealth Bank of Australia v Saleh* [2007] NSWSC 903, [30], [38]-[39] to which reference was also made.

⁶² See also *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 (claim for money had and received against innocent donee of proceeds of stolen money) to which reference was made.

on 22 September 2011, after the Public Trustee was appointed financial administrator. Accordingly, by reason of the principle in *Bergmann v Daw*, Mr Lawrie lacked capacity to enter into any contract with Suncorp in relation to that account. The only party to the contract of customer and banker was Ms Hwang. But even if that was not the case, and there was in fact a joint account, Ms Hwang still held the full sum paid into the account on trust for Lawmar: *Lurgi (Australia) Pty Ltd v Gratz* [2000] VSC 278, [80], [85].

(b) Tracing

(i) Foreign property

[83] On the basis of these contentions, it was submitted that Ms Hwang held all of the traceable proceeds of the moneys taken from Lawmar, on constructive trust for Lawmar. This was so even though the relevant property might be located in Korea, or Minnesota, or elsewhere outside Australian territory, because the acts of Ms Hwang giving rise to Lawmar’s claim occurred in Queensland. In those circumstances, Queensland law would, acting *in personam*, compel Ms Hwang to hold the traceable proceeds on trust for Lawmar, notwithstanding that the proceeds be located in a foreign jurisdiction: *Ewing v Orr Ewing* (1883) 9 App Cas 34, 40; *Macmillan Inc v Bishopgate Investments Trust plc* [1996] 1 WLR 387, 398, 408.

[84] It was thus not necessary for Korean law to recognise equitable rights in order for Lawmar to trace its proprietary interest in the funds into and out of Mr Lawrie’s Korean bank account, nor for the law of the place in which the traceable proceeds are to be found, to recognise the concept of a trust: *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, 736-737 (rev on other grounds); L Smith, *The Law of Tracing* (Oxford, 1997) p 277.

(ii) Practical and robust approach

[85] As to tracing Lawmar’s equitable interest in the relevant funds, it was submitted that the court should adopt a “practical and robust approach”, in accordance with the principles recently summarised by Allsop ACJ in *Toksoz v Westpac Banking Corporation* (2012) 289 ALR 557, 579-580 with particular reliance being placed on the following remarks:

[8] Money can be traced notwithstanding an inability of the follower to connect each link in the chain of accounts. Commonsense and reasonable inference play their part, especially if there is fraud involved and if there is a lack of explanation, when the circumstances cry out for honesty to be explained, if it can be.

[9] A number of cases reveal a sensible robust approach to the tracing of moneys from theft: *R v Powell* (1837) 7 Car & P 640; 173 ER 280; *Harford v Lloyd* (1855) 20 Beav 310; 52 ER 622; *Black; Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; [1992] 4 All ER 512; *El Ajou v Dollar Land Holdings Plc* [1003] 3 All ER 717; and see the discussion in L D Smith, *The Law of Tracing*, Clarendon Press, Oxford, 1997, p 263 and the other cases there cited. The expression ‘tracing by exhaustion’ is sometimes used. Where the facts as proved are sufficient to permit the inference that moneys have been received or property bought without there being an honest

source available to explain the wealth and the sums or value can be seen as referable to the following party's property wrongfully obtained, such that the inference is open that the wrongfully obtained funds were the source of the wealth, the funds can be so treated. One does not need to be able to show every link in the chain of accounts from and through which the money passed. Inferences will be more easily drawn, as here, in circumstances where the funds were stolen, the person who is said to have provided the funds was one of the thieves who stole money from the funder, when the recipient has an apparent close relationship with the thief, which recipient gave no value for it, has no personal source of income and gives no explanation as to the source of circumstances of the receipt of the money or any honest source of it.

[10] None of this is the expression of a principle of law. It is the expression of the available approach to fact finding in the presence of fraud and lack of explanation when plainly called for."

(c) Money judgment

[86] As mentioned, concurrent claims for a money judgment are advanced on three bases.

(i) Money had and received

[87] It was submitted that Lawmar was entitled to claim from Ms Hwang the approximately \$2.64 million transferred from the Lawmar term deposit and received by her into the Joint Account, and the additional \$361,000 (approximately) received by her, as money had and received by her to its use, on the basis that the money was paid without authority, and without any actual intention on the part of Lawmar to make the payment. Reference was made to *Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App Cas 84 (payment to wrong bank); *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 (dishonest taking of client money by solicitor); *Break Fast Investments Pty Ltd v Giannopoulos* [2011] NSWSC 1508, [33]; *Restitution Law in Australia* 2nd edn (Lexis Nexis, 2008) [308].

[88] Reliance was placed on authority that a claim for money had and received will lie against those who have received the traceably identified proceeds of money that has been paid without authority, on the basis of more liberal equitable tracing rules (which permit, eg tracing through mixed funds and bank clearing systems). The measure of the claim, it was submitted, was the traceable value surviving when the payee obtains notice of the relevant facts: *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230, [143]-[145], [153], applied *Break Fast Investments Pty Ltd v Giannopoulos* [2011] NSWSC 1508, [33]-[34].

(ii) Personal obligation to account as trustee

[89] Additionally, it was submitted one incident of the trust that it was contended was imposed on Ms Hwang was a personal obligation to account to Lawmar for the sums received by Ms Hwang of the same kind as owed by an express trustee who misapplies the trust estate. The same obligation was owed by the knowing recipient

of trust property: *Lewis on Trusts* 18th edn (Sweet & Maxwell, 2008) [42-23].⁶³ Ms Hwang was thus obliged to account for the sums taken irrespective of its subsequent payment away to Korea: *Lurgi (Australia) Pty Ltd v Gratz* [2000] VSC 278, [79], [80], [85]; *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429, [64]. Indeed, it was submitted that causing the money to be paid away to the Korean bank (and elsewhere) was itself a breach of Mr Hwang's obligation to get in the trust estate, and to refund it to the beneficial owner, which was Lawmar: *Lurgi (Australia) Pty Ltd v Gratz* [2000] VSC 278, [79]; *Robb Evans v European Bank Ltd* (2004) 61 NSWLR 75, [116], [162]; *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230, [114].

(iii) *Equitable compensation*

[90] As mentioned, it was contended that the evidence established that Ms Hwang exercised undue influence over Lawmar, through her manipulation of Mr Lawrie, to cause the money to be transferred, and that her conduct also amounted to unconscionable conduct of the kind described in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 and *Louth v Diprose* (1992) 175 CLR 621.

[91] Citing *Smith v Glegg* [2005] 1 Qd R 561, 575, it was submitted that, although there was formerly doubt about the matter, undue influence provided a foundation for an obligation to pay equitable compensation.

[92] It was thus submitted that on the basis of the material before the court Ms Hwang was obliged to pay Lawmar \$3,011,619.61 (see below) as equitable compensation for undue influence, including the breakage fee of \$6,233.65 which was claimed on this basis.

[93] It was further submitted that in the circumstances of this case, there was no bar arising from Lawmar's corporate status to its claim since a company may maintain a plea of undue influence: *Commonwealth Bank of Australia v Ridout Nominees Pty Ltd* [2000] WASC 37 at [59].

(d) *Quantum*

[94] The plaintiffs contended that Ms Hwang received the benefit of some \$3 million in cash which originated in the Suncorp accounts of Lawmar.

(i) *Three sets of transactions*

[95] The evidence relied upon concerned three sets of transactions.

(a) The first and largest comprised of the transfer of \$2,643,934.60 from the Lawmar term deposit on 8 November 2012 into the Joint Account, which was then transferred to Mr Lawrie's Shinhan Bank account. Those transactions are evidenced by an instruction to Suncorp to cancel the term deposit,⁶⁴ an account statement for the term deposit showing cancellation of the term deposit,⁶⁵ an account statement for the Joint Account showing a deposit of the funds from the term deposit,⁶⁶ an instruction to Suncorp to pay the sum of \$2,640,030 to

⁶³ See C Harpum "The Stranger as Constructive Trustee" (1986) 102 LQR 114 and 267, p 269.

⁶⁴ See Ex. 3 (Tender Bundle), doc 35.

⁶⁵ See affidavit of J Waldon sworn 11 October 2012, exhibit JAW-22 (p 252).

⁶⁶ Affidavit of J Waldon sworn 11 October 2012, exhibit JAW-14 (p 150).

Mr Lawrie's Shinhan Bank account,⁶⁷ and an account statement for Mr Lawrie's Shinhan Bank account showing a deposit of the funds transferred from the Joint Account.⁶⁸ It was submitted that this series of transactions would not appear to be uncontroversial (given Ms Hwang's affidavit of assets and admissions during cross-examination on 12 October 2012 (T 1-24)). Ms Hwang admitted that she used this money to fund the purchase of various assets, and Dr John has opined that Mr Lawrie had no capacity to understand or enter into these transactions.

- (b) The second set of transactions totalled \$361,457.36 and comprised all the other significant withdrawals and transfers from the Australian bank accounts between June 2011 (just after Ms Hwang started residing with Mr Lawrie in Australia) and January 2012 (by which time substantially all the funds in the relevant accounts had been withdrawn). The details for each transaction were set out in Annexure 2 to the plaintiffs' submissions.
- (c) The third set of transactions comprised the withdrawals and transfers from Mr Lawrie's Shinhan Bank account, principally a transfer of some 2.5 billion won (A\$2.185 million) to Ms Hwang's Shinhan account, a transfer of some \$835,000 to Ms Hwang's Brookside NAB⁶⁹ and a large series of cash withdrawals.⁷⁰

(ii) *The Annexure 2 transactions*

[96] It was submitted that the amount of \$361,451.36 identified in Annexure 2 was the total of the funds actually withdrawn, over the course of 34 transactions, from the Lawmar transactions, Mr Lawrie's personal account, and the Joint Account purportedly opened in the names of Mr Lawrie and Ms Hwang.

[97] All of the amounts withdrawn from Mr Lawrie's personal account, and from the Joint Account were counted as losses by Lawmar, by reason of the fact that, within the relevant period (1 June 2011 to 31 January 2012), funds from Lawmar accounts in excess of the amounts withdrawn from the personal accounts were transferred (at Ms Hwang's behest, it was contended it should be inferred) into each of these accounts, viz:

- (a) \$156,000 was transferred from Lawmar accounts into Mr Lawrie's personal account (see transactions 1, 4, 5, 12, 31 and 32) while \$125,530 was claimed as wrongful withdrawals for, or caused by, Ms Hwang;
- (b) \$65,000 was transferred from Lawmar accounts into the Joint Account (see transactions 26 and 30) while \$61,054.28 was claimed as wrongful withdrawals for, or caused by, Ms Hwang.

[98] The withdrawals were divided into three categories.

[99] The first category (shaded in yellow in Annexure 2) comprised withdrawals (including cheques and bank transfers) in respect of which the evidence was said to plainly demonstrate that the amounts were paid away either to, or at the direction and for the benefit of Ms Hwang. The total of these sums is \$236,997.08 (see transactions 2, 9, 11, 13, 16, 17, 27, 34, 35, 36, 39, 40, 41, 45, 46).

⁶⁷ Affidavit of J Waldon sworn 11 October 2012, exhibit JAW-23 (p 253).

⁶⁸ See affidavit of S Lee, exhibits SL-1, SL-2.

⁶⁹ The bank account statement set out at SL-1 to the affidavit of S Lee, together with the transfer forms at SL-3 and SL-4 evidence these transactions.

⁷⁰ Affidavit of S Lee, exhibits SL-1, SL-2.

- [100] The second category (shaded in green) comprised cash withdrawals. Of these withdrawals, \$87,067.80 was withdrawn in Australia between June 2011 and January 2012 (transactions 3, 6, 15, 18, 20, 21, 22, 23, 26, 33, 38, 42, 43, 44, 47, 48, 49). Further amounts totalling \$35,386.48⁷¹ in cash were withdrawn in South Korea between 5 October 2011 and 28 October 2011 (see transaction 29). The total cash withdrawals were, therefore \$122,454.28.
- [101] The third category (shaded purple) comprised of one transaction for \$2,000 in respect of which there is no direct evidence of the destination or use of the funds (see transaction 9). There was a further amount of \$80,030 which went to Jin Marine Co (a Korean company) on 8 July 2011, which was included in the table, but for which no claim in these proceedings was maintained.
- [102] The plaintiffs contended that it was appropriate to draw the inference that each of the cash withdrawals in category 2, and the transaction for \$2,000 in category 3 was made to, or at the direction of Ms Hwang in circumstances in which each of the transactions was for a significant sum of money (ranging from \$500 and \$25,000) and all but one of the transactions were cash withdrawals. Each transaction occurred after Ms Hwang had started residing with Mr Lawrie and at a time when it was contended other funds were being transferred to or at the direction of Ms Hwang. It was contended that the transactions occurred in circumstances where, according to Dr John, Mr Lawrie did not have sufficient capacity to make the decision to enter into any of the transactions. Furthermore, it was argued that all the transactions were put to Ms Hwang (through her solicitors) as payments to her or for her benefit, and she had been asked to advise what had become of the money, what assets she had acquired with it, and where the money and assets were currently.⁷² Yet, no response was forthcoming.

Quantification

- [103] Lawmar sought a money judgment in the amount of \$3,011,619.61, calculated as follows:
- (a) \$2,643,934.60 paid from the Lawmar Term Deposit to the Joint Account and then to Mr Lawrie's Shinhan Bank account in Korea, on 8 November 2011 (comprising \$2,619,000 on term deposit, plus \$31,168.25 interest, less \$6,233.65 breakage cost);⁷³
 - (b) \$6,233.65 breakage cost incurred on 8 November 2011 and paid to Suncorp on that day;⁷⁴
 - (c) sums totalling \$361,451.36 received between June 2011 and January 2012.

⁷¹ This amount included foreign currency conversion fees and cash advance fees charged by Suncorp Bank in respect of each cash withdrawal.

⁷² Affidavit of J Waldon sworn 7 November 2012, exhibit JAW-12. It was noted the principle difference between the sums in Annexure 1 to that letter, and the sums in Annexure 2 of the written submissions, was that the payment of \$80,030 on 8/7/11 was deducted from Annexure 2 following production of documents recording that the payment was made to Jason Jin at Jin Marine Co.

⁷³ See affidavit of J Waldon sworn 11 October 2012, exhibit JAW-22 (p 252).

⁷⁴ See affidavit of J Waldon sworn 11 October 2012, exhibit JAW-22 (p 252).

[104] The calculation of the moneys sought was as follows:

Category	Amount
Term Deposit withdrawal	\$2,643,934.60
Breakage fee on Term deposit	\$6,233.65
Withdrawals – destination of funds known	\$236,997.08
Withdrawals – cash withdrawals	\$122,454.28
Withdrawals – destination of funds unknown	\$2,000.00
Total claim	\$3,011,619.61

(e) Goldpearl's assets

[105] The plaintiffs contended that all of the assets of Goldpearl were purchased with funds originally from Lawmar and that so much was apparent from Ms Hwang's affidavit evidence⁷⁵ and sworn oral evidence given on 12 October 2012 before the Chief Justice. It was supported by Mr Lawrie's Shinhan Bank account statements name showing the transfer of \$835,000 to Ms Hwang's NAB account⁷⁶ and the receipt of that amount into Ms Hwang's NAB account.⁷⁷ Although the transfer thereafter to Goldpearl was unable to be directly traced, the schedule to Ms Hwang's affidavit explained the ultimate source of the funds for the purchase of Goldpearl's assets was the A\$2.64 million transferred on 8 November 2011 from Pitt Street in Sydney.⁷⁸ The subsequent purchase of the assets of Goldpearl was evidenced by documents tendered.⁷⁹ It was submitted that there could be no doubt that Goldpearl's assets were financed entirely with sums taken from Lawmar, and that its assets must (in the circumstances of this case outlined above) be held on trust for Lawmar.

(f) Orders sought

[106] A draft of the judgment and orders sought was provided on behalf of the plaintiffs.

Concurrent claims

[107] As outlined, Lawmar contended it had concurrent claims for a declaration of constructive trust and for money orders. Lawmar made concurrent claims for the payment of a liquidated sum by Ms Hwang, as follows:

- (a) Equitable compensation for undue influence for the loss suffered by Lawmar by reason of Ms Hwang's undue influence;
- (b) Money had and received for sums received by Ms Hwang from Lawmar's bank accounts;
- (c) A personal obligation to account as a constructive trustee, in respect of money that Ms Hwang received.

[108] Judgment was sought on each of the concurrent claims and it was submitted there was no need for Lawmar to elect between the claims when judgment was obtained: *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 29-30. It was submitted

⁷⁵ See affidavit of K Hwang, sworn 12 October 2012, transcript 1-24.

⁷⁶ See affidavit of S Lee, exhibit SL-4; Ex. 3 (Tender Bundle), doc 4.

⁷⁷ See Ex. 3 (Tender Bundle), doc 34.

⁷⁸ Affidavit of K Hwang, sch A; transcript 2-51.

⁷⁹ Ex. 3 (Tender Bundle), docs 8, 9, 10, 11, 12, 13, 14, 15, 16, 18 and 19.

that Lawmar may enforce a judgment in respect of each claim, although not so as to obtain double recovery: *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514, approved *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635, 653-654. However, Lawmar sought a single order for all of its money claims, accepting the effect of which was that each of the three claims would be merged in a single judgment. That approach is reflected in para 1 of the draft judgment.

- [109] As mentioned, Lawmar also sought declarations of constructive trust. Lawmar argued it be permitted to obtain and to enforce judgment on both the personal and proprietary claims founded upon the imposition of a constructive trust, acknowledging that it could not recover twice over: see LD Smith, *The Law of Tracing* (OUP 1997), p 378; *Boscawen v Bajwa* [1996] 1 WLR 328, 342.

Appointment of receivers and managers

- [110] An order for the appointment of receivers and managers was also sought as practical consequential relief to give effect to the constructive trusts that the court was asked to recognise by declaration. Insofar as the receivership was to be characterised as equitable execution, it was contended that there was no difficulty with such an order, for it enforced rights arising in equity, and the methods of execution at common law would be inadequate: *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450, [52]-[58], [184]; *Hall v Foster* [2012] NSWSC 975, [16]-[19].

- [111] As to the last point, it was argued that, unlike the procedure for enforcing money orders, the procedures for enforcing non-money orders (set out in Chapter 20 (rr 890–947) of the *Uniform Civil Procedure Rules 1999* (Qld)), are not confined to the issue of an enforcement warrant. The procedures available included procedures for contempt (see rr 922–928), the issue of an enforcement warrant for the seizure of property, the delivery of goods or a charging order (rr 906, 915, 916, 917), and the appointment of another person to do an act which a person is required, by an order, to do (see r 899).

- [112] It was submitted that in the circumstances of this proceeding where the principal assets within the jurisdiction (and over which the receivership is sought) are trading businesses that must be sold, and where Ms Hwang is not in the jurisdiction and can be expected to continue to ignore the court's processes, the means of execution available under the UCPR to give effect to Lawmar's rights under the constructive trusts declared by the court are inadequate. It was therefore appropriate to appoint a receiver.

Freezing order

- [113] In addition, a freezing order was sought. Citing *Masri* [134], it was submitted such an order would be more easily obtained after judgment and given that there remained a real risk that the judgment would remain unsatisfied otherwise. It was argued that the order was required, given the evidence of Ms Hwang's disregard of the court's previous orders, in mortgaging the Korean properties on 26 and 31 October 2012, and in failing to attend and be examined about her assets (the purpose of which was to ascertain their whereabouts). In this context, the plaintiffs submitted that it was also significant that there is a gap of almost \$1 million between the quantum of the money withdrawn (viz, \$3 million) and the assets

disclosed by Ms Hwang (approximately \$2 million).⁸⁰ For the same reason, an order was sought that Ms Hwang provide an affidavit as to her assets and attend and be examined as to her assets.

Mr Lawrie's mental impairment

- [114] Central to the claims brought is the issue of Mr Lawrie's mental capacity over the relevant periods.

Dr John's report of 16 November 2011

- [115] Dr John's report of 16 November 2011 was based on an assessment of Mr Lawrie on 11 November 2011 (three days after the transfer of \$2.64 million from the Lawmar term deposit). Mr Lawrie attended the appointment with Ms Hwang. In his report,⁸¹ Dr John opined that Mr Lawrie had significant short term memory problems and may have very early Alzheimer's disease. It was noted that Mr Lawrie had two cerebral infarcts (apparently ischemic strokes) both in parts of the brain that would affect day to day cognitive functioning. One of the infarcts was in the frontal area of the brain, which would affect his ability to plan for the future, his judgment and his insight, though he still had reasonable ability to make simple decisions like what he would like to do during the day. It was not possible to determine when the infarcts occurred, but it would be reasonable to say that they had been there for some time. Dr John considered that he would have significant concerns about Mr Lawrie's capacity to make complex decisions. It was very likely that Mr Lawrie's cognition would continue to deteriorate.

Dr Davis' report of 22 December 2011

- [116] On 15 December 2011, Mr Lawrie was examined by Dr Davis at Mr Pennisi's request, as already mentioned. In his report,⁸² Dr Davis noted that Mr Lawrie could not explain why he was at the appointment. When Dr Davis explained that it was at the request of Mr Pennisi, Mr Lawrie indicated that he had no recollection of that. Mr Lawrie "repeatedly acknowledged his short term memory limitations" but stated that these did not interfere with his ability to drive or continue his work as a consultant on marina development. When pressed regarding details of his work in South Korea, Mr Lawrie could not name any businesses that he was assisting in, nor the name the sites of any current developments.
- [117] When questioned about general knowledge of recent news events, Mr Lawrie could not name any, despite indicating he regularly monitored the media. When pressed, he was able to name the Prime Minister, but not the opposition leader, even though he volunteered he liked him. Mr Lawrie took some time to properly identify his current address. Dr Davis observed that Mr Lawrie scored 19/30 on Folstein's MMSE. Mr Lawrie was unable to interpret the proverb "people in glass houses shouldn't throw stones". The most obvious deficits on the MMSE were his inability for short term recall and poor orientation for place.

⁸⁰ See her affidavit of assets of 12 October 2012.

⁸¹ See affidavit of J Waldon sworn 11 October 2012, exhibit JAW-5.

⁸² Ex. 11 (Letter from Dr Davis to V Pennisi).

- [118] Mr Lawrie indicated he was married to his current wife for about seven months. Dr Davis assessed his capacity to enter into a marriage contract. He considered Mr Lawrie was aware of the mutual benefits and obligations of the marriage contract and that he possessed sufficient cognition for that matter and that there was nothing to support undue influence in his decision to marry. Regarding Mr Lawrie's ability to make an Enduring Power of Attorney, Mr Lawrie was unable to describe the nature and effect of the instrument and could not recollect having made one.⁸³ When the instrument was described, he could grasp the general concept, but in Dr Davis' view could not retain sufficient detail to fulfil the capacity criterion under the *Powers of Attorney Act 1998*.
- [119] In the course of assessment for testamentary capacity Dr Davis enquired as to the nature of Mr Lawrie's assets. Mr Lawrie told Dr Davis that he currently had assets of about \$4 million held in various bank deposits, and pressed for further details, he stated that they were in various bank deposits earning around 5-6%.⁸⁴ When Dr Davis enquired as to who he needed to consider as his potential beneficiaries, Mr Lawrie responded that there were his two sons and his current wife, among whom he intended to distribute his assets equally.
- [120] Dr Davis concluded:
 "In summary, Mr Lawrie's cognitive decline satisfies the criteria for a clinical diagnosis of dementia. Noting the CT findings of old cerebro-vascular events in Dr Nick John's report, together with poor short term memory suggestive of co-existent Alzheimer pathology, his dementia is of probable mixed aetiology. It is interfering with his ability to make complex decisions as he cannot adequately retain, evaluate and manipulate relevant facts in a reliable manner. I am advised by his wife that attempted dementia specific therapeutic interventions were not complied with or did not result in improvement and have been discontinued. My recommendations are that he should be considered for appointment of a guardian and an administrator, and that his testamentary capacity be further evaluated with reference to specific information regarding his assets and the parties who might reasonably be considered in drafting his will."

Dr John's report of 21 November 2012

- [121] Dr John's recent expert report dated 21 November 2012 compiled for the purpose of this proceeding is comprised of two letters dated 9 November 2012 and 19 November 2012.⁸⁵
- [122] Dr John's report of 9 November 2012 detailed his examination of Mr Lawrie on 7 November 2012 in the company of a carer from Quality Lifestyle Support. Mr Lawrie's cognitive impairment had progressed since his last assessment by Dr John. Dr John recorded that on testing for cognition, Mr Lawrie scored 20/30 with 0/3 for short term recall. Mr Lawrie had no recollection of his previous

⁸³ In fact, Mr Kirby had been appointed in December 2010: affidavit of W Kirby paras [33]-[36], exhibit WK-1.

⁸⁴ It is pertinent that Mr Lawrie's statements to Dr Davis were made after the transfer of \$2.64 million on 8 November 2011 and the approximately \$2.185 million had been transferred to Ms Hwang on 16 November 2011.

⁸⁵ Ex. 1 (expert report of Dr John), see also affidavit of Dr John.

meeting with Dr John in November 2011. He did not remember that he was married. When prompted, he said that he may still be married to Ms Hwang, but he did not know where she was, and was not sure if they were still married.

[123] Although Mr Lawrie provided a very good social front, he had very little short term memory and no insight into his current problems.

“Para 4.1 With regards to the questions about the transactions made on the 8th November 2011 and 16th November 2011, whether Mr Lawrie would have the mental capacity to understand the ramifications of the transaction, the impact it would have on his long term financial security and the financial legacy for his family, I think the answer clearly is that he would not have the capacity to make those decisions. With the question as to whether he would be significantly more susceptible to influence given the damage to the front part of his brain, his rather superficial and insightful manner would make him ideal ‘pickings’ for unscrupulous people to take advantage of his undoubtedly generous nature.

Para 4.2 With regards to the issue as to whether he had the capacity on the 27th January to understand the issues involved in transferring money from his superannuation account to a Korean bank account again there is absolutely no doubt in my mind that he would have no capacity to understand the seriousness and the implications of such an act. Again because of the damage to his frontal lobe he would be exquisitely sensitive to influence and would have no insight into the impact such an adverse financial transaction would have on him or the people around him.

Para 4.3 These statements are made as a matter of my own opinion. Having read Dr Christopher Davies’ [sic] report, Dr Davies has come to exactly the same conclusion and I feel that it would be unusual for a Geriatrician or other practitioner who deals with cognitive impairment to come to any other conclusion other than that provided within my report. ...”

[124] In his report dated 19 November 2012, Dr John confirmed that given his frontal lobe infarct Mr Lawrie did not have capacity to make the decisions to undertake the transactions on 8 November 2011 (the withdrawal of \$2,643,934.60 from the term deposit into the Joint Account, and the telegraphic transfer of \$2,640,030 from the Joint Account to Mr Lawrie’s Shinhan Account) and 16 November 2011 (the transfer of 2.5 billion Korean won or approximately \$2.185 million from Mr Lawrie’s Shinhan Account to Ms Hwang’s Shinhan Account): see paras (a) and (b). Nor was he capable of making the particular decisions about his assets or finances affected by these transactions, as the frontal lobe damage affected his ability to weigh up the consequences of his decision-making: see paras (c) and (d). Mr Lawrie did not have the capacity to understand the nature or effect of the transactions, if they were explained to him, because of his poor short term memory and lack of insight into the wider ramifications of issues as a result of the frontal lobe infarct: see para (e). Moreover, his capacity was so impaired that he had no understanding of the nature or effect of the documents he was signing: see para (f). According to Dr John, on or about 8 and 16 November 2011, Mr Lawrie would have been much more susceptible to Ms Hwang’s influence in relation to entering

into financial transactions than a person with average cognitive function because of the damage to his frontal lobe: see para (g).

- [125] With respect to the Annexure 2 transactions (para (h)), Dr John advised that Mr Lawrie was not able to make the decisions undertaken during the period in which those transactions occurred because of the damage to the front part of his brain from the cerebral infarct. Mr Lawrie would not have been capable of making particular decisions about his assets or finances affected by these transactions because of that damage. He would not have had the capacity to understand the nature or effect of those transactions, if they were explained to him due to his poor short term memory and lack of insight. Dr John advised that Mr Lawrie would similarly have been much more susceptible to persuasion and had little insight into the impact of entering into financial transactions than a person with average cognitive function.
- [126] He also considered (paras (i), (j)) Mr Lawrie was not capable of making the particular decision about the assets or finances involved in transferring the \$1.5 million in the Lawrie Superannuation Fund (which failed), nor its nature or effect, even if explained to him. Dr John reiterated his opinion that Mr Lawrie's capacity was severely impaired in November 2011 when seen by him (para (k)).

Other evidence about Mr Lawrie's capacity

- [127] Mitchell Lawrie began to notice changes in Mr Lawrie's capacity in 2007. Mr Kirby had concerns since 2008. However, no formal steps were taken to assess Mr Lawrie's capacity until 2010. On 27 September 2010, Dr Yoong, Mr Lawrie's general practitioner, sent a referral letter to Dr Helen Siddle, a psychiatrist. Dr Yoong thanked him for seeing Mr Lawrie for "an opinion and management" and stated that Mr Lawrie had "been getting forgetful over the last 12 months, has forgotten appt, and a few other issues, but he considers it mild". It was not apparent whether Dr Siddle saw Mr Lawrie in November 2010. As mentioned, in December 2010, Mr Lawrie appointed Mr Kirby as his attorney under an Enduring Power of Attorney.⁸⁶
- [128] On 6 June 2011, Dr Yoong wrote letters of referral to Dr James and Dr MacKean in which Dr Yoong noted that Mr Lawrie had been "missing out on ... Lucrin injections due to memory issues and plus travelling to Korea on a regular basis". On 24 June 2011, Dr James wrote to Dr Yoong expressing the view that Mr Lawrie's memory was "not the best". On 27 June 2011, Dr MacKean provided a medical report to Dr Yoong, which although substantially dealing with Mr Lawrie's prostate cancer condition, also made reference to Mr Lawrie's memory. Dr MacKean commented that Mr Lawrie's "memory and decision making, whilst it has been good up until now, he is starting to become slightly problematic, and there is some concern that androgen deprivation therapy may contribute to cognitive impairment." Dr MacKean stated he was "concerned about Keith's cognitive abilities" to make decisions concerning treatment for his prostate cancer.
- [129] On 28 June 2011, Dr Yoong sent another referral to Dr Siddle, repeating that Mr Lawrie "had been getting forgetful over the last 12 months, has forgotten appt,

⁸⁶ Affidavit of W Kirby, paras [33]-[36], exhibit WK-1.

and a few other issues, but he considers it mild.” He added that his “partner feels it is certainly worsening and requested for tabs – Reminyl 16 mg privately started last week.”

- [130] The affidavits of Mr Kirby and Mitchell Lawrie filed with the application to QCAT in July 2011 further detailed their concerns about Mr Lawrie’s deteriorating mental state. Both Mr Kirby and Mitchell Lawrie also noted occasions in mid-2011 on which Mr Lawrie could not remember Ms Hwang’s surname, or when they met. When asked at the QCAT hearing on 24 August 2011, Mr Lawrie was unable to provide any details of when he and Ms Hwang had (recently) married in South Korea. Mr Lawrie appeared at times confused and required to be prompted to confirm that he was now married.
- [131] The material indicates Mr Lawrie felt lonely after the death of his wife and sought companionship. Mitchell Lawrie stated that his father asked two Korean students staying with him to marry him on different occasions. Indeed Mr Lawrie himself acknowledged his desire for a wife at the QCAT hearing on 24 August 2011. One of the Korean students living with Mr Lawrie sent an email to Mitchell Lawrie in September 2011 in which she said of Mr Lawrie, and his relationship with Ms Hwang: “Now, I really do not know what their relationship is. Keith always forgets”.
- [132] On 8 August 2012, Mr Moran of the Office of the Public Trustee spoke with Mr Lawrie privately, away from Ms Hwang. Mr Lawrie repeatedly referred to his faulty memory and stated his money had been robbed or stolen by the government. He could not remember whether or not he had any superannuation. He did not know how many bank accounts he held, or the name of the bank with which he held them, although he knew the branch was at Chermside and there was a lady manager there. (He also stated he had some money in a bank in Korea but he had forgotten where the money was and could not find it.) Mr Lawrie had no knowledge of the transaction on 8 November 2011, or that he ever had \$2.6 million in a bank account.⁸⁷ Mr Lawrie said he did not know how much money he had in the bank, but what he had was with the bank at Chermside. He said he did not have \$2.6 million in the bank and that if he did, he had forgotten it, but he wished that he did. He had not transferred any money to South Korea recently, only \$100,000 to a person named “Jason” years ago. He could have visited the Pitt Street branch of Suncorp to get “back up money for living”, though he did not remember. He said he would be concerned if he did in fact have \$2.6 million in a bank account and someone had transferred it to South Korea; he would want that money back.

Findings

- [133] I note that there is no evidence to contradict the expert evidence of Dr John, which is supported by the opinions expressed in Dr Davis’ report. I accept the evidence of Dr John, in particular the opinions expressed in the letter dated 19 November 2012 at paras (a) to (k). I am satisfied that this medical evidence establishes the contentions of the plaintiffs advanced in paras 30 to 32 of the ASOC and that it was corroborated by those close to Mr Lawrie, who provided lay evidence of his impaired mental capacity.

⁸⁷ See paras [37]-[42] of Mr Moran’s affidavit.

Dishonesty

- [134] The plaintiffs seek to establish Ms Hwang’s fraud or dishonesty by showing firstly that she was aware that Mr Lawrie “was not capable of making the particular decisions about his assets or finances at the time of the relevant financial transactions” and secondly that Ms Hwang “knew or believed that he then did not have that capacity”. This approach is adapted from the test used in the context of the offence of fraud under the *Criminal Code* in *R v Shanta Mani Naidu* [2008] QCA 130 at [5] (McMurdo P), also at [22] (Fraser JA).⁸⁸
- [135] Although the civil standard of proof applies in the present case, it is accepted that the seriousness of the allegations means that the Court requires a high degree of satisfaction of the two matters sought to be established.
- [136] As already stated, I find that Mr Lawrie lacked capacity to make decisions as to his assets and finances the subject of the impugned transactions and to understand documents he signed on 8 and 16 November 2011 in that regard.
- [137] As to the question of Ms Hwang’s knowledge or belief that Mr Lawrie lacked capacity, there are several factors which it was contended together establish that she knew of that lack of capacity when the relevant payments were made (and orchestrated them).
- [138] Firstly, it was submitted that, given the close and continuous contact Ms Hwang had with Mr Lawrie since May 2011, Ms Hwang must have been aware of the extent and degree of Mr Lawrie’s intellectual impairment. It was submitted that the exchange between Mitchell Lawrie, Kumok Hwang and Keith Lawrie on the evening of 28 June 2011, set out in Mitchell Lawrie’s affidavit, made it plain that Kumok Hwang was well aware of Mr Lawrie’s very real mental impairments from at least that time which was so acute he could not at times recall her name. Mitchell Lawrie deposed to the following exchange at his father’s house on the evening of 28 June 2011:⁸⁹

“48. I then had the following exchange with Keith and Ms Hwang:

I said, ‘So people have been saying something about you getting married?’

Keith said, ‘Oh something in the wind.’

I said, ‘Oh, when?’

Keith said, ‘Don’t know?’

I said, ‘You don’t know?’

Ms Hwang said, ‘We had a date planned but ... What day are we supposed to be getting married?’

Keith said, ‘I’m so bloody confused now I don’t know whether I am upside down or inside out.’

Ms Hwang said, ‘He just woke up.’

49. I later had the following further exchange with Keith and Ms Hwang:

⁸⁸ The appellant, who developed intimate relationship with elderly man suffering from memory loss from strokes and receiving money claimed to be gifts, was convicted of fraud (s 408C of the Queensland Criminal Code). See also, *R v Capewell* [1995] 2 Qd R 645 (CA) (mother withdrew money from daughter’s bank account using deposit slip signed by daughter and transferred to her own bank account with same bank).

⁸⁹ See affidavit of M Lawrie sworn 9 October 2012, paras [48]-[49].

Keith said, 'Firstly, have you two met before?'

My said, 'Yes.'

Keith said, 'You have?'

Ms Hwang said, 'Yeah.'

Keith said, 'Right okay.'

I said, 'You don't remember? You came to my place with her'

Keith said, 'Oh okay, No I can't remember.'

I said, 'How long have you known each other now?'

Keith said, 'How long? ...'

Ms Hwang sad, 'So you tell me he want to know your memory.'

I said, 'Yeah I wanted to know'

Ms Hwang said, 'We take some medication so ... He's more clear in the morning time. Right now I don't know.'

I said, 'What is her name?'

Ms Hwang said, 'What's my name?'

Keith said, 'Ahh ... don't embarrass me.'

Ms Hwang said, 'Why all of a sudden you forget my name?'

Keith said, 'I don't know. I don't know, I think it's all ah ... temporary memory loss I suppose.'

Ms Hwang said, 'All of a sudden ... you know I did take your medication today but ...'

I said, 'What medication?'

Ms Hwang said, 'Went to the doctor today and he gave me this.'

I said, 'What's that?'

Ms Hwang said, 'He take that ...'

I said, 'Hmmm so what else can you tell me about this lady? What was she doing? Where did you meet?'

Keith said, 'I've got a complete bloody memory loss now.'

Ms Hwang said, '... his short term memory sometimes which I didn't know that, cos its night time ...'

Keith said, 'In the normal circumstances it doesn't happen very much. Very little but ever since we left the house and all this bloody ...'

Keith said, 'Trying to find our way home, its just sort of ...'

Ms Hwang said, 'Blacking out??'

Keith said, 'Got it all confused.')

[139] Secondly, reliance was placed on the evidence of two medical reports which independently recorded Ms Hwang's awareness of Mr Lawrie's impairment:

- (a) On 28 June 2011 a referral letter sent by Dr Yoong to Dr Siddle concerning Mr Lawrie's memory, commented that Mr Lawrie's partner "feels it is certainly worsening and requested for tabs – Reminyl 16 mg privately started last week."⁹⁰
- (b) Likewise Dr Davis' report recorded that Ms Hwang advised that "attempted dementia specific therapeutic interventions were not

⁹⁰ Affidavit of J Waldon sworn 11 October 2012, exhibit JAW-5 (p 21).

complied with or did not result in improvement and have been discontinued.”⁹¹

- [140] Thirdly, the plaintiffs pointed to the evidence that Mr Kirby told Ms Hwang on 22 June 2011, and in an emailed letter dated 23 June 2011, that he and others had noticed a deterioration in Mr Lawrie’s mental capacity, and cautioned not to consider marriage until a medical assessment of Mr Lawrie’s capacity was obtained.⁹²
- [141] Fourthly, Ms Hwang attended the QCAT hearing on 24 August 2011 where Mr Lawrie’s vulnerability by reason of intellectual impairment was discussed in detail, and knew that QCAT had made an order appointing the Public Trustee as administrator, because of concerns about his impaired mental capacity, and consequent vulnerability to fraud.
- [142] Fifthly, the plaintiffs submitted that there was a plethora of evidence of Ms Hwang exercising control over Mr Lawrie. Reliance was placed on affidavit evidence of Mr Kirby and Mitchell Lawrie concerning her subsequent isolation of Mr Lawrie. Also noted was her instruction to Mr Lawrie during the hearing of 24 August 2011, to not answer a question from the QCAT member as to whether she was keeping others from him.⁹³
- [143] In respect of the QCAT hearing at which Ms Hwang and Mr Lawrie were both present and participated,⁹⁴ specific reliance was placed on the following features of what occurred at the QCAT hearing on 24 August 2011:
- (a) There was discussion of the fact that Mitchell Lawrie, supported by Mr Kirby, had applied for the appointment of an administrator because of concern that Ms Hwang may abuse Mr Lawrie’s trust by taking his money, in the light of:
 - (i) their concern about Mr Lawrie’s deteriorating mental capacity;
 - (ii) their belief that Mr Lawrie had recently been the victim of theft by a female Korean living with him, Ms Jennifer Yoon (who had taken some \$30,000 without authority, and then left the country);
 - (iii) their concern about the recent behaviour of Mr Lawrie and Ms Hwang. (see T 36, 37, 38, 48-49, 50, 56-7, 58, 60).
 - (b) In particular, Ms Hwang indicated that she was aware that the reason for the application to the QCAT, and for the hearing on 24 August 2011, was because of a concern that she would take advantage of Mr Lawrie’s apparent mental impairment to take his money for herself:
 - (i) Ms Hwang spoke of being insulted by Mitchell Lawrie who “treat me like a thief” (T 37 para 625), and “said a lot of nasty things thing about marrying his father about money” (T 37, para 625), asserting “he’s worried about his money more than anything else” (T 38, para 633).
 - (ii) Mitchell Lawrie was recorded as saying “Can we please remember that the day that I met you was also the day that I found out the previous Korean woman had stolen over \$100,000 from Keith” (T 48, para 819), to which Ms Hwang responded “Yes I do understand that” (T 49, para

⁹¹ Ex. 11 (Letter from Dr Davis to V Pennisi).

⁹² Affidavit of W Kirby, paras [56]-[59], exhibit WK-6.

⁹³ QCAT Transcript, para 704.

⁹⁴ Counsel for the plaintiffs noted that there was no direct evidence that Ms Hwang read the affidavits of Mitchell Lawrie and Mr Kirby filed in support of the application, but, in any event, the information was discussed during the hearing of 24 August 2011.

820), and then asserted that she was quite different to Jennifer Yoon, and had no need to “steal”:

Ms Hwang: “But I understand that now okay. But he can think, like I understand that part but he can think like that but you can put it on one side. But this lady was take advantage of him so he allowed to give a credit card or whatever happened. So first, different instance totally ... You cannot compare me and what her name Jennifer and me you cannot compare ...”. (p 49, para 826, 828).

TH (Tribunal member) “... You are able to say confidently I am not like Jennifer, you say that because you know yourself. Nobody else at that time knew you particularly well and therefore they were concerned.” (p 49, para 831).

Ms Hwang: “I don’t have to steal from everything. I can whatever necessary think as a husband. I can ask for, not steal it. That was different” (pp 50-51, para 854).

- (iii) The QCAT member subsequently stated that “one of the significant issues that appears to be emerging is whether or not you are going to be making your decisions freely or voluntarily or whether you might be unduly influenced by Ms Hwang in the decisions that you make” (T 60, para 950).
- (c) There was discussion about Mr Lawrie’s bank manager having put in place measures to protect Mr Lawrie from being taken advantage of again. QCAT was specifically told that arrangements were in place with Mr Lawrie’s bank manager, such that no changes could be made to accounts with significant sums of money without certain “protocols” being followed: T 72 (para 1122),⁹⁵ 76 (para 1164), 78-79, 80-81.

Mr Kirby: “The arrangement that Keith made with his bankers is that there is limits, specific limits on particular accounts and that no changes can be made to those areas where there’s significant sums of money without a series of protocols agreed on by he and the bank manager being undertaken ... (T 78-9).

TH: “... So there’s a protocol whereby only certain accounts are available and only up to a particular limit. And other accounts are not able to be touched unless a particular protocol has gone through ...” (T 79, para 1199).

QCAT was also told that the bank manager who had put the measures in place was Cheryl Rogers (the manager at the Chermside Branch): T 80-81.

- (d) In this context, Mr Lawrie specifically stated that Ms Hwang would not have access to his accounts, and Ms Hwang confirmed this: T 76 (para 1166), 78 (1186), 81 (para 1217). The Transcript records:⁹⁶

(T 79):

TH: “Have you made Kumok a signatory to your accounts yet?”

⁹⁵ KL: “I would like you to contact by bank manager, a lady bank manager, because she periodically, we talk quite frequently and she assures me yep time to time that there are no unusual withdrawals or anything like that period” (QCAT Transcript, para 1122).

⁹⁶ Mr Lawrie also told QCAT that he did not spend much money: QCAT Transcript, paras 479, 494, 495, 1190.

Mr Lawrie: “No. No. What I propose to do eventually, I mean I have mentioned it, is to set up her own account but she doesn't have access to any of my accounts right.”

Ms Hwang: “Yep (u/i):

(T 78):

Ms Hwang: “She [Ms Yoong] wasn't using your credit card properly the last four years ...”

Mr Lawrie: “But I meant that, that thing doesn't exist now. I mean that's why, I mean as much as I feel about this lady, I haven't given her access to any of the accounts and don't propose to purely for this sort of incident happening again. More so I mean not too long off I was going to start opening her own accounts period which I will transfer funds to at my control. So I can only say that in all honesty that I have to object in principle because I believe I have looked after my funds pretty well, period”.

(T 81):

Mr Lawrie: “Well apart from the incident with Jennifer which can't be replicated without intentionally giving somebody in that situation a card, that's something which I've got no intention of. I mean later on with this lady you know I'm going to get her some stuff, I'm going to give her own accounts, period. Not any of Lawmar or my accounts.

Ms Hwang: “Okay”

- (e) QCAT explained that its role, and the order it made, was to “protect” Mr Lawrie: see T 63, para 984 (“for protection of Keith”), 71-2, para 1121 (“protect your position in relation to your financial affairs”), 74, para 1143 (“there needs to be some protective device put in place for you”), 77, para 1181 (“to ensure you are not at risk”), 81-82, para 1220 (“protect the parties position”).
- (f) QCAT explained that the Public Trustee was to be the substitute decision-maker for Mr Lawrie, and would have control of his bank accounts and money, with Mr Lawrie in consultation with the Public Trustee, retaining control of his funds “for day to day things”: see T 75 (para 1153), 83 (para 1248), 85, 89 (para 1334, 1335).

[144] It was submitted that the only realistic inference from the matters set out above was that Ms Hwang knew that the Public Trustee had been appointed as administrator for Mr Lawrie, in order to prevent her doing precisely that which she did, and that her conduct was dishonest. Moreover, when the course of events after 24 August 2011 was considered in the light of the QCAT hearing, the only realistic inference was that Ms Hwang knew that she should not be causing Mr Lawrie to transfer his money away, and that she was acting dishonestly in doing so.

[145] It was also contended that the evidence as a whole revealed a range of powerful indicia of fraud. These were summarised by counsel for the plaintiffs as including the isolation of Mr Lawrie after 31 May 2011; Ms Hwang's drive to marry Mr Lawrie notwithstanding his expressed uncertainty and confusion about that, and as to Ms Hwang's name, and how and when he had met her; their departure for Korea shortly after the filing of an application to QCAT, and the subsequent marriage there (instead of Brisbane on 7 July as had previously been planned) in the teeth of Mr Kirby's remonstrance that a medication examination was first

necessary; the opening of a bank account with Shinhan Bank on the same day as the purported marriage (Mr Lawrie's Shinhan Bank account), which had no apparent commercial purpose in terms of Mr Lawrie's business dealings (Mr Lawrie having previously conducted business in Korea for a number of years without the need for any local bank account); Ms Hwang's return to Brisbane with Mr Lawrie at the eleventh hour when told the QCAT hearing would proceed on 24 August 2011; the cancelling of Mr Lawrie's medical appointment on 26 September 2011, even though the hearing concluded with unambiguous statements that this should be done as soon as possible; the subsequent systematic cash withdrawals from the Joint Account in Seoul during October 2011; the transfer of the \$2.64 million to Korea from a bank branch in Sydney where Lawrie was unknown (and following an earlier visit to Sydney in September, and after some \$50,000 had been transferred apparently overseas on 1 November 2011); the travelling to Korea shortly thereafter to effect a transfer of 2.5 billion Korean won into Ms Hwang's own account, followed by the transfer of \$835,000 into her account with the NAB on 6 January 2012; the subsequent attempt to transfer the remaining \$1.5 million of cash in Mr Lawrie's superannuation account to Korea on 27 January 2011, soon after Mr Lawrie and Ms Hwang returned from a trip to Korea; the transferring away of \$360,000 of Lawmar money (Annexure 2) in the circumstances set out above; and Ms Hwang's false statement to Mitchell Lawrie (on 16 September 2012) that she had never been to Sydney.

- [146] I find that in respect of transactions occurring after 24 August 2011, Ms Hwang was well aware that the Public Trustee of Queensland had been appointed administrator for Mr Lawrie for financial matters as a protective measure and, *inter alia*, in order to prevent her from taking advantage of his mental impairment, to take his or Lawmar's money for herself.
- [147] I am also satisfied that dishonesty established on the basis that Ms Hwang well knew and believed that Mr Lawrie did not have capacity to make decisions about his assets or finances at the time of each of the impugned transactions from 27 June 2011.
- [148] I am satisfied that Ms Hwang implemented a scheme to orchestrate and effect the transfer of moneys to her and Goldpearl. I am satisfied that Ms Hwang caused Mr Lawrie to establish a bank account in Korea on 26 July 2011, the day of the marriage ceremony, for the purpose of receiving money from Australia. It is pertinent that Mr Lawrie had been doing business in Korea for years and never previously had a bank account there. Establishing a bank account in Korea into which Mr Lawrie's money could be paid made Mr Lawrie's actions in sending money overseas more plausible as the money was (initially) going to another one of Mr Lawrie's own bank accounts, albeit overseas. Ms Hwang did not set up any account at the Chermside branch of Suncorp. Nor was the Joint Account set up there, where Mr Lawrie was known. Ms Hwang was aware that protocols were in place at the Chermside branch. Nor did the transfer of the Lawmar term deposit occur at that branch but in Sydney. I am satisfied that the true purpose of routing the money through a Korean bank account in Mr Lawrie's name, was to evade those at Suncorp who might have queried the sending of very large sums of money to Korea, and who had to be convinced to action Mr Lawrie's payment instructions. The routing of the money was achieved by the veneer that Mr Lawrie was making the payment of money to Korea (of his own free will) by ensuring that he signed

relevant documents (including when it was open to Ms Hwang to do so with respect to the Joint Account) when in fact he was under Ms Hwang's influence and control.

- [149] From the totality of the evidence, I am prepared to infer that a scheme was implemented, not lacking in sophistication, to achieve an outcome that the moneys be transferred for Ms Hwang's benefit and in part utilised by Goldpearl. The material indicates that initially Ms Hwang proceeded cautiously, by causing Mr Lawrie to make a series of payments to his new Korean bank account to test whether they would be successful, being the transfer of \$5,030 on 29 July 2011,⁹⁷ increasing to \$50,030 on 27 September 2011,⁹⁸ (by which time she was also well aware of the concerns aired at the QCAT hearing on 24 August 2011). These payments enabled Ms Hwang to gauge whether there would be any impediment to sending larger sums to Korea. Only after four such payments had been effected was the overseas transfer of the \$2.64 million transacted.
- [150] The finding of dishonesty is supported by the matters summarised in para 165 of the submissions, which are established on the evidence. Ms Hwang's behaviour since 11 October 2012 also reinforces my view of Ms Hwang's conduct. Notwithstanding her undertaking to return to the jurisdiction and two court orders that she appear and be examined as to her assets, she failed to appear. No evidence was put before the court explaining her absence. The assertions in the "defence" document as to why she did not retain lawyers to represent her to defend the proceedings, in particular were not supported by any affidavit evidence. Nor was evidence filed concerning her current state of health which would preclude her attendance. The absence of explanation supports the inferences that I am prepared to draw of her dishonesty. Further, notwithstanding restraining orders, she mortgaged her Korean properties.

Undue influence and unconscionable conduct

- [151] As stated, I accept the expert opinion of Dr John. In particular, I accept the opinion set out paras (g) and (h)(iv) of his report dated 19 November 2012 which is pertinent to the issue of undue influence.
- [152] I find that Mr Lawrie was significantly more susceptible, compared with a person of average cognitive function, to Ms Hwang's influence in respect of the transactions on 8 and 16 November 2011 and those occurring during the period and in respect of the making of the payments totalling \$361,451.36 (as set out in Annexure 2).
- [153] I am satisfied that Ms Hwang caused the transactions for which the money judgment in para 1 of the draft order is sought to be made by manipulating Mr Lawrie to undertake the relevant transactions and thereby exercising undue influence over Mr Lawrie.
- [154] On the basis of the evidence, I am satisfied that Ms Hwang did so by deliberately taking advantage of and exploiting Mr Lawrie's known vulnerability and mental impairment to cause him to undertake the relevant transactions with an eye to her ultimate advantage. Her exploitative conduct was unconscionable.

⁹⁷ Payment 9 on Annexure 2 of the outline of submissions filed by leave on 5 December 2012.

⁹⁸ Payment 27 on Annexure 2. On 26 August 2011, the overseas payment was instead made to Ms Hwang's account in the United States: payment 13 of Annexure 2.

- [155] The facts alleged in para 37(a), (d), (e), (f) and (g) of the ASOC are established on the evidence. I do not consider that there is an impediment in the particular circumstances of this case arising from Lawmar's corporate stakes to its claim. I adopt the dicta of Wheeler J in *Ridout Nominees* at [56]. To deny Lawmar relief in equity would allow the clearly deliberate and unconscionable conduct of Ms Hwang to be rewarded, in circumstances where I am satisfied she was well aware of Mr Lawrie's role in Lawmar and the nature and extent of Mr Lawrie's mental impairment (and manipulated it to her advantage).

Lack of capacity/authority to make payments

- [156] As to Mr Lawrie's capacity and authority, I am satisfied on the basis of the expert medical evidence that Mr Lawrie had no legal capacity, and thus no authority from Lawmar, to make the following payments:

- (a) the payments of approximately \$2.64 million on 8 November 2012;
- (b) the payments to Ms Hwang on 16 November 2012;
- (c) the 37 payments comprising the sum of \$361,451.36 dealt with in Annexure 2.

He had no ability to understand their nature and effect even if they were explained to him.

- [157] I am satisfied that at the time of the transactions in question Ms Hwang knew that Mr Lawrie lacked capacity.

Quantum

- [158] I am satisfied that Ms Hwang received the benefit of the following sums of money that originated in the bank accounts of Lawmar held with Suncorp:

- (a) \$2,643,934.60, that was received by Ms Hwang when paid from the Lawmar Term Deposit into the Suncorp Joint Account on 8 November 2011. In that regard, I accept the contentions at para 115 of the written submissions, that Ms Hwang received the whole of that sum notwithstanding that the account was nominally in joint names;
- (b) 2.5 billion won, that was transferred from Mr Lawrie's Shinhan Bank account (account no. 110338908862) into Ms Hwang's account with Shinhan Bank (account no. 110316954360) on 16 November 2011, which money formed the bulk of the \$2.64 million (viz about \$2.185 million⁹⁹) that had been received into that bank account on 11 November 2011, as 2,987,136,797 won¹⁰⁰ three days after the transaction on 8 November 2011, by which Suncorp acted on instructions to transfer the money to Mr Lawrie's bank account in Korea;
- (c) \$361,451.36, that was received by Ms Hwang between 21 June 2011 and 31 January 2012, as particularised in Annexure 2 and proved by the evidence referenced therein;
- (d) as to the payments of cash, and the \$2,000 amount, I am satisfied that the inferences referred to in para 175 of the plaintiffs' submissions ought to be drawn.

- [159] I am also satisfied that Ms Hwang caused Lawmar to suffer the following losses:

- (a) \$2,643,934.60 paid into the Joint Account on 8 November 2011;

⁹⁹ Affidavit of S Lee, para 10(a).

¹⁰⁰ I note therefore that that amount is not to be added to the sum of \$2.64 million received on 8 November 2011.

- (b) \$6,233.65 breakage cost sustained on 8 November 2011;
- (c) \$361,451.36 paid away and lost as particularised in Annexure 2.

[160] In the circumstances, judgment is given in the amount of \$3,011,619.61.

Tracing

[161] I find that the assets the subject of Annexure A of the draft judgment were acquired by Ms Hwang using money originating in the bank accounts of Lawmar held with Suncorp. That finding is based upon:

- (a) The affidavit of Ms Hwang sworn on 12 October 2012;
- (b) The evidence of Ms Hwang given on cross-examination on 12 October 2012, that when she met Mr Lawrie, the only asset that she had was the house in Minnesota identified as asset #8 on her affidavit of assets sworn 12 October 2012;¹⁰¹
- (c) As to the US Bank account, the subject of para 6 of Annexure A, also document 44 of the tender bundle concerning the transfer of US\$10,000 on 26 August 2011.

[162] I find that the evidence establishes the existence of each of the assets identified in Annexure A of the draft judgment:

- (a) para 1(a) (Suncorp) – tender bundle, document 34;
- (b) para 1(b) (CBA) – Ms Hwang’s affidavit of assets, asset #13;
- (c) para 1(c) (NAB) – tender bundle, documents 4 and 5; Ms Hwang’s affidavit of assets, asset #14;
- (d) para 2(a) (Ford, 2001) – Ms Hwang’s affidavit of assets, asset #16;
- (e) para 2(b) (Ford, 2003) – Ms Hwang’s affidavit of assets, asset #17;
- (f) para 2(c) (Kia, 2011) – Ms Hwang’s affidavit of assets, asset #18;
- (g) para 2(d) (Daewoo) – which insofar as it does not appear to be the asset identified as #18, Ms Hwang’s ownership of it is established by exhibit 12;
- (h) para 3 (Korean properties) – Ms Hwang’s affidavit of assets, assets #1, #2, #3, #4; affidavit of Kyung-Joon Choi sworn 8 November 2012 (ct doc 12);
- (i) para 4(a) (Shinhan 1) – affidavit of Steven Lee sworn 9 October 2012, para 9 and exhibit SL-2; Ms Hwang’s affidavit of assets, asset #5;
- (j) para 4(b) (Shinhan 2) – affidavit of Steven Lee sworn 9 October 2012, para 9 and exhibit SL-2; Ms Hwang’s affidavit of assets, asset #7;
- (k) para 4(c) (Pusan) – Ms Hwang’s affidavit of assets, asset (f);
- (l) para 5 (Jin) – Ms Hwang’s affidavit of assets, asset (f);
- (m) para 6 (US Bank) – Ms Hwang’s affidavit of assets, asset #9; tender bundle, document 44.

[163] I am also satisfied that the evidence establishes the existence of all of the assets and undertaking of Goldpearl disclosed, being asset #10, #11, #12, #15 and that Ms Hwang’s affidavit of assets establishes that they were acquired using money provided by Lawmar that originated in the accounts in Lawmar’s name.

Constructive trust

[164] I find that Ms Hwang acquired the assets identified in Annexure A of the draft judgment, in circumstances where that money was obtained by Ms Hwang by fraud

¹⁰¹ Transcript 1-26.

and undue influence, and where Mr Lawrie lacked capacity to make the payments, so that they were not authorised or intended by Lawmar. Accordingly, those assets are held on a constructive trust.

[165] I find that Goldpearl received the money from Ms Hwang that it used to acquire its assets and undertaking as a volunteer, and in the knowledge that the money had been acquired by her using fraud, undue influence and without authority from Lawmar. Accordingly, it holds those assets on constructive trust.

[166] I am satisfied that the facts alleged in paras 48-55 and 57, 58 of the ASOC are established on the evidence, as are the facts alleged in para 56(a) to (d) of the ASOC. As counsel for the plaintiffs conceded, the evidence does not establish the fact alleged in para 56(e). But that does not matter to the result given the findings above.

Other orders

[167] I accept for the reasons submitted that the other orders sought, including for the appointment of receivers and managers and freezing orders should also be made as expressed in the draft judgment.

Judgment

[168] I will make orders in terms of the draft judgment as initialled.