FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 23
A226/17

Lord President
Lord Malcolm
Lord Doherty

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

in the cause

PEEBLES MEDIA GROUP LIMITED

Pursuers and Reclaimers

against

PATRICIA REILLY

Defender and Respondent

Pursuers and Reclaimers: Lindsay QC; Clyde & Co (Scotland) LLP
Defender and Respondent: Smith QC; Lefevre Litigation

12 March 2021

Introduction

[1] The pursuers, who are a publishing company, pursue their former credit controller for damages arising out of a "whaling fraud". In short, the defender made four payments totalling some £193,250 to persons, who had no connection with the pursuers, in the mistaken belief that the payments had been authorised by her managing director, namely

Yvonne Bremner, by a series of emails. The pursuers' claim on record is based upon a breach by the defender of the implied term in her contract of employment to exercise reasonable care and to display the skill commensurate with her position. More specifically, the defender was said to have been at fault in failing to realise that emails, purporting to be from Ms Bremner, were suspicious. She ought to have taken steps to check their authenticity. The case is not based on the defender doing something which she was contractually prohibited from doing. There is no suggestion that the defender was complicit in the fraud.

[2] The central issue in the reclaiming motion is whether the Lord Ordinary erred in finding that the defender was not negligent. The case is unusual because it is rare for an employer to sue a relatively junior employee for negligent actings. That there is a duty to act with care, when dealing with an employer's funds, is undoubted (*Clydesdale Bank* v *Beatson* (1882) 10 R 88). However, few employees insure themselves in respect of their own negligence. Employers are generally able to obtain insurance to cover losses sustained in that manner. If employers were to pursue their employees for negligent actings on a regular basis, this could have a significant impact on the employment relationship. That, however, is strictly irrelevant to the current claim.

The Lord Ordinary's Reasoning

General

[3] Although the Lord Ordinary made no findings on the matter, it is admitted on record that the pursuers are the publishers of magazines aimed at the business (eg Scottish Grocer) and consumer (eg Homes & Interiors Scotland) markets. They employed around 50 staff. Again, although not dealt with in the opinion, the averments that the defender had been

employed by the pursuers, or companies which they had absorbed, since 1996, first as an accounts assistant, then as a credit controller, are admitted.

[4] The Lord Ordinary found that the defender's main duty was to "chase" trade debts. She would do this by phoning customers, checking customer details, providing support when court action was instructed, and liaising with Ms Bremner. Her line manager was Claire Caldow. Ms Caldow prepared sales invoices, reconciled the sales ledger, made payments on the bank account, processed purchase invoices, reconciled the purchase ledger, reconciled the bank accounts and processed the petty cash. Ms Bremner was closely involved in those processes. She liaised with the defender on a daily basis "in that connection". Responsibility for clearing an invoice for payment lay with her. According to Ms Bremner, the defender did not have "the right" to make payments. Only Ms Bremner, Ms Caldow and the company secretary and finance director, namely Rosemary Morris, who worked part-time, were authorised to make payments. At some point, Ms Bremner extended the defender's duties "so as to provide support for" Ms Caldow, but this did not involve her in making payments to creditors.

The First Payment

[5] Ms Bremner was to start a week's holiday on the evening of Thursday, 8 October 2015, prior to going to Tenerife on the following day. Ms Caldow was also to go on holiday on the Friday. The defender would be the only full time employee in the accounts department from the following Monday. All three met to discuss arrangements during Ms Bremner's absence, including work which the defender was to do. There was no indication that the pursuers would require to make a series of payments to other businesses, other than to G4S. Ms Bremner told the defender to ask G4S to send an invoice.

[6] Late in the morning of Friday, 9 October, an email purporting to come from Ms Bremner's iPhone ("Yvonne Bremner [mailto:yvonne.bremner@... etc]"), but in fact emanating from "ceoreplys@writeme.com", was sent to the defender's email address (trisha.reilly@... etc). This asked whether the defender was in the office. She replied that she was. The response to that was "Ok Trisha, I need you to process a Chaps payment swiftly. what [*sic*] details will be needed? Thanks Yvonne Bremner". The defender set out the information that would be required to make the payment (name, bank account, sort code, amount) and continued: "Claire is saying we need your password as she doesn't think her's worked the last time". The recipient replied:

> "Ok Trisha, I think claire [*sic*] password has been sorted, or has all password [*sic*] been reset again? process [*sic*] a chaps payment in the amount of 24,800 GBP to… Power Counsulting LTD"

A Barclay's Bank account number was provided. The email ended "Thanks Yvonne Bremner Sent from my iPhone".

[7] The defender could not find the name of the company on the pursuers' system. The name had obviously been mis-spelt. She checked with the register at Companies House. She attempted to phone Ms Bremner to explain that the payment was not going smoothly. She sent an email back querying the precise name of the payee, as there were several similarly named companies and an address was required. An address was provided. The defender contacted Ms Caldow, who was authorised to operate the pursuers' online bank account and was familiar with the regular payees. Power Consulting was not a name with which Ms Caldow was familiar. That did not deter her from making the payment. A discussion followed, during which the defender surmised that the money might be to pay for Ms Bremner's roof repairs.

[8] Ms Caldow's testimony took the form of an affidavit. She deponed that she processed the payment as fast as possible because she was going on holiday. The defender said that Ms Caldow "clicked through" the bank's fraud warning notice. Since Ms Caldow's affidavit was silent on the point, the Lord Ordinary accepted that this is what happened. The payment went through.

[9] At the time of the defender's phone call, Ms Bremner was on her flight. She did not pick up that she had a missed call and that a voicemail had been left until the evening. The Lord Ordinary found that, in the voicemail, the defender had told Ms Bremner that she was "making" or "processing" a payment. The voicemail did not mention an email from Ms Bremner. Ms Bremner had not been concerned by the voicemail as it was one of the defender's responsibilities to help Ms Caldow, who was authorised to make payments.

[10] The Lord Ordinary held that the defender was not responsible for this payment as it had been made by Ms Caldow. Ms Caldow had originally been a co-defender, but the case against her had been abandoned. The Lord Ordinary took into account the fact that Ms Caldow had not noticed anything suspicious when assessing the defender's "culpability". He had not heard evidence on the defender's familiarity with Ms Bremner's vocabulary or writing habits which would have made her suspicious of the use of certain words, mis-spellings or the signing off of emails using her full name. He did not consider that the defender's suspicions should have been aroused because the emails had come from an iPhone, whereas Ms Bremner was a technophobe whom the defender only knew to carry a mobile. Submissions from the pursuers in relation to the existence of two different email chains and odd times on some of the incoming mails, which might have suggested an origin in the Americas, did not persuade the Lord Ordinary that the defender ought to have realised that something was amiss.

The Second Payment

[11] On the following Monday, 12 October, another email purporting to come from Ms Bremner was sent to the defender. It confirmed that the Friday payment had been received and asked the defender to "process another payment of $75,200 to the same recipient and classify it as payment balance". The defender queried the dollar amount which was promptly converted into "GBP" with "Sorry for the Typo" added. The defender set about processing the payment by using the details which Ms Caldow had provided. She could not process this as "Power Consulting" was not on the payee list. She emailed the person whom she thought was Ms Bremner and asked for help on how to complete the payment.

[12] The defender texted Ms Caldow, telling her that Ms Bremner had asked her to process another payment and asking for confirmation that a particular PIN was the correct one for use with what was presumably a card reader. Ms Caldow confirmed that the PIN was correct. The Lord Ordinary concluded, not surprisingly, that Ms Caldow was thereby aware that the defender had the appropriate details with which to process online banking payments. The defender had seen how Ms Caldow processed the payments but, despite the averment to the contrary in her pleadings, she eventually accepted during her testimony that Ms Caldow had not taught her how to do this. She had seen and been able to recall how Ms Caldow had made the first payment.

[13] Prior to being able to authorise payment, the defender would have been faced with the bank's fraud warning notice. One of the warnings referred to precisely the type of fraud which was being perpetrated on the pursuers. It explained that those involved in payments would receive an email "seemingly from the genuine email address of another member of

the business (often a Director) with a payment instruction". Customers were advised "to take additional steps to verify payments when dealing with email based instructions (particularly where the beneficiary is not one that you have paid before)". The defender "clicked through" the fraud warnings without reading them, just as she had seen Ms Caldow do.

[14] When she could not enter the payee details successfully, the defender phoned Alistair MacKay at the bank for assistance. He explained that he could not help her as he was not sufficiently knowledgeable about online banking. The bank helpdesk could assist with this type of query, but would not do so here as the defender was not authorised to make payments. Mr MacKay explained to the defender that she was not authorised but, as the Lord Ordinary found, he did not tell the defender that she should not make any further attempts to make payment. In his testimony, Mr MacKay acknowledged that he had a discretion to allow unauthorised payments to proceed. He knew that the defender was alone in the office; with Ms Bremner and Ms Caldow both on holiday. This explained why he did not stop the defender from using the system.

[15] The defender received a response to the question in her email, to the person whom she believed was Ms Bremner, on whether there was another method of payment. This asked whether she (the supposed Ms Bremner) required to confirm the account details again. The Lord Ordinary interpreted this as meaning that the defender was to continue to try to make payment. He added:

> "I consider that the defender was entitled to read this as an instruction from Yvonne Bremner to keep trying to make payment even though Mr MacKay had told her she was not authorised to make the payment".

The defender said that she would keep trying. Eventually, the defender emailed as follows:

> "Eureka, sorted. Only took about 2 hours but hey, printed off acknowledgement – ready for a Gin & Tonic lol."

[16] The Lord Ordinary concluded that he "was unable to say that [the defender] was in breach of her implied obligation to exercise reasonable skill and care". The defender "was entitled to take her lead to some extent from her superior", by whom he meant Ms Caldow. He was not "persuaded" that reading the bank's notice would have altered the outcome. The defender was alone in the office. Ms Bremner had not replied to her voicemail and Ms Caldow had ignored the warning at the time of the previous payment. The Lord Ordinary explained that, looking at matters from the defender's point of view, "she was entitled to conclude that Yvonne Bremner wished her to make the payment". He did not think that the defender should have been alerted by the use of the dollar sign on the email because, he reasoned, this could have been a "typo", as the emailer had said it was, because the dollar and pound keys are next to one another on a standard keyboard. He makes no observation that this is not the position on an iPhone keyboard.

The Third and Fourth Payments

[17] No doubt buoyed by his or her success so far, on the Tuesday (13 October, 2015) another email was sent from an iPhone, bearing to be from Ms Bremner, advising of the need to make two more "chaps payments". After sundry exchanges, the payees' account details were provided. The sum of £56,750 was paid to Hitendra Limited of Wembley, London and £36,500 to Arshad maintenance services [*sic*] of Walsall. This required the defender to find the correct sort code for the latter. There were sufficient funds in the pursuers' current account to make one or other of the payments, but not to make both. In order to pay both amounts, the defender transferred funds from the pursuers' invoice

financing account, to which the defender did have access, to the current account. Although the defender said that Ms Caldow had authorised her to do this, the Lord Ordinary did not believe her. The bank's "Fraud Area" considered the Tuesday payments to be suspicious. It contacted the defender to query them. The defender confirmed that the pursuers did wish to make payments to the payees. As a result, Mr MacKay authorised the release of the funds.

[18] The fraud was discovered when Ms Morris was in the office on the Thursday (15 October, 2015). She contacted the bank, which was able to retrieve £85,265.98. These were sums of approximately: £15,000 from Arshad maintenance services; £4,700 from Hitendra; and £50,000 and £16,000 from Power Consulting. The defender was dismissed on 11 November 2015.

[19] The Lord Ordinary concluded that the language of the emails on the Tuesday was not any more suspicious than those on the Friday or the Monday. The defender was not in breach by not becoming suspicious. Although no case of this nature was made on record or in the submissions at the end of the proof, the Lord Ordinary held that the defender had breached her duty to act with reasonable skill and care in transferring the funds between the pursuers' accounts. He nevertheless held that the losses sustained as a result of this breach did not arise "naturally, ie according to the usual course of things" (*Hadley* v *Baxendale* (1854) 9 Ex 341).

Submissions

Pursuers

[20] The Lord Ordinary identified the relevant duties but erred in law in concluding that, on the facts found, the defender had not breached those duties in respect of the Friday and Monday payments. The problem was not with the individual findings in fact, but that,

when considered cumulatively, the only reasonable conclusion was that the defender had been in breach. The conclusion that the language of the emails on the Tuesday did not contain any more clues as to their origin than those that had gone before was wrong in the same respect. The emails were obviously fraudulent. The Lord Ordinary failed to consider "in the round" the following factors: the pursuers had no business relationship with any of the payees; their names did not suggest any legitimate relationship; it was inherently improbable that Ms Bremner would instruct an employee who was not authorised to make payments of significant sums, all while she was on holiday. These additional suspicious circumstances meant that the only reasonable conclusion was that there was also a breach relative to the Tuesday payments. There were repeated flags which would have alerted a person of ordinary intelligence and everyday experience. Reassessing the factors objectively, a credit controller, who exercised reasonable skill and care, would have been alerted.

[21] The Lord Ordinary was correct to hold that the defender was in breach in making the internal transfer. The loss here was not too remote (*Hadley* v *Baxendale*; *Jackson* v *Royal Bank of Scotland* [2005] 1 WLR 377; *Transfield Shipping* v *Mercator Shipping (The Achilleas)* [2009] 1 AC 61). The Lord Ordinary failed to consider what was within the reasonable contemplation of the parties at the time of the contract. The context for assessing remoteness was the employment relationship. The relevant contractual terms were that she was not authorised to make payments on behalf of the pursuers and/or to effect the internal transfer of funds. Losses are recoverable if they would generally happen in the ordinary course of things if the obligation not to transfer money from one account to another was breached (*Balfour Beatty Construction (Scotland)* v *Scottish Power* 1992 SLT 811 at 813, 1994 SC (HL) 20 at 31; *Cosar* v *UPS* 1999 SLT 259). The loss was "a real danger", "a serious possibility" and "not

very unusual and easily foreseeable" (*Cosar* at 264, quoting from *Czarnikow* v *Koufos* [1969] 1 AC 350).

[22] The Lord Ordinary erred on causation. He failed to apply his mind to the content of the defender's duty, having held that she was obliged to email Ms Bremner for authority for the internal transfer. He failed to consider whether the duty required the defender to compose a fresh email using the correct email address for Ms Bremner. The failure to use the correct email address for Ms Bremner caused the pursuers' loss. Applying common sense, it was the dominant or effective cause (*Galoo* v *Bright Grahame Murray* [1994] 1 WLR 1360). It did not merely give the opportunity for the loss to be sustained.

Defender

[23] The Lord Ordinary was entitled to reach the conclusions that he did on the Friday and Monday payments. The pursuers' criticism of a purported failure to look at the individual indicators of fraud in the round fell into the first (credibility, reliability and the primary facts) and second (inference of fact drawn from primary facts) categories which were identified in *W* v *Greater Glasgow Health Board* [2017] CSIH 58, at para [49] (see also *Anderson* v *Imrie* 2018 SC 328, at para [35]). The argument, that the Lord Ordinary erred in failing to hold that the defender breached her contract, fell into the third category (application of the law to the facts; ie issues of mixed fact and law). In respect of the first and second category failures, the pursuers had not produced a transcription of the evidence. There was no direct challenge to any findings of primary fact. The alleged failure to consider all the evidence in the round did not acknowledge the Lord Ordinary's rejection of certain evidence and his findings that there was no evidence for some of the pursuers' factual propositions. These were first category criticisms (see *McGraddie* v *McGraddie* 2014

SC (UKSC) 12, at para [3], citing *Anderson* v *City of Bessemer* 470 US 564 (1985) at 574-575). Without a transcript, the court could not review these findings.

[24] The Lord Ordinary's evaluation of the facts fell into the second category. It could only be interfered with if he applied the wrong principle, or failed to take a relevant matter into account, or took into account an irrelevant matter or was wrong (*Datec Electronics Holdings* v *UPS* [2007] 1 WLR 1325, at para [46]; *NRAM* v *Steel* 2018 SC (UKSC) 141, at para [37]). None of these were argued.

[25] The third category argument did not address hindsight or the context in which the defender received and responded to the fraudulent emails. The reliance on the unfamiliarity of the payee name ignored the fact that Ms Caldow ordinarily made payments. There was no evidence that the defender should have recognised Power Consulting as an unfamiliar entity. Ms Caldow did not interpret the transaction as suspicious. The errors and oddities in grammar and vocabulary were not unusual. The pursuers led no evidence demonstrating that Ms Bremner had a fixed method of signing emails. The contentions that Ms Bremner was a "known technophobe", or not a habitual user of a mobile phone, were disputed. She had a phone on holiday and received the voicemail. In respect of ignoring the warning, the defender had taken her superior's lead; this was tacit permission to do so. Had she not done so, there would have been no difference. Mr MacKay did not tell the defender not to make further attempts at payment. He was willing to allow the transaction to proceed. The use of a dollar sign was reasonably categorised as a typographical error. The reclaiming motion rested heavily on hindsight, whereas the Lord Ordinary avoided this error.

[26] The Lord Ordinary applied the correct legal test for remoteness, under reference to *Hadley* v *Baxendale (supra)*. In submissions, neither party addressed whether the loss was reasonably in the contemplation of the parties when their contract was formed. The Lord

Ordinary correctly concluded that the fraud was "exceptional and unnatural". There was no evidence of the prevalence of "whaling", or any of the measures which the pursuers had in place to avoid the risk therefrom or any instructions given by the pursuers to the defender on how to recognise such a fraud. There was no evidence that a transfer of funds between accounts could result in loss and that this would have been in the contemplation of the parties when they entered into the contract (*H Parsons (Livestock)* v *Uttley Ingham & Co* [1978] QB 791, at 807). The Lord Ordinary held that, had the defender emailed to ask if she should transfer funds to the current account, the fraudster would have confirmed that she should do that. The pursuers led no evidence on why a fresh email was required.

Decision

[27] In *Woodhouse* v *Lochs and Glens Transport* 2020 SLT 1203 the court (LP (Carloway) at para [31]), having reviewed the authorities, set out the scope of a reclaiming motion against a Lord Ordinary's finding on an employee's negligence. Although the duty in *Woodhouse* was *quasi* delictual and the damage was physical, the same considerations apply when the negligence averred is in the context of a contract and the losses are economic.

[28] The decision at first instance on whether or not negligence has been established was one of law. It was nevertheless heavily dependent upon primary and secondary findings of fact. In reviewing these findings, the court has to exercise appropriate caution. Where what is being reviewed is the application of the law to the facts, the court can more easily reverse a first instance decision. In doing so, "an appellate court may be more objective in its approach and be less influenced by the Lord Ordinary's perception of, and maybe even sympathy for, the witness" (*Woodhouse*, at para [33]).

[29] The payment, by a commercial organisation, of large sums to persons who had no known dealings with it and without a supporting invoice might be regarded as extraordinary. However, one of the Lord Ordinary's critical findings, which the pursuers do not challenge, is that the defender genuinely thought that she was being instructed to make the payments by her managing director.

[30] The primary challenge by the pursuers was that the Lord Ordinary failed to assess the evidence as a whole. It was not said that he had failed to consider relevant evidence or that he had misunderstood it. There is no sound basis for holding that he did not assess the evidence as a whole. As with many written judgments, the decision maker will set out different parts of the evidence, and the relative findings in fact, in a linear fashion. He or she may make comments which are specific to those elements. That does not carry with it any assumption that the judge has failed to consider the whole evidence or that his reasoning was based upon a consideration of only parts of the evidence. The Lord Ordinary did consider all of the relevant evidence in reaching his conclusions on each of the payments.

[31] One problem which this court faces is an absence of findings, or information, in areas in which it might have expected there to be greater detail. This may have been because of a lack of evidence. Where these areas exist, and there is no admitted position upon record, the court is not able to remedy any lack of information. It cannot, without a transcription of the evidence, review the Lord Ordinary's findings of primary fact. It was not asked to do so. Ultimately this was a critical feature in the determination of the reclaiming motion.

[32] One area where there is a dearth of information in the Lord Ordinary's opinion is the nature and scope of the pursuers' business and the defender's position within it. These factors are important in an assessment of whether the defender has performed her duties in a manner, as the pursuers put it on record, commensurate with her position. Her level of

functioning within the pursuers' organisation is a crucial factor. Although the general nature of the pursuers' business and the defender's place within it appear on record, there is little insight into the degree to which the defender was aware of the pursuers' business and thus the extent to which she may have been alerted by the names and addresses of the payees or the apparent oddities in the emails.

[33] What the court is left with are the findings by the Lord Ordinary that the defender's "main duty" was to "chase" trade debts. The only other duty mentioned was to support Ms Caldow. Although not spelled out by the Lord Ordinary, the significance of this must be that the defender was neither trained nor experienced in the payment of creditors. It may seem obvious to many that regular payments made by commercial concerns should not occur without the existence of a covering invoice, but the Lord Ordinary did not find that the defender was aware of this. Perhaps she was not asked. Although Ms Bremner said that the defender did not have "the right" to make payments, this appears to have meant that she was not authorised to intromit with the online banking. Unfortunately for the pursuers, that contention was contradicted by the actings of Ms Caldow and Mr MacKay. Ms Caldow was aware that the defender was using the current account and confirmed to the defender the PIN number for use in making payments. Mr MacKay did not tell the defender not to use the account, even though he knew that she was not one of the persons whom the pursuers and the bank had agreed were authorised to use it. Ultimately he was content to allow the defender to process significant sums of money.

[34] In relation to the Friday payment, and this must have influenced his thinking on the payment of the later sums, the Lord Ordinary found, and again it was not disputed, that Ms Caldow had not noticed anything suspicious in relation to the request in an email from an iPhone, bearing to be from "Yvonne Bremner", to pay a significant sum to an unfamiliar

entity without an invoice. Ms Caldow was the defender's line manager and the person (apart from Ms Bremner) responsible for paying creditors. Making payments to creditors was one of her normal tasks, but she had not noticed anything odd about the situation. It would be difficult for the pursuers to demonstrate that a more junior employee, who was not engaged to do this type of work, ought to have done so.

[35] The Lord Ordinary states that he had not heard evidence on the defender's familiarity with Ms Bremner's vocabulary or writing habits. He made no finding on whether Ms Bremner had an iPhone but it may be inferred from the references to her being a technophobe that she did not. He does not say whether the defender knew this. Nevertheless, critically, the Lord Ordinary did not consider that the defender should have noticed that: the emails had come from an iPhone; there were two different email chains and their timings were odd. In order to sustain a challenge to such findings, the court would require to look at the evidence, and in particular to the testimony of the defender, particularly under cross examination. Without a transcript, it cannot do this.

[36] Similar considerations apply to the second payment. The Lord Ordinary makes reference, on at least two occasions, to the defender being "entitled" to read the emails as being instructions from Ms Bremner to pay the amounts sought notwithstanding that she was not authorised to operate the bank account. This may be an odd use of language, if all that is meant is that it was reasonable for the defender to believe that this was what she took from the emails. The problem with the pursuers' position on this payment is that the defender was not only given authority by Ms Caldow to use the PIN, she contacted the pursuers' bank. This allowed her, as an unauthorised person, to process the payments without further inquiry. In ignoring the bank's warning notice on the Monday, the defender was doing the same thing as her line manager, Ms Caldow, had done on the Friday.

[37] There were certainly features which may have caused a person in the defender's position, and who used greater skill and care, to be wary, but the Lord Ordinary had material before him from which he could hold, as a matter of fact, that the defender did not jalouse what was truly going on and could not reasonably have been expected to do so. The same applies to the third and fourth payments, which the bank had initially regarded as suspicious, but had allowed to be processed. Since the bank were undoubtedly aware of the potential for a scam, and the defender was not, it was difficult to fault the defender in circumstances in which the bank had authorised the transfer of the funds.

[38] Leaving aside the specific ground of challenge in relation to failing to look at the evidence as a whole, which the court has rejected, and asking the broader question of whether the Lord Ordinary's decision on the ground of action can reasonably be explained or justified, the answer must be in the affirmative. That is so even if another Lord Ordinary might have drawn different inferences from the primary facts and might then have applied the law in a manner which resulted in a different conclusion on whether negligence had been established.

[39] Although there were relatively elaborate submissions on remoteness of damage and causation in relation to the internal transfer of funds, the remaining aspects of the reclaiming motion can be shortly dealt with. First, there was a no case on record that the defender was in breach of her duty by transferring monies from one of the pursuers' accounts to another. Not only that, there were no submissions from either side on that point. In these circumstances, there was no basis for the Lord Ordinary to make any finding of breach of duty based upon this ground.

[40] Secondly, the transfer of monies from one of the pursuers' bank accounts to another, did not cause them any loss. It was the transfer to the payees which did so. For the reasons already given, the pursuers' case against the defender on that aspect failed on the facts.

[41] The court accordingly refused the reclaiming motion and adhered to the Lord Ordinary's interlocutor of 15 November 2019.