



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 89

A226/17

OPINION OF LORD SUMMERS

In the cause

PEEBLES MEDIA GROUP LTD

Pursuers

against

PATRICIA REILLY

Defender

**Pursuers: D Thomson QC; Paterson; Clyde & Co (Scotland) LLP
Defender: A Smith QC; C Murray; Lefevre Litigation**

15 November 2019

Introduction

[1] The pursuers seek payment of £107,984.02 from a former employee named Patricia Reilly. This sum represents the loss suffered by the pursuers as a result of a “whaling fraud” (see paragraph 57). A fraudster impersonated the defender’s boss Yvonne Bremner, the Managing Director of the pursuers. In a series of emails bearing to come from Yvonne Bremner the fraudster instructed the defender to make various payments. The defender believing she was in communication with Yvonne Bremner acted on those instructions. The pursuers argue that in acting on these instructions the defender was in breach of her contractual obligation to exercise reasonable skill and care. The pursuers submit that the emails were obviously fraudulent. Firstly the pursuers allege that

the defender should either have worked out that the emails were false or checked with Yvonne Bremner to make sure that they were genuine. Although Yvonne Bremner was in Tenerife at the time the defender could have spoken to her by phone. Secondly the pursuers argue that the defender's job was to chase sums due to the pursuers, not to make payment of sums due by the pursuers. In making payment the pursuers argue the defender strayed beyond the duties she was authorised to perform and breached her implied obligation of reasonable skill and care. Thirdly the pursuers offer to prove that in a telephone call with the pursuers' bank manager the defender was told that she was not authorised to make payments by online banking. The pursuers argue that in ignoring this warning and the warnings that appeared on the online banking system she further breached her implied obligation. Had she exercised reasonable skill and care she would have heeded the warnings and discontinued her attempts to make payment. The issues for me are whether the evidence supports these submissions and whether on the facts proved, the law permits the pursuers to recover their loss.

[2] I acknowledge that employees have an implied obligation to exercise reasonable skill and care in the performance of their duties. That such a term exists is amply borne out by *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 and *Janata Bank v Ahmad* [1981] IRLR 457. The defender's skeleton argument confused this obligation in contract with the duty of care in delict. Much of what is submitted in the defender's skeleton argument involves a conflation of two distinct principles of liability. I do not need to consider the question of whether the law imposes a duty of care or what factors might inhibit or control it. The pursuers' case is based on contract and no attempt was made to argue that the obligation of reasonable skill and care was inapplicable to the performance of the defender's contractual responsibilities. For circumstances in which obligations in contract and delict

can co-exist in the context of the employer-employee relationship see eg *Barber v Somerset* CC [2004] 1 WLR 1089; *Davie v New Merton Board Mills Ltd* [1959] AC 604.

[3] More generally it can be observed that employers seldom sue their employees for damages. Other than *Lister* and *Janata Bank* (cited above), there are hardly any reported cases. Why that is so is a matter lying beyond the scope of this opinion. I accept that the directors of the pursuers in fulfilment of their duties to the company were entitled to consider whether an action was merited. I accept that in principle an employee might be so careless in his handling of the employer's finances that steps should be taken to recover the loss. Thus although the defender sought to argue that in principle a remedy was not available to the pursuers I am not persuaded that this is so. In my judgement if the pursuers can establish the requisite breach of contract they would be entitled to obtain damages.

Facts and circumstances

[4] The defender was the company's credit controller. Her main duty was to chase trade debts owing to the company. This involved phoning customers so as to solicit payment, checking customer details, providing support where legal action was instructed and liaising with Yvonne Bremner in connection with her duties. Another employee, CC, was the defender's line manager. CC 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. Yvonne Bremner was the managing director of the pursuers. She was closely involved with these processes. She stated in evidence that responsibility for the sales ledger was hers and that she liaised with the defender every day in that connection. Responsibility for clearing an invoice for payment lay with her. She gave evidence that the defender did not have the right to make

payments. That authority lay with her, CC and, in respect of tax or accounting payments, with Rosemary Morris. Rosemary Morris was an accountant who worked part-time for the pursuers. She was the company secretary and finance director. Unlike the others she was not permanently based in the pursuers' office.

[5] Some time prior to the events in question CC had suffered a stroke. This left her with various deficits. Her memory was affected as was her ability to speak. In order to assist CC on her return to work and to perform her duties Yvonne Bremner extended the defender's duties so as to provide support for CC. There is no formal record of this extension and no written statement of what the defender was or was not permitted to do. In consequence of her medical difficulties CC did not give evidence in person. The court was supplied with a soul and conscience certificate by her GP. An affidavit was lodged dated 31 August 2019 which contained her evidence (7/22).

[6] Yvonne Bremner went on holiday on the evening of Thursday 8 October 2015. CC went on holiday the following day, Friday 9 October 2015. Yvonne Bremner was aware that CC was due to leave the day after her departure. Prior to Yvonne Bremner's departure all three met in the pursuers' office to discuss what was to happen in Yvonne Bremner's absence. They discussed the work the defender was to do during her absence. There was no indication at that meeting that Yvonne Bremner anticipated the possibility that the pursuers might have to make a series of further payments to other businesses. The only payment anticipated was to G4S. Yvonne Bremner asked the defender to chase G4S and ask them to produce the invoice that the pursuers required before they could make payment.

[7] The first fraudulent email arrived on Friday 9 October 2015. For ease of understanding I have incorporated the key emails into my judgement and put them in chronological order. In re-ordering the emails I have taken account of the fact that the

timings on some of the emails show the local time in the UK whereas some of the emails sent to the fraudster show what appears to be the local time in the time zone of the computer where they were received. No evidence was offered to shed light on the inferences to be drawn from the times of the pursuers' emails to the fraudster. Without expert assistance I am unable to say whether this offers any clues as to the location of the fraudster.

The emails on Friday 9 October 2015

"From: Yvonne Bremner [mailto:yvonne.bremner@peeblesmedia.com]

Sent: 09 October 2015 11:24

To: trisha.reilly@peeblesmedia.com

Subject: Request for October 9, 2015

Hi Trisha,

Are you at the office? Write me back when you are.

Thanks

Sent: Friday, October 09, 2015 at 5:29 AM

From: 'Trisha Reilly' <trisha.reilly@peeblesmedia.com>

To: 'Yvonne Bremner' <yvonne.bremner@peeblesmedia.com>

Subject: RE: Request for October 9, 2015

Yes, I am here

trish

From: Yvonne Bremner [mailto:yvonne.bremner@peeblesmedia.com]

Sent: 09 October 2015 11:50

To: trisha.reilly@peeblesmedia.com

Subject: Re: RE: Request for October 9, 2015

Ok Trisa, I need you to process a Chaps payment swiftly. what details will be needed?

Thanks

Yvonne Bremner

Sent: Friday, October 09, 2015 at 5:53 AM

From: 'Trisha Reilly' trisha.reilly@peeblesmedia.com>

To: 'Yvonne Bremner' <yvonne.bremner@peeblesmedia.com>

Subject: RE: RE: Request for October 9, 2015

Hi Yvonne,

Name, bank account, sort code, amount and [CC] is saying we need your password as she doesn't think her's worked the last time.

From: Yvonne Bremner [mailto:yvonne.bremner@peeblesmedia.com]
 Sent: 09 October 2015 12:09
 To: trisha.reilly@peeblesmedia.com
 Subject: Re: RE: RE: Request for October 9, 2015
 Ok Trisha, I think [CC] password has been sorted, or has all password been reset again? process a chaps payment in the amount of 24,800 GBP to the following beneficiary:
 Account Name: Power Counsulting LTD
 Sort code: xxxxxx
 Account: xxxxx958
 IBAN NUMBER: xxxxxxxxxxxxxxxxxxxxx958
 Bank: BARCLAYS BANK PLC
 Indicate in the reference: Peebles Media Group
 Email me once its completed.
 Thanks
 Yvonne Bremner
 Sent from my iPhone

From: Trisha Reilly <trisha.reilly@peeblesmedia.com>
 Sent: 09 October 2015 12:12
 To: 'Yvonne Bremner'
 Subject: RE: RE: RE: Request for October 9, 2015
 Thanks, we will give it a go and get bk to you.
 trish

Sent: Friday, October 09, 2015 at 6:31 AM.
 From: 'Trisha Reilly' <trisha.reilly@peeblesmedia.com>
 To: 'Yvonne Bremner' <yvonne.bremner@peeblesmedia.com>
 Subject: RE: RE: Request for October 9, 2015
 Hi Yvonne,
 Can you pls advise which address we have to use- these are the options on Companies House:

- POWER CONSULTING UK LTD.
04354061 - Incorporated on 16 January 2002
8c High Street, Southampton, Hampshire, SO14 2DH
- POWER CONSULTING EUROPE LTD
SC270578 - Incorporated on 12 July 2004
35 Hillpark Grove. Edinburgh, EH4 7AP
- POWER CONSULTING SERVICES LTD
06836062 - Incorporated on 4 March 2009
6 Laurel Cottages, Siddington, Cirencester, Gloucestershire, GL7 6HE
- POWER CONSULTING COMPANY LIMITED
03771533 - Incorporated on 17 May 1999
4 Lombard Street, London, EC3V 9HD

From: Yvonne Bremner [mailto:yvonne.bremner@peeblesmedia.com]
Sent: 09 October 2015 12:42
To: trisha.reilly@peeblesmedia.com
Subject: Re: RE: RE: Request for October 9, 2015
6 Laurel Cottages, Siddington, Cirencester, Gloucestershire, GL7 6HE
Let me know when its done.
Thanks,
Yvonne Bremner

Sent: Friday, October 09, 2015 at 6:57 AM
From: 'Trisha Reilly' <trisha.reilly@peeblesmedia.com>
To: 'Yvonne Bremner' <yvonne.bremner@peeblesmedla.com>
Subject: RE: RE: RE: Request for October 9, 2015
Payment gone through — we printed off transaction ID number for the file.
Cheers
Trish & Claire''

[8] As the emails disclose the fraudster's first instruction arrived late morning. The defender suspected nothing. She could see that the payee details were inaccurate and went on to the online register maintained by Companies House in order to get accurate details. As the email timed at 6.41am indicates the defender could not find a company with the name "Power Counselling" (*sic*) on their system. The name was obviously misspelt. The defender checked the online register maintained by Companies House. The name did not match any of the names on the register. She phoned Yvonne Bremner to explain that the payment was not going smoothly. She emailed a list of company names to the person she thought was Yvonne Bremner. As the emails disclose the fraudster emailed back identifying the name of the payee. At some stage the defender contacted CC and communicated to her the name of the payee and the sum due. There was some variation in the evidence as to whether CC was shown the email instruction. CC (paragraph 25 page 6 of affidavit) saw a paper print out in the defender's hand. She could not recollect whether the defender told her that she had been emailed or phoned by Yvonne Bremner. The defender stated that she printed off the emails but did not show them to CC.

[9] CC was authorised to operate the pursuers' online banking facility and was familiar with the names of the businesses to whom payments were regularly made. Power Consulting Ltd was not a familiar name. There was some discussion of this. The defender suggested that it was to pay for roof repairs for Yvonne Bremner. That plainly would have been an improper use of the pursuers' funds. But the suggestion was not in my view a serious one and I disregard it. The defender and CC had no idea why a payment to Power Consulting Ltd was due.

[10] CC states in her affidavit that she processed the payment as fast as possible. The transaction took about 2 minutes (page 7 affidavit). This was because she was going on holiday and had a lot to do before she left. She makes no mention of seeing a warning about fraud on the home pages of the online banking facility. Since she was not available for cross-examination and her affidavit does not address the point I consider that I should accept the defender's evidence that CC "clicked through" the warning. The speed with which the transaction was being processed favours the conclusion that she did not read the warning, I hold that she did not do so. Payment was made during the afternoon of Friday 9 October 2015.

The voicemail on Friday 9 October 2015

[11] There was considerable evidence about the defender's telephone call to Yvonne Bremner during Friday 9 October 2015. The call was made at 12.20pm. By this time Yvonne Bremner was on her way to Tenerife and out of contact. Yvonne Bremner checked her mobile phone at 7.00pm after arriving in Tenerife. It showed a missed call from the defender at 12.20pm. It also showed a voicemail from the defender.

[12] Although an audio copy of the defender's voicemail was not produced, the court was supplied with Yvonne Bremner's recollection of its contents in the form of a transcript of a disciplinary hearing. The transcript (7/16) is undated but I take it that it records the meeting of Friday 6 November 2015 referred to in other correspondence lodged in court.

[13] The transcript comes to be available in unusual circumstances. The defender asked Yvonne Bremner who chaired the disciplinary meeting if it could be recorded.

Yvonne Bremner refused the request. The defender had however anticipated this outcome and had concealed her mobile phone in her bag. She had activated the recording facility. As a result the defender was able at a later stage to obtain a transcription of the recording. The transcript was lodged by the defender.

[14] The pursuers objected to the transcript being admitted in evidence. I deal with the issue of admissibility below. The transcript records Yvonne Bremner's recollection of the contents of the defender's voicemail (7/16/19). In the transcript Yvonne Bremner states:

"There was no mention of an email on that call. The call was quite clear and said, hi, Yvonne its Trisha. The internet is going slow, I am on Companies House; I am trying to get an address for a payment we made. End of, can you phone me back?"

[15] It is evident from this extract that Yvonne Bremner was aware of a "payment".

Yvonne Bremner's recollection was that the defender mentioned a "payment we made".

This gives the impression that the defender was speaking about a previous payment. It does not give the impression that the defender was referring to a payment she was engaged in making at the time of the call. However I notice that at page 22 of the transcript

Yvonne Bremner states "the payment was going through" (7/16) which indicates that she acknowledges the possibility that the defender referred to a payment that was being processed at the time of the call. The defender's recollection was that she told

Yvonne Bremner she was trying to find out the name of the company “for the payment” or “the details of the payment”.

[16] I am satisfied that the defender did tell Yvonne Bremner that she was making a payment. The defender’s message to Yvonne Bremner was at 12.20pm, shortly after the defender had received the fraudulent instruction. The only plausible explanation for her call was that she wished to let Yvonne Bremner know why her instruction was taking some time to go through. Her call referenced the poor internet connection and the need to check the payee’s details. Yvonne Bremner’s position is that if she had known that the defender was processing a payment she would have objected. I do not accept this explanation. I consider that the probable explanation is that she was not concerned by the voicemail. After all one of the defender’s responsibilities at that time was to assist CC and CC was authorised to make online payments. I accept that the defender did not mention an email from Yvonne Bremner. Had she done so Yvonne Bremner would have been alerted and the fraud would have been exposed. The defender cannot be blamed for failing to mention the email. The defender assumed that Yvonne Bremner was aware of the payment instruction and had no reason to give details.

The evidence of the voicemail

[17] Yvonne Bremner said that she deleted the voicemail containing the defender’s message. It was not clear whether she deleted it immediately after listening to it or at some later stage of the holiday. Whatever the position she must have deleted it before the end of the holiday because she stated that on her return to Glasgow she dictated a memo which contained her recollection of the contents of the voicemail. This memo was not produced in evidence. I was given no explanation for its absence. The defender sought to persuade me

that the deletion of the voicemail and the failure to produce the memo was suspicious and that I should as a result treat Yvonne Bremner's evidence with caution. I accept that the absence of the voicemail is surprising. I acknowledge however that it is possible she was in the habit of deleting voicemails after receipt, particularly if they did not seem important. The absence of the memo however is more surprising. It was dictated because Yvonne Bremner had become aware of the fraud. I have come to the view however that I should not offer an opinion on the credibility and reliability of Yvonne Bremner in this connection. In my opinion nothing turns on the absence of the voicemail or the memo containing Yvonne Bremner's recollection of it. I am satisfied for reasons given above that the defender did refer to the fact that she was engaged in processing a payment but that she did not say that she was doing so because Yvonne Bremner had sent emailed instructions to that effect. I am satisfied that had Yvonne Bremner thought that someone else was communicating in her name she would have phoned back.

[18] For completeness I should refer back to the admission of the transcript in evidence. The pursuers objected to the admission of this evidence. The ground of objection was that the pursuers had reservations about the accuracy of the transcript. No objection was stated on the ground that it had been secretly recorded by the defender. The defender explained that the transcript had been supplied to the pursuers' agents some time ago in connection with earlier proceedings (later discontinued) in the Employment Tribunal. The existence of the document and its contents ought not to have been a surprise. In order to allay the pursuers' fears the defender's counsel gave the name of the company that transcribed the recording. I invited the pursuers to consider the matter overnight in light of the information offered by the defenders. I advised them if they wished to renew their objection they could

do so. The objection was not renewed. In that situation the objection must be treated as having been withdrawn.

Breach of obligation

[19] Since the pursuers allege breach of obligation in connection with each payment, I turn now to examine the first payment. In my judgement CC was responsible for this payment. She was the defender's line manager and was authorised to make online payments. I am unable to see how the defender can be said to have breached her obligation when she submitted the relevant details to her superior. Responsibility for the transaction devolved to CC and did not remain with the defender. The only possible way in which the defender may have breached her obligation of reasonable care and skill is at an earlier stage. It is possible to argue that she should have appreciated that the emails were the work of a fraudster. If she had realised this, the emails would never have been passed to CC.

[20] In approaching this issue I remind myself that the unfamiliarity of the payee's name did not prevent CC from processing the transaction. Although she suffered from the issues set out in paragraph 5 I do not have any evidence to indicate that they diminished her ability to discern suspicious features in a transaction. I am therefore mindful that features of the transaction that with the benefit of hindsight seem suspicious were not so interpreted by CC. I consider I should take this into account in assessing the defender's culpability.

[21] The pursuers rely on the misspellings and inept wording of the emails on Friday 9 October 2015 as indicative of the work of a fraudster. I do not consider however that this is so. Yvonne Bremner gave evidence that the word "swiftly" (email on 9 October 2015 at 11.50am) was not a word she would use. But the word itself is not unusual. Nor do I have any evidence that the defender was so well versed in Yvonne Bremner's vocabulary

that she should have recognised it as suspicious. The pursuers submitted that because they were signed "Yvonne Bremner" as opposed to "Y" or "Yvonne" the defender ought to have been suspicious. They relied on evidence from Yvonne Bremner and CC that Yvonne Bremner was not in the habit of using her full name when signing emails. In the absence of evidence in the form of prior communications between Yvonne Bremner and the defender demonstrating that this was a fixed habit it is difficult for me to accept that the defender ought to have noticed the difference in designation or attached any weight to it. Hindsight is a wonderful thing. I consider that the pursuers are reading the emails in light of the knowledge that a fraud was perpetrated. The tenor of the defender's evidence was that she did not notice anything suspicious. As far as the defender was concerned Yvonne Bremner was either in transit to Tenerife or on holiday and making use of a mobile phone. If there were anomalies in her emails they could be ascribed to these factors. She stated that she thought that iPhones inserted the sender's name in auto text at the foot of email messages. She would not have thought it suspicious if Yvonne Bremner's full name appeared at the foot of the email.

[22] Evidence was adduced to show that Yvonne Bremner was not a habitual user of a mobile phone. The emails are marked "sent from my iPhone". But I do not consider this was suspicious. The defender knew that Yvonne Bremner owned a mobile phone. Even if Yvonne Bremner was known to be a technophobe, I do not consider her (apparent) use of the mobile phone while on holiday was a matter that should have excited the defender's suspicions.

[23] The pursuers also ask me to notice that the first fraudulent email posed a question to which the Yvonne Bremner already knew the answer. Yvonne Bremner would have known that the defender would be at the office at the time of the email. But not all questions are

born of ignorance. Nor are all questions susceptible to logical analysis. To bring to bear this level of scrutiny on these emails does not in my opinion furnish the means of demonstrating a breach of the defender's obligation of reasonable skill and care.

[24] The pursuers argue that the defender should have appreciated that something was amiss when the defender replied to Yvonne Bremner. On doing so it was said a different address appeared in the field for the recipient's email address. The email address visible was ceoreply@writeme.com as opposed to Yvonne.bremner@peeblesmedia.com. It would appear that the fraudster's email address showed in the email when a reply was sent but the cloned email address was visible when an email was incoming. Yvonne Bremner stated in evidence that on her return to Glasgow she checked the defender's emails and noticed this discrepancy.

[25] A scrutiny of the print outs reveals a varied picture. Sometimes the cloned email address appears (Yvonne.bremner@peeblesmedia.com) and sometimes the fraudster's false address (ceoreply@writeme.com). The emails eg of 9 October 2015 at 5.29am, 5.53am and 6.31am and 12 October 2015 at 5.12am and 6.14am pass from the defender to Yvonne Bremner but do not show the ceoreply@writeme.com email address. The pursuers' counsel pointed out that the defender sent two emails (6/3/11 and 6/3/9) to two different email addresses. These emails were presumably responses to two separate "chains". One leading back to the true address (to which she would have received an "out of office" reply) and one to the fraudster's cloned email address. The defender said she sent the follow-up to prompt a reply. It was not suggested that the defender knew that she was in communication with a fraudster and no sinister reason was assigned to her use of a different chain leading to a different address. While she was unable to explain why she had chosen a separate chain in order to elicit a reply it does not follow that the defender knew that there

were two email addresses. I asked whether the email address was visible on screen at the time of the reply or whether the cursor had to be “hovered” over the email for the email name and extension to appear. I have no note of this query being answered. The fact that the email addresses appear on the email print outs does not mean that the full addresses were visible on screen at the time. I am not satisfied on the evidence adduced that I can draw this inference. The defender stated she had not noticed that there were two email addresses. Given her ignorance of any other features of the transaction that suggested that a fraud was being practised on her and the apparently innocuous nature of the spurious email address, I am not convinced that this evidence demonstrates a breach of her implied obligation.

[26] It was submitted that the defender should have been suspicious due to the fact that the timings of the emails sent to the fraudster were out of kilter with UK timings. But there was no evidence that the defender appreciated that this might be significant. Electronic devices may have date stamps that vary from local time for a variety of reasons. It should also be remembered that Yvonne Bremner was overseas. The defender was not asked whether she knew what time zone Tenerife was in nor if she appreciated that the time zone appearing on her email replies had time stamps at variance with both the UK and Tenerife time zone. Nothing turns on this.

Emails on Monday 12 October 2015

[27] After the payment on Friday, the weekend intervened. No doubt buoyed by his or her success the fraudster contacted the defender again and the following series of emails ensued:

"From: Yvonne Bremner [mailto:yvonne.bremner@peeblesmedia.com]

Sent: 12 October 2015 11:05

To: trisha.reilly@peeblesmedia.com

Subject: Payment request - 12 October 2015

Morning Trish,

The payment on Friday has been confirmed by beneficiary, process another payment of \$75200 to the same recipient and classify it as payment balance. And also print transaction ID number for the file.

Thanks,

Yvonne Bremner

Sent from my iPhone

From: Trisha Reilly <trisha.reilly@peeblesmedia.com>

Sent: 12 October 2015 11:13

To: 'Yvonne Bremner'

Subject: RE: Payment request - 12 October 2015

Hi Yvonne,

So this would be £48979.09? - I'll get on it and confirm when it has gone through.
trish

From: Yvonne Bremner [mailto:Yvonne.bremner@peeblesmedia.com]

Sent: 12 October 2015 11:25

To: Trisha.reilly@peeblesmedia.com

Subject: Re : Re: payment request – 12 October 2015

No Trish i mean 75, 200 GBP. Sorry for the Typo

Email me once its Done.

Thanks

Yvonne Bremner

Sent from my iPhone

From: Trisha Reilly <trisha.reilly@peeblesmedia.com>

Sent: 12 October 2015 12:14

To: 'Yvonne Bremner'

Subject: RE: RE: Payment request - 12 October 2015

Hi Yvonne,

I'm afraid I can't get this to go through, I've tried a few times now.

Everything on the page is exactly the same as the, confirmation from last time.

except the value but the message — 'Beneficiary details must be selected or entered'

keeps coming up I have trolled through the payee list but Power Consulting is not

there to select so I typed it in. I called Alistair but he advised it would be CB Online

we need help from and as I am not an authorised person on the current a/c — would

not be able to get the info we need!

Sorry about this — let me know if I can do this another way?

trish

From: Yvonne Bremner [mailto:yvonne.bremner@peeblesmedia.com]
 Sent: 12 October 2015 12:26
 To: trisha.reilly@peeblesmedia.com
 Subject: RE: RE: Payment request - 12 October 2015
 Ok Trisha, Do you need me to confirm the account details to you again?
 Thanks
 Yvonne Bremner

From: Trisha Reilly <trisha.reilly@peeblesmedia.com>
 Sent: 12 October 2015 12:43
 To: 'Yvonne Bremner'
 Subject: RE: RE: Payment request - 12 October 2015
 Eureka, sorted. Only took about 2 hours but hey, printed off acknowledgement — ready for a Gin & Tonic lol. Trish"

[28] When the email instruction came in at 11:05 the defender set about the task of making the payment. Although she was not authorised by the bank to make online payments she used CC's details to make payment. The email bearing to be from Yvonne Bremner carried the implication, as the defender would have understood matters, that despite CC's absence, the defender should make a payment. She texted CC in order to get some help.

[29] The defender produced evidence of a text exchange with CC on Monday 12 October 2015 at 11.11am. In the text the defender told CC that Yvonne Bremner had asked her to process another transaction. She asked CC for confirmation that "xxxx is pin for wee calculator gadget?" CC replied at 11.12am "yup". Although it is not altogether clear, I take it that using the PIN number must have been the means of generating the "token" referred to by Mr MacKay the bank manager. It is evident from this communication that the defender knew or had access to CC user name and password although she lacked the PIN number or token. CC in her affidavit states that everyone in the department knew where her online banking details were stored (page 3 of affidavit). Although CC states that she did not share her username and password it is evident that the defender had access to it. CC text betrays no surprise or disapproval. I am satisfied that CC knew that the defender had

access to her online user name, banking password and was willing to co-operate by providing the code or token necessary to pass security.

[30] The defender had watched CC process a payment on Friday afternoon. Armed with her memory of watching that transaction together with the exchange of texts with CC she got access to the online banking system.

[31] The pursuers focussed on this aspect of the defender's evidence in order to persuade me that it demonstrated that the defender was an untrustworthy witness. The defender in her pleadings averred that CC had taught her how to make online payments. She persisted with this line in examination. In cross-examination however she accepted that this was not the case. She acknowledged that she was relying on what she had seen CC do on Friday afternoon and not any tuition CC offered her.

[32] In my opinion her original position is unsustainable and if she had maintained it, I would have rejected her evidence. CC had no reason to suspect that in her absence more instructions to make online payments would be received. In that situation she had no reason to tutor the defender in the skills of online banking. The defender's protracted efforts to make payment on Monday suggest that she had not been tutored by CC. Since I accept that the defender's position changed and that her initial stance was designed to throw her in a more favourable light, I accept that I should take a cautious view of the defender's evidence. But I am not inclined to be wholly sceptical. The defender did ultimately accept that CC had not trained her and thus ultimately adopted what I consider to be a truthful stance. In other connections her evidence can be checked against contemporaneous records in the form of the emails that were being exchanged.

[33] At some point after she had accessed the online banking system the defender was confronted by a series of fraud warnings on the Clydesdale Bank website. The defender said

in evidence that she clicked through them. She did not read them and did not apply her mind to the warnings they contained. She stated that she had seen CC do the same on Friday afternoon. I have accepted this was so. If the warning was there on Monday 12 October 2015 I consider that I should proceed on the basis that it was there on Friday 9 October 2015. The warning (6/4) specifically refers to the use of fraudulent emails purporting to emanate from senior members of a business such as directors. It notes that the emails appear to be from genuine email addresses. The warning could have been written for this transaction. The advice given is:

“Take additional steps to verify payments when dealing with email based instructions (particularly where the beneficiary is not one that you have paid before). Be aware of any changes to the style/grammar when receiving new payment instructions (often these instructions will have poor English). If you believe you are a victim or target contact your Account Manager as soon as possible and report this to Action Fraud”.

[34] Once in the system she ran into difficulty. She was not able to enter the details (see email of 12.14pm) of Power Consulting Services Ltd. She phoned Alasdair MacKay of the Clydesdale Bank, the pursuers’ relationship manager, for assistance. The call took place before lunch. He explained that he could not help her. He was not sufficiently knowledgeable about online banking to assist. He explained that the bank’s helpdesk dealt with this type of query. But he also explained that the helpdesk would not provide assistance to someone who was not authorised to make payments. Mr MacKay knew that the defender had gained access to the system without authorisation. The email from the defender timed at 12:14 states that he told her that she was “not an authorised person.” The defender’s position was although Mr MacKay explained that she was not authorised to make a payment he did not say that she was not permitted to use CC’s access details. Mr MacKay’s position was contrary to that of the defender. He stated that he told her she should not make a payment.

[35] I have come to the conclusion that Mr MacKay did not tell the defender that she should not make any further attempts to make payment. If he gave such a piece of advice it does not appear in the email sent by the defender to the person she assumed was Yvonne Bremner. I consider that the defender would probably have told Yvonne Bremner (the fraudster) if Mr MacKay had told her to stop. I can think of no reason why she would have omitted to relay such advice back to the person she thought was Yvonne Bremner. As Mr MacKay acknowledged in evidence he knew the defender was on her own and without CC's details would be unable to make a payment. He stated in evidence that he had a discretion to allow payments from an unauthorised person to go through. I consider that he explained to her that she was not authorised but did not issue an express instruction to stop using the system. The absence of a clear direction from Mr MacKay is also consistent with his decision not to stop the payment identified by the bank's "Fraud Area" the following day. Had the defender ignored a direction not to make payment he would have intervened rather than let the transaction proceed. I consider his willingness to allow matters to continue is consistent with an unwillingness to take steps to prevent the defender exercising access.

[36] After the conversation with Mr MacKay the defender reported back to "Yvonne Bremner" saying that she could not make the payment. She said, "Sorry about this - let me know if I can do this another way?" The fraudster replied "Ok Trisha, Do you need me to confirm the account details to you again?" This communication implied that she should continue to try to make payment. 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.

[37] Mr MacKay gave evidence that when an alarm was raised by the bank's "fraud area" he had a discretion to allow unauthorised payments to go through. He explained that from time to time it was desirable to allow an unauthorised person to make a payment eg when the authorised person was ill. In that situation he could approve another person to use the authorised person's details. He knew that Yvonne Bremner and CC were on holiday and that the defender was using CC's security details so that the pursuers could pay an invoice. This no doubt explains why he did not rescind CC's token.

[38] One further feature of this passage of evidence requires attention. The defender said that Mr MacKay told her "this conversation did not happen" or words to that effect.

Mr MacKay denied saying any such thing. I have come to the conclusion that Mr MacKay did not say this. I can see no reason why Mr MacKay should say this. I can see no reason why he would have wished to cover up his advice. As he explained in evidence he had discretion to allow payments through. It is possible that the defender is lying and putting words on Mr MacKay's lips that suggest that he allowed the payments to continue even though he knew he should not. It may be that she has misinterpreted Mr MacKay's position. He could it seems have stopped the payments but he chose to permit them to continue. He could have prevented access to online banking had he wished to do so. She may have understood this as improper when it was in his discretion to do so.

[39] I do not feel compelled to decide who is telling the truth or whether both are telling the truth but from a different perspective. No remedy is sought from the bank and there is no allegation that what Mr MacKay said was a breach of obligation. Even if Mr MacKay did not say "this conversation did not happen" and even if I was of the opinion that the defender was making this up in order to deflect the blame on to the bank, such a finding would not alter the fact that she was using the online banking facility with the knowledge

and approval of her line manager. It is clear from the texts exchanged between the defender and CC that the defender was permitted to use CC's access codes. Since CC was the defender's manager the defender had the authority to use the pursuers' online banking facilities.

Breach of obligation

[40] The defender accepted that she did not read the fraud warning. But then again CC had also "clicked through" the fraud warning on Friday. I acknowledge that CC's insouciance may show that both were in breach of the implied obligation. But given that the defender was CC's junior and had limited understanding of the system, I consider that she was entitled to take her lead to some extent from her superior. I am unable to say that she was in breach of her implied obligation to exercise reasonable skill and care. Even if she had read the warning and examined the advice I am not persuaded it would have altered the outcome. She was in the office on her own at this stage. What additional steps should she have taken? The two people who she might have asked were on holiday. Yvonne Bremner had not replied to her voicemail on Friday and the other, CC, had ignored the warning on Friday afternoon. The warning refers to "changes to the style/grammar" in new payment instructions. As I have explained I consider it would have been very difficult for the defender to work out whether the emails from what appeared to be Yvonne Bremner's mobile phone were "different". The defender did not know whether or not these were "new payment instructions". The fact that she was "holding the fort" for more experienced members of staff put her at a significant disadvantage. I do not consider that the defender was in breach of her implied obligation of reasonable skill and care in failing to read the fraud warning nor do I consider that it would have made any difference had she read it.

[41] I do not consider that the defender was in breach of her implied obligation of reasonable care and skill in continuing to progress the payment after speaking to Mr MacKay. Although Mr MacKay had told her she was not authorised to make payments, her boss Yvonne Bremner communicated with her in terms which indicated that the defender should continue to try to make payment. While we know that the email emanated from the fraudster, this was not how it appeared to the defender. Looking at matters from the defender's point of view, she was entitled to conclude that Yvonne Bremner wished her to make the payment. Yvonne Bremner knew that CC had gone on holiday on Friday. If knowing that, Yvonne Bremner was willing to instruct her to make a further payment, the further instruction carried with it from the defender's perspective apparent (though not actual) authority to make the payment.

[42] In assessing matters I also remind myself that CC had permitted the defender to use her security details. So even if Mr MacKay did tell the defender in plain terms not to make the payment the defender had good reason to think that her employer would not have been concerned if she carried on. I do not consider in these circumstances that the defender can be in breach of her implied duty of skill and care.

[43] In any event I do not consider on balance that the defender ignored a direction from Mr MacKay. I accept that the defender and Mr MacKay discussed the fact that she was not authorised to make a payment but I have come to the conclusion that if she had been directed not to pay she would have said so in her communication with the person she thought was Yvonne Bremner, when she sought further guidance. In addition if she had ignored his direction I would have expected Mr MacKay to take a more robust view when the next payment was flagged by the fraud area. That he allowed the payment through suggests that he took a benevolent view of her situation. He knew that the two authorised

users of the online banking system were away and that in their absence payments could not be processed. In this situation while I accept that he told her she was not authorised to use the online banking system he did not give a clear direction that she should desist.

[44] The pursuers point out that in this phase of the fraud the fraudster sought payment of a sum denominated in dollars. I accept that this hints that the author is not from the UK. But it is to be observed that the defender asked Yvonne Bremner (the fraudster) about the apparent error and was told it was a typo. The dollar sign and pound sign sit side by side on the keyboard of many (perhaps most) keyboards used in the UK. So the explanation is a credible one. Her interlocutor seemed to be Yvonne Bremner. It has never been suggested she had any suspicions otherwise. The emails ran in Yvonne Bremner's name and were associated with an email address that seemed to bear her name. I am unable to conclude that her conduct in this phase was in breach of her implied obligation of skill and care.

[45] As to the inferences the defender should have drawn from any other misspellings or errors, the observations I made in connection with the first series of emails on Friday 9 October 2015 continue in my opinion to apply to the circumstances of the second payment.

The emails of Tuesday 13 October 2015

[46] The fraudster continued with his criminal activity on Tuesday. The following emails were exchanged.

"From: Yvonne Bremner [mailto:yvonne.bremner@peeblesmedia.com]

Sent: 13 October 2015 10:49

To: trisha.reilly@peeblesmedia.com

Subject: RE: RE: Payment request - 12 October 2015

Hi Trish,

How was your night? i need you to make two chaps payment this morning. But i need to know if everything has been resolved concerning CB online to avoid further delay.

Thanks

Yvonne Bremner

Sent from my iPhone

From: Trisha Reilly <trisha.reilly@peeblesmedia.com>

Sent: 13 October 2015 12:21

To: 'Yvonne Bremner'

Subject: RE: RE: Payment request - 12 October 2015

Hi Yvonne,

Thanks, had a relaxing evening.

Alex just finished correcting problem I had with a system update relating to emails!

If you let me know Chaps payments info — I'll get on it.

trish

From: Yvonne Bremner [mailto:yvonne.bremner@peeblesmedia.com]

Sent: 13 October 2015 12:37

To: trisha.reilly@peeblesmedia.com

Subject: RE: RE: Payment request - 12 October 2015

Ok Trish, i hope everything is perfectly fine now? Below is the transfer information:

Bank Name: santander bank

Address: 49, 5winderby road Wembley , Ha0 4sd

Account: HITENDRA LIMITED

Sort: xx-xx-xx

Account Number: xxxxx789

IBAN - xxxxxxxxxxxxxxxxxxxxxx789

Amount: 56,750 GBP

Bank: Lloyds bank Plc

Address: The Bridge, Walsall, W51 1LG

Account name- Arshad maintenance services

Sort code- xxxxxx

Account name- xxxxx068

Than- xxxxxxxxxxxxxxxxxxxxxx068

Amount: 36,500 GBP

Print transactions ID numbers for file

Thanks

Yvonne Bremner

Sent from my iPhone

From: Trisha Reilly <trisha.reilly@peeblesmedia.com>

Sent: 13 October 2015 13:16

To: 'Yvonne Bremner'

Subject: RE: RE: Payment request - 12 October 2015

Hi Yvonne,

Payment to Hitendra Ltd went through fine.

Having probs setting up Arshad as beneficiary – think the SORT CODE should be xx-xx-xx! Can you please confirm?

trish

From: Yvonne Bremner [mailto:yvonne.bremner@peeblesmedia.com]

Sent: 13 October 2015 13:42

To : trisha.reilly@peeblesmedia.com

Subject: RE: RE: Payment request - 12 October 2015

Yes Thanks Trish. Sort Code xx-xx-xx is_the right one.

Thanks

Yvonne Bremner

Sent: Tuesday, October 13, 2015 at 8:09AM

From: Trisha Reilly <trisha.reilly@peeblesmedia.com>

To: 'Yvonne Bremner' <yvonne.bremner@peeblesmedia.com>

Subject: RE: RE: Payment request - 12 October 2015

That's both sorted Yvonne.

trish"

[47] These were the last payments made by the defender. No further requests for payment were made.

[48] In this last sequence of payments the defender transferred money from another account. As I understand it, this was to enable the final payments to go through. She moved funds from the invoice financing account into the pursuers' current account. The defender stated in evidence that after making the payment on Friday night and before she left CC told the defender to "keep her eye on the current account balance" and that if it went below a certain figure she should transfer funds from the invoice financing account. The defender said that she thought it odd that CC would give her this advice. I agree with the defender. It would be odd if CC had spoken of the need to transfer money between accounts. When she left, as I have indicated, she had no reason to anticipate that further payment instructions would be issued. I can see no reason why CC should say such a thing.

She makes no reference to this matter in her affidavit. In my opinion the defender made this transfer on her own initiative. It would seem the defender had access to the invoice financing account (affidavit paragraph 18 page 4). In cross-examination the defender was asked what figure CC had said she should keep an eye on. The defender was unable to say what it was. In these circumstances I have come to the conclusion that the defender was not telling the truth about the funds transfer and that she made the transfer on her own initiative.

[49] The bank's "fraud area" considered that the payment on Tuesday 13 October 2015 was suspicious. The fraud area phoned the pursuers but was unable to speak to the "corporate administrators" Yvonne Bremner and CC since they were on holiday. The defender spoke to the bank and confirmed that she had made the payments. Mr MacKay then permitted the money to be released. It appears that he was satisfied that if the defender was aware of the payments then he could be satisfied that the pursuers had indeed authorised the payments. There was no evidence to indicate that he asked the defender about the concerns referred to in the bank's fraud warning.

Breach of obligation

[50] I do not consider that the language of the final set of emails contains any more clues as to their origin than those that had gone before. In light of the conclusions expressed above I do not consider them to be indicative of breach of contract.

[51] I am persuaded however that the defender acted in breach of her obligation of reasonable skill and care in transferring funds from the invoice financing account to the current account. I consider she did this on her own initiative. I do not accept that CC gave her any guidance about transferring funds from one account to another. Although I was not

supplied with any evidence to demonstrate how much money was switched from the invoice financing account to the pursuers' current account, the evidence proceeded on the basis that it was a significant sum. None of the documents lodged in support of the action appear to cast light on this issue. Unlike the other transactions this transfer was done on her own initiative. The fraudster did not prompt her to take this step. I am satisfied that switching money in this way was a significant step and that she had no express or implied authority to do so. I am conscious that neither the pursuers nor defenders made any submissions to me in connection. The case was focused on the alleged breaches dealt with above. I am satisfied however that this was work done in the course of her duties and that she was obliged to exercise reasonable skill and care in making transfers. The critical distinction between this transfer and the others is that she was not asked to make the transfer. She was not asked by Yvonne Bremner or the fraudster masquerading as Yvonne Bremner. Although I consider her unilateral decision to transfer company funds without any authority was in breach of contract I do not consider that the loss that ensued was the natural consequence of the breach. I do not consider that the loss was one that can be said to have arisen naturally, ie according to the usual course of things (*Hadley v Baxendale* (1854) 9 Ex 341). The loss was exceptional and unnatural because she was ignorant of the fraud being perpetrated on her and on the pursuers.

The aftermath

[52] The fraud came to light when Rosemary Morris came to the premises on Thursday 15 October 2015. Rosemary Morris contacted the bank. The bank was able to retrieve £85,000 of the £193,250 paid out. There was nevertheless still a substantial loss. The unrecovered balance is the sum sued for. Yvonne Bremner was contacted and informed

about what had happened. As indicated above disciplinary measures were taken against the defender and CC. The defender was dismissed and CC was demoted. The defender began proceedings for unfair dismissal in an Employment Tribunal but proceedings were discontinued before they came to a hearing.

Causation

[53] In performance of her implied obligation of reasonable skill and care the defender should have sought approval for the transfer of funds. The defender should have spoken to CC or Yvonne Bremner. This could have been achieved by phoning Yvonne Bremner on her mobile phone number. But Yvonne Bremner had not returned her call at the start of her holiday. I consider that had she been alert to her responsibility she would have emailed Yvonne Bremner. That after all was the person who she thought had asked her to make payment. However this would have merely resulted in the fraudster learning that funds were required to enable the payments to go through. In that situation I consider that the fraudster would have agreed to the defender's suggestion. On balance however I consider that had she fulfilled her obligation the pursuers would still have suffered the loss.

[54] If I am wrong about that the payments to Arshad Maintenance Services Ltd and Hitendra Ltd of £56,750 and £36 500 would not have been made.

[55] I was referred to a letter from the Clydesdale Bank (7/8). It indicates that the bank took steps to salvage the situation but that only £85,265.98 was recovered. The letter states that a stop was put on the account. It indicates that indemnities were raised in relation to the banks to whom payment had been made. The letter continues:

“It was then discovered that the payment made previously on the 9 October 2015 was for credit to one of the same accounts. As the other banks have 30 days under standard protocol to investigate the fraud and respond to our request we were unable to verify within that time scale how much would be recovered. I understand

the police investigating the fraud advised that there was around £88k recoverable from these accounts, however this information was not provided to the Clydesdale Bank”.

This does not enable me to decipher which of the sums recovered were attributable to which payment. There was however evidence from Yvonne Bremner in this connection. She gave evidence that £15,000 was recovered on 1 December 2015 from the payment to Arshad Maintenance Services Ltd. She gave evidence that £4,700 was recovered from the payment to Hitendra Ltd on 23 December 2015. She also gave evidence that £50,000 and £16,000 was recovered from the payment to Power Consulting Ltd. Since the breach I have identified only relates to the payments to Arshad Maintenance Services Ltd and Hitendra Ltd the sums of £15,000 and £4,700 would fall to be deducted from the damages attributable to her breach of contract. In light of my findings on remoteness of loss and causation however this is an issue of theoretical importance.

Contributory negligence

[56] The defender pleads contributory negligence. Strictly it is unnecessary for me to comment on this in light of my conclusions. But for completeness I should record that the defender complained that she had not been trained to identify fraud. I have come to the view that I have insufficient evidence to decide this issue. “Whaling” frauds were new. I have no evidence to indicate that training was available that addressed this type of fraud nor any idea whether it could have been provided. It may be of course that elementary training in fraud awareness would have made a difference. In my view however the defender was not the person who would have been suitable for that type of training. The persons who were expected to process online payments were Yvonne Bremner and CC. They were the persons who should have been trained, if that was necessary. The defender found herself

“holding the fort” because Yvonne Bremner and CC were on holiday at the same time. I do not consider that the pursuers were negligent in failing to provide training to the defender for a circumstance that could not have been envisaged.

Other matters

[57] The nature of the fraud was explained in evidence by Mr MacKay. He stated that the fraud was known as a “whaling” fraud. “Whaling frauds” are to be distinguished from “phishing” frauds. In the latter case multiple fraudulent emails are sent out in the hope of netting an unwary “phish”. A “whaling” fraud by contrast uses what might be described as a “harpoon” and targets specific persons or businesses. As I understand it an email is sent to a person identified as a senior manager of the business. I was not advised how their email addresses might be harvested but it is easy to imagine a number of ways in which that might be done. If the email results in an “out of office” reply, or a reply that otherwise indicates that the person is away from the office, the fraudster then creates an email address bearing the name of the manager. The fraudster then issues a payment instruction to a junior member of staff in the company or organisation. Since the emails will appear to run in the name of the absent manager the unsuspecting member of staff will, if all goes according to plan, implement the instruction. The fraudster then instructs payment to a fictional client and supplies the sum due and bank details. The bank account is in fact controlled by the fraudster. If payment is made he then withdraws the sum paid thus completing the fraud. Mr MacKay indicated that in 2015 “whaling frauds” were on the increase and were a relatively new phenomenon.

[58] Finally I should note that I was asked by the defender to take into account the animosity between Yvonne Bremner and the defender in making my assessment of her

evidence. Yvonne Bremner certainly made some unpleasant remarks about the defender in the course of her evidence. She described her as “the office gossip” and as “untrustworthy”. She characterised her as “lazy” and complained that she avoided hard work. She asserted that when CC was absent through ill health, the defender became “arrogant”. During her evidence she complained that the defender was distracting her. The defender at the time was conferring with her counsel but was not disrupting the court in any way nor interfering with her evidence. There were therefore many indications that she was ill disposed to the defender. I have come to the conclusion however that I do not need to venture down this road. I consider that I have sufficient objective evidence to decide the issues of disputed fact. I do not need to speculate as to whether Yvonne Bremner’s animosity towards the defender affected her evidence. I note that although the defender presented her evidence in a moderate way I have rejected her evidence in a number of respects. Their presentations in my estimation were a reflection of their characters. I do not consider the way they gave evidence to be necessarily connected to their truthfulness or reliability. I accept that the loss was a heavy blow to Yvonne Bremner. I can understand why the defender’s behaviour upset her. I do not find it necessary however to comment on whether she became antagonistic to the defender and what effect, if any, that had on her evidence. There was sufficient objective evidence to enable resolution of the issues placed before the court.

Conclusion

[59] In conclusion I can only record my regret that whoever was behind the fraud has not been caught. The fraudster is the real culprit whoever he or she (or possibly they) may be. The pursuers have suffered a major loss. The defender has lost her employment. CC has on top of her health problems suffered a demotion. It is a tragic case.

[60] I shall sustain the second plea in law for the defender and reserve the expenses
meanwhile.