

# Commodities warehouse receipts—common mistake; and issuer’s liability in bailment and negligent misstatement (Natixis SA v Marex Financial)

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**Commercial analysis:** The claim arose out of the discovery that warehouse receipts for nickel deposited in overseas warehouses, were forgeries. In a wide-ranging judgment the Commercial Court concluded that the forgery did not provide a defence of common mistake to a seller who supplied the receipts in performance of contracts for the sale of the nickel. The decision illustrates the limited scope for the doctrine of mistake to operate in commercial contracts, because the contract terms will often allocate risk (expressly or impliedly) for the circumstances that give rise to the relevant mistake. The decision also considered whether a party’s standard terms can exclude or limit tortious liability for misstatement, and the legal effect of a warehouse receipt. Written by Seb Oram, barrister, at 3PB Barristers.

*Natixis SA v Marex Financial and others* [\[2019\] EWHC 2549 \(Comm\)](#)

## What are the practical implications of this case?

First, the scope of common mistake will be limited in commercial contracts. Where, on its proper construction, the contract itself allocates responsibility for the circumstances giving rise to the mistake (eg the belief that the warehouse receipts that the seller intended to transfer were genuine), the doctrine cannot apply. The allocation may be express or, more commonly, implied—and the first imperative must be for the law to uphold the contract rather than destroy it.

Secondly, a joined claim between the seller and the warehouseman raised a point of general interest as to whether a claim in negligent misstatement can be defended by reference to exclusion and limitation clauses in the representor’s terms and conditions. The judgment confirms that terms do not need to be incorporated into a contract before they can have legal effect. Provided that reasonable notice is given of them, and they satisfy the statutory requirement of reasonableness (where it applies), those terms may be effective to qualify a party’s duty, or restrict its liability, in tort. Since, on the facts, notice was provided by referring to the terms in an email footer (of the same email that contained the misrepresentation), the decision confirms an important means of limiting tortious liability.

Thirdly, the decision considers the legal effect of a representation by the issuer of a warehouse receipt as to the genuineness of the receipt. The court rejected the suggestions that the warehouseman’s representation gave rise to: (i) a warranty, collateral to the contracts of sale between a buyer and seller of the goods, or (ii) an estoppel that entitled the seller to pass title to the buyer. It could, however, generate liability for negligent misstatement under familiar *Hedley Byrne* principles (*Hedley Byrne & Co v Heller & Partners* [\[1963\] 2 All ER 575](#)).

## What was the background?

The defendant, a commodities broker and trader, transferred warehouse receipts relating to quantities of nickel stored in overseas warehouses, to the claimant. It did so in purported

performance of five spot purchase contracts by which the claimant had agreed to buy the nickel from the defendant.

The receipts were subsequently discovered to be forgeries. Before that was discovered, and before two of the purchase contracts had been entered into, the defendant had sent the relevant warehouse receipts to the warehouseman, expressly for the purpose of verifying their authenticity. The warehouseman failed to identify that they were forgeries, and wrongly informed the defendant in correspondence that they were authentic.

The seller was sued by the buyer under the purchase contracts for failing to provide genuine warehouse receipts and failing to pass good title to the goods. It sought to set aside the sale contracts for common mistake or, alternatively, relied on the warehouseman's representation to contend that it was estopped from denying the claimant's title, with the effect that the defendant had not itself been in breach of the sale contract. Separately, the defendant (and the claimant) brought a claim in negligent misstatement based on the warehouseman's assurance.

### **What did the court decide?**

The seller's defence to the buyer's claim, failed. Before a defence of mistake could arise, the court had to consider if the contract terms placed responsibility on either party for the genuineness of the warehouse receipts. On the proper construction of the purchase contracts, they did, because the seller was not obliged to provide these specific warehouse receipts, but genuine warehouse receipts (wherever they were obtained). In those circumstances there was no room for mistake to operate so as to render the purchase contracts void (at paras [162],[181]–[185]). Putting it another way, mistake could also not arise because, given the seller's obligation, the fact that these particular receipts were forgeries did not render the contract impossible to perform by buying genuine receipts in the market (at para [213]).

The seller's (and the claimant's) contention that the warehouseman's assurances gave rise to an estoppel, with the effect that the seller could pass title to the claimant and was not in breach of the contracts of sale, was also rejected. It was common ground that an estoppel could not create a cause of action against the warehouseman, which led to a discussion of whether there was a separate contract binding on the warehouseman, contained in (i) the warehouse receipts themselves, or (ii) in the warehouseman's written assurances about the certificates, if they could operate as a collateral warranty. Following previous authority (*Mercuria Energy Trading Pte Ltd v Citibank* [2015] 1 CLC 999) the warehouse receipts could not give rise to a contract between the warehouseman and claimant/defendant unless and until the warehouseman had attorned to them—until that point the only legal relationship that existed was one of bailment between the warehouseman and the first person who deposited the goods and to whom the warehouse receipts were first issued (at paras [232]–[242]). The estoppel claim would also have failed because any estoppel would have been personal to the parties to it, and could not have permitted the defendant to confer title on the claimant (at para [283]).

The defendant's tortious claim against the warehouseman did succeed, to a limited extent. On conventional principles the assurances given by the warehouseman to the defendant were given in circumstances giving rise to an assumption of responsibility (at para [331]). But the warehouseman was entitled to rely on its terms and conditions, containing a liability cap, as a partial defence. It was not necessary for that, to point to a contract into which they would be incorporated, because so long as reasonable notice was given of them (which does not require actual knowledge by the defendant), they could operate as notice of disclaimer or limitation (at paras [485]–[488]). They could operate to qualify the basis on which responsibility had been initially assumed, or to negate or limit liability (at para [504]) Here there had been reasonable notice because (at para [502]):

'[...]in the context of the long standing relationship between [D] and [W]; the numerous references to the Terms and Conditions in various forms of communication between [W] and [D]...; the specific references to the Terms and Conditions in the emails concerning the very authentication services being performed, and [D's] evidence as to knowledge that there would be limitations of liability clauses and that someone at [D] would have read [W]'s Terms and Conditions at some point, reasonable notice was given not only of the Terms and Conditions but also of the limitation clauses therein, not least in circumstances where I do not consider that Clause 10.5 was either particularly unusual or onerous for the reasons I have given, and there was, in such circumstances, no necessity to draw it specifically to [D]'s attention.'

### Case details

- Court: Hight Court, Queen's Bench Division (Commercial Court)
- Judge: Bryan J
- Date of judgment: 02/10/2019

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