Neutral Citation Number: [2019] EWHC 2549 (Comm)

Claim No CL-2017-000325

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 2 October 2019

Before :

THE HONOURABLE MR JUSTICE BRYAN

- -

Between :

NATIXIS S.A.

Claimant

-and-

MAREX FINANCIAL

First Defendant/Part 20 Claimant

-and-

ACCESS WORLD LOGISTICS (SINGAPORE) PTE LTD

Second Defendant/Part 20 Defendant

-and-

MCAP
(A Lloyd's syndicate, sued on its own behalf and on behalf all other underwriters of contracts placed with Lloyd's having unique market references B0713MACCD1701988 and B0713MACDD1601988)

Fourth Party/Part 20 Defendant

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Duncan Matthews QC and **Susannah Jones** (instructed by **Stephenson Harwood LLP**) for the **Claimant**
Alain Choo-Choy QC, Robert Weekes, Laura John, and **Max Kasriel** (instructed by **Memery Crystal LLP**) for the **First Defendant/Part 20 Claimant**
Robert Thomas QC and **Nicola Allsop** (instructed by **Hill Dickinson LLP**)

for the **Second Defendant/Part 20 Defendant**
Luke Parsons QC and **Ben Gardner** (instructed by **Kennedys Law LLP**
for the **Fourth Party/Part 20 Defendant**

Hearing dates: 21, 22, 23, 24, 25, 28, 29, 30, 31 January 2019
1, 4, 5, 6, 7, 8 and 11 February 2019

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE BRYAN

MR JUSTICE BRYAN:

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A. INTRODUCTION

A.1 The parties

1. The Claimant ("Natixis") is a bank and the international corporate, investment, insurance and financial services arm of Groupe BPCE. The First Defendant/Part 20 Claimant ("Marex") is an independent commodities broker and trader. The Second Defendant/Third Party ("Access World"/AW") is part of the Access World Group of companies (formerly Pacorini Metals) and is a provider of London Metals Exchange ("LME") warehousing. Its LME approved warehouses include warehouses in Gwangyang, Korea ("AW Korea") and Johor, Malaysia ("AW Malaysia"). The Fourth Party ("MCAP") is a Lloyd's syndicate and representative underwriter in relation to two Lloyd's contracts of insurance insuring Marex.

A.2 The Purchase Contracts

2. By five spot purchase contracts dated between 22 November 2016 and 10 January 2017, Marex agreed to sell, and Natixis agreed to buy, nickel stored at AW Korea and AW Malaysia warehouses (the "Purchase Contracts"), which formed part of "conditional repo" transactions, under which Marex had options to repurchase the nickel at later dates. The Purchase Contracts are referred to by the parties as “PC1” to “PC5”. The documentation that Marex was obliged to deliver to Natixis included warehouse receipts. Pursuant to each Purchase Contract, Marex delivered hard copy documents (including documents which purported to be genuine Access World warehouse receipts) to Natixis' London branch and Natixis thereafter transferred the relevant payment amount to Marex (with the last such transfer occurring on 10 January 2017 under PC5). A total of sixteen purported warehouse receipts were delivered to Natixis by Marex: two relating to PC1-PC3; thirteen relating to PC4 and one relating to PC5.

A.3 The false warehouse receipts

3. On 27 January 2017, Access World issued a press release stating:

"Forged Warehouse Receipts
Access World has become aware that there are forged warehouse receipts in our name circulating in the market. We encourage holders of any Access World warehouse receipts to seek authentication from the relevant issuing office for any warehouse receipts not issued to them directly by Access World."

4. On 9 February 2017, Access World issued a further press release stating:

" ... In order to provide relevant market participants with additional clarity, we are now announcing a four business day authentication window commencing Friday 10 February 2017 and ending Wednesday 15 February 2017. Holders are requested to make appointments with the relevant issuing office to be scheduled during business hours within this period. We note that currently all relevant forged warehouse receipts we have seen have been in the name of Access World Logistics (Singapore) Pte Ltd (previously Pacorini Metals (Asia) Pte. Ltd.) and have been solely across nickel . ... "

5. On 14 February 2017 at its Asia Regional Office in Singapore, Access World inspected sixteen purported warehouse receipts (which Marex and Natixis say are the same documents as were delivered to Natixis by Marex, and which, in the case of the fourteen documents comprising PC4-5, had previously been authenticated by Access World (as appears below)). Three employees of Access World undertook an authentication procedure in respect of those documents, and following that process Access World informed Natixis that none of the sixteen purported warehouse receipts (the “Purported Warehouse Receipts”/PC1-5) were genuine warehouse receipts issued by Access World.

6. Although Marex initially alleged that the Purported Warehouse Receipts were genuine documents, by its Re-Amended Defence to Natixis' claim on 7 December 2018, Marex conceded that the Purported Warehouse Receipts were forgeries (the three experts on document authentication all agreed at paragraph 5 of their Joint Memorandum that the Purported Warehouse Receipts were, indeed, counterfeit).

7. The genuine warehouse receipts in respect of the nickel which was the subject matter of the Purported Warehouse Receipts have all been presented to Access World, authenticated and cancelled, after which the nickel concerned has variously been placed on LME warrants, or made the subject of fresh warehouse receipts, or the nickel has been taken out of Access World's warehouses and put into third party warehouses. Marex never had, and Natixis never acquired, title to any of the nickel.

A.4 The Claims and Part 20 Claims

A.4.1 Natixis' claim

8. Following the notification by Access World that the Purported Warehouse Receipts were forgeries, on 27 February 2017 Natixis closed out certain nickel futures positions it had opened pursuant to Clause 2(e) of the Purchase Contracts, and now claims damages and/or an indemnity against Marex in a sum of US$32,114,093 (plus costs and expenses relating to its claim against Access World) which it says Marex is obliged to indemnify it in respect of, pursuant to the terms of the Purchase Contracts, in particular on the basis that Marex failed to give it good title to the nickel. Natixis submits that it has a straight-forward contractual claim against Marex – it paid Marex the purchase price against the forged receipts, and Marex is liable to it pursuant to the terms of the Purchase Contracts.

9. More specifically Natixis submits that Marex failed to deliver the Required Documentation to Natixis on the Payment Date (or at all) in breach of Clause 2(b) of the Purchase Contracts; that Marex breached a representation and warranty at Clause 3(a) of the Purchase Contracts as it did not have good title (or any title) to the Purchased Metal and did not have the full and unqualified right to sell and deliver the Purchased Metal to Natixis; that Marex failed to pass title to the Purchased Metal to Natixis on receipt by Marex of the Payment Amounts in breach of Clause 2(d) of the Purchase Contracts; that Marex failed to deliver the Purchased Metal to Natixis on the Payment Date in breach of Clause 6(a) of PC4 and of PC5 and that Marex breached a representation and warranty at Clause 3(b) of the Purchase Contracts as the Purchased Metal was not free of any encumbrance or adverse

claim by any third party. Natixis also submits that each of these breaches was also a breach of Clause 5 of the Purchase Contracts, in that those breaches also constituted a failure to execute and deliver all instruments, and/or a failure to take all actions, as were required to carry out the terms of the Purchase Contracts. Natixis has an alternative claim for restitution of the Payment Amounts, as money paid upon a consideration which has wholly failed.

A.4.2 Marex's defences and their evolution

10. Marex denies that it is liable to Natixis. In its original Defence Marex denied that the purported warehouse receipts were forgeries and denied that they had been confirmed or established by Access World to be forgeries. It said that the purported warehouse receipts delivered by Marex to Natixis were the same as were delivered to it by Come Harvest Holdings Limited ("Come Harvest"/CHH") under related spot purchase contracts, and that those documents were specifically inspected and authenticated by Access World.

11. In that regard, in relation to PC1 to PC3, Access World inspected scanned copies of two purported warehouse receipts and reported in relation thereto in an email to Marex dated 22 November 2016 (the "22 November Email") which (says Marex) created the impression that the warehouse receipts were authentic. For its part Access World says that the 22 November Email says nothing of the sort and that it did not (and could not) authenticate warehouse receipts from photocopies. In the case of PC4 and PC5, a physical inspection of the fourteen purported warehouse receipts was undertaken by Access World at its premises in Singapore, and Access World (it is now known erroneously) confirmed them to be authentic in emails to Marex dated 22 December 2016 and 9 January 2017 (the "22 December and 9 January Emails"). However, as foreshadowed above, Marex now accepts that all the Purported Warehouse Receipts (including the fourteen erroneously authenticated by Access World) are forgeries, as Access World identified in the inspection on 14 February 2017.

12. Following its acceptance, in December 2018, that the Purported Warehouse Receipts are indeed forgeries, Marex, at trial, advances two defences to Natixis' contractual claim:-

    (1) First, it submits that the Purchase Contracts are null and void as a result of a common and fundamental mistake as to the authenticity of the warehouse receipts. If this were the case this would give Natixis a restitutionary claim, but Marex alleges that it has changed its position in good faith and restitution would be inequitable.

(2) Secondly, it submits that Marex is not in breach, rather it gave Natixis good title because Natixis has a valid claim against the warehouse, Access World because the receipts, even though they are fake, give Natixis the right to delivery of the nickel, because Access World had contractually promised to deliver the nickel against the receipts it inspected and Access World is estopped, as against Natixis, from denying authenticity because it had represented to Natixis that the documents were authentic. Whilst this plea originally related to PC1-3 as well as PC4-5, in a letter on 9 January 2019 (i.e .very shortly before the start of trial) Marex abandoned its pleaded case that it and Natixis had estoppel claims against Access World in relation to PC1-3 (Marex accepting that the effect of Access World's disclaimer when it communicated with Marex regarding the status of PDF copies of the receipts used for PC1-3 was such as to prevent any estoppel by representation from arising as against Access World). In doing so Marex confirmed that it *"admits liability to Natixis for breach of contract in respect of the PC1-3 contracts"* subject only to Marex's common mistake argument.

13. For its part, Natixis denies that there was any common mistake submitting that such a claim is misconceived as Marex cannot establish the requisite ingredients for such a claim, most fundamentally on the basis that the terms of the Purchase Contracts preclude any such claim, as the risk of forged warehouse receipts was (says Natixis) upon Marex, the Purchase Contracts thereby providing who bears the risk of the mistake which is fatal to any claim in common mistake.

14. Natixis says that Marex's case based on estoppel fares no better submitting, amongst other matters, that estoppel by representation is personal to the parties and cannot create title. In October 2017 (and Natixis says at Marex's behest) Natixis amended its claims to add Access World as the Second Defendant. The claims brought by Natixis against Access World follow, and are parasitical upon, the Part 20 claims (as identified below) that had been brought by Marex against Access World. Natixis' claims are expressly brought on the basis that, insofar as Marex establishes the case and facts that it has pleaded, it will follow that Natixis also has a claim against Access World. It is fair to say that, on the whole, Natixis has very much left it to Marex to do the running in respect of such claims.

15. It is now common ground between Natixis and Marex that if Natixis' claim against Marex succeeds, Natixis is entitled to recover:-

(1) US$30,428,374.40 (the price Natixis paid to Marex under the Purchase Contracts).

(2) US$1,476,025.80 (the loss Natixis incurred when it unwound the hedges of the Purchase Contracts).
(3) US$209,694.25 (the sums which Natixis would have received on the Prompt Dates (17 May 2017 and 21 June 2017) if not for Marex's breaches of the Purchase Contracts.
(4) Statutory interest, at a rate and on a basis to be determined in due course (if not agreed), from the Prompt Date until date of judgment.

16. There is an issue as to whether Natixis is entitled to recover from Marex under Clause 7 of the Purchase Contracts (the indemnity clause), the costs of Natixis' claim against, and any costs liability to, Access World.

A.4.3 Marex's claims against Access World

17. Turning to Marex's claims against Access World, Marex's primary claim is one based on alleged contractual warranties and associated alleged estoppels in relation to an alleged obligation of Access World to deliver up the nickel the subject matter of PC4-5. This claim is one which Access World characterises as difficult to understand and ultimately misconceived – characterisations which Marex strongly denies.

18. Marex also advances a claim based on negligence and/or for negligent misstatement (*Hedley Byrne* type liability) in relation to the verification of the purported warehouse receipts concerning PC1-3 and the authentication of purported warehouse receipts concerning PC4-5. Access World accepts that if Marex were to have a claim it would be one along such lines, but it denies that it owed Marex a duty of care or was negligent.

19. If, contrary to Access World's Defence, there is any valid contractual claim or negligence claim against Access World, Access World submits that its Standard Terms and Conditions apply to limit its liability (and also exclude liability for indirect loss). Access World also submits that Marex either caused its own loss alternatively contributed to its loss by entering into the PC1-PC5 contracts without any, or any appropriate, due diligence in respect of Come Harvest (and its owner the Chinese businessman Mr Wong).

20. Marex more recently amended its pleading against Access World to add claims in deceit and conspiracy, claims which Access World submitted were unfounded and should never have been pleaded or maintained. They involved the alleged involvement of a Mr Png (the Access World employee who authenticated the PC4 and PC5 purported warehouse receipts as genuine) who was said to have conspired with Marex's seller Come Harvest in relation

to the fraudulent warehouse receipts. These allegations were pursued at trial, and indeed featured in Marex's written Closing Submissions. However they were abandoned by Mr Choo-Choy, on behalf of Marex, during the course of his oral closing, and accordingly they do not stand to be addressed.

21. In order to understand the issues that arise between Marex and Access World (and between Natixis and Access World) it is necessary, even at this overview stage, to identify how Marex's claim in relation to the delivery up of the nickel has been articulated over time. At the time of opening submissions, the claim was put in these terms at paragraph 3 of Marex's Opening Submissions:-

"AW has, at all material times, been (and continues to be) obliged to deliver the relevant metal to Natixis upon presentation of the receipts delivered by Marex to Natixis under PC4-5…(notwithstanding that they were subsequently found to be forgeries). The correct position is that:

(a) AW promised or warranted to deliver up the specified metal in respect of PC4 and PC5 to the endorsee of the relevant warehouse receipts, upon presentation of those receipts;
(b) It is irrelevant that the receipts have, in the course of these proceedings, been confirmed to be forged documents. This is for two independent reasons:

(i) First, the warranties that AW gave were in respect of those very documents that have since been found to be forged. AW did not give warranties in respect of some other documents. Indeed, the very purpose of AW being asked to authenticate those documents was to provide assurance when those documents were presented to AW for delivery up of the metal, AW would honour those documents and deliver up.
(ii) Second, in any event, having expressly confirmed the authenticity of the PC4 and PC5 Receipts, and Marex and Natixis having relied on such confirmations when entering into the contracts, AW is estopped from denying (i) the authenticity of the receipts; and/or (ii) the right of an endorsee or transferee of the receipts to call for delivery of the metal upon presentation of the endorsed receipts to AW. This is a clear case for the operation of estoppel by representation. The evidence will show that all of the elements of the estoppel are made out. The arguments against it, such as the "shield/sword" point or that title cannot be derived through estoppel when there has been forgery, are misconceived. Marex relies on the estoppel not as a foundation of its or Natixis' cause of action against AW, or as the basis of title to the metal, rather, the estoppel operates to preclude AW from denying the authenticity of the receipts, with the result that, pursuant to its warranties to deliver metal upon presentation of original receipts (the warranties being the basis of the cause of action), AW cannot refuse to honour its obligations to deliver (and thereby pass title to) the metal.

(c) Accordingly, Natixis' claim against Marex for the non-delivery of the metal or contractually required warehouse receipts must fail. Natixis is entitled to delivery up of the metal from AW upon presentation of the receipts in fact delivered by Marex to Natixis

under PC4 and PC5 (and to that extent Natixis' claim against AW for delivery up or specific performance must succeed), Marex has not breached its obligations under PC4 and PC5, and/or Natixis has in any event not suffered any loss by reason of any breach of contract by Marex."

22. In opening Access World pointed out what it says were insuperable difficulties with a claim for delivery up of the nickel including that an estoppel cannot give rise to a cause of action, nor can it create proprietary rights in the nickel (which is owned by others).

23. By the time of its Written Closing Submissions, Marex was advancing a case based on contractual claims against Access World (and, if necessary, estoppel by representation) in the terms set out in its "overview" at paragraphs 42 to 48 of its Written Closing Submissions:

"42. By way of overview, Marex contends that AW is contractually liable on promises (or warranties) of delivery of metal that it made to Marex and/or Natixis, as contained in:

(a) The thirteen PC4 receipts and the PC5 receipts that were expressly authenticated by AW in its emails dated 22 December 2016 and 9 January 2017 (the "Authentication Emails") ; and/or

(b) The so-called PMA letters dated 23 November 2016, 19 December 2016 and 3 January 2017 sent by AW to Natixis with specific reference to the PC4 and PC5 receipts (the "PMA letters") .

43. In each case, Marex specifically relies on the promise or warranty by AW that *"[d]elivery will be made upon presentation of the duly completed/endorsed ORIGINAL Warehouse Receipt" (as set out in the PC4-5 receipts) and/or that "upon receiving the original warehouse receipt duly endorsed, signed and dated by the order party, and subject to payment of [its] warehousing fees, [it] will release the goods to the endorsee without further written instructions from the order party"* (as set out in the PMA letters) .

44. There are issues as to whether the above statements ever took effect as contractually binding promises or warranties, and how any contract arose as between AW (on the one hand) and either Marex or Natixis (on the other hand) in the terms of such promises or warranties. However, for the reasons explored in paragraphs 51 -52 and 54 below, it is submitted that there is no particular difficulty in identifying the usual ingredients of a contract or a contractual promise or warranty binding AW on the particular facts of this case.

45. If Marex is right that AW has made contractually binding promises or warranties to deliver metal as alleged, then the promisee, be it Marex or Natixis, is entitled to claim delivery of the metal by way of specific performance of the promises, subject to compliance with the terms of the promise.

46. In so far as the promise is to be performed only upon presentation of a duly endorsed "original warehouse receipt", a question arises as to what is meant by "original". As to this, Marex has two arguments:

(a) that this term is to be understood in the sense of "original" as determined by AW itself in connection with the transactions in contemplation of which the Authentication Emails and PMA letters were provided;

(b) alternatively, if the term is to be understood in the sense of what may now objectively be shown to be a genuine original receipt, that AW is estopped by representation from denying that the PC4-5 receipts are genuine original receipts, with the result that AW is therefore required to comply with its delivery promises as if the PC4-5 receipts were (as it represented them to be at the time) genuine original receipts.

47. The fact that, by reason of the forgery of the PC4-5 receipts, the underlying metal has been delivered up to the true owner or owners and that it has either been put on warrant or taken out of the AW warehouse, does not excuse AW's compliance with its promises or warranties of delivery. This is so for three principal reasons:

(a) First and foremost, none of AW's promises or warranties of delivery are expressed to be (or should be construed as being) conditional upon either Natixis or Marex (as the promisee) having pre-acquired title to the metal in question. As seen in sub-section (2) below, AW's undertaking to deliver as contained in its warehouse receipts operates and is implemented by AW **without reference to or investigation into who has title**. In practice, the endorsement and transfer of the warehouse receipts by the order party to the next endorsee and from one endorsee to the next is clearly intended as a means of transferring title or, at least, the right to claim delivery of the goods, but AW's promise to deliver (and the performance thereof) is **not itself** conditional (or expressed to be conditional) upon the last endorsee's proof or demonstration to AW that it has independently acquired title from the true owner.

(b) Second, it may fairly be said that, in a case where AW has mistakenly authenticated particular receipts as genuine receipts, it has made its delivery promises on the basis of mistake. However, AW has rightly not alleged that, if its delivery promises are otherwise contractually binding, they should be seen as void or unenforceable on the basis of the principles of common mistake reviewed in *The Great Peace*. Any attempt by AW to rely on such principles would inevitably fail because: (i) AW was at fault in wrongly confirming the PC4-5 receipts as authentic (see section (F) below on AW's negligence), (ii) by its Authentication Emails, AW effectively warranted the authenticity of the PC4-5 receipts, and (iii) contractual performance of the delivery promises is not in any event impossible as explained in sub-paragraph (c) below.

(c) Third, the metal in the present case is not a form of unique property, but a fungible. This is not disputed by AW. Accordingly, the fact that the particular metal described in the receipts by warehouse lot numbers has since been claimed by the true owner(s) is not an obstacle to an order for delivery up

or specific performance of AW's delivery promises. It is open to AW either to re-acquire the same metal lots in so far as the particular lots remain within its warehouses, or (in so far as the metal has left AW's warehouses) to acquire metal of similar brand, shape and weight, in order to honour its promises of delivery.

48. If necessary, in the alternative to delivery up, Marex claims damages for non-performance of AW's delivery promises, its loss being measured by the value of the metal that AW fails to deliver. Natixis has already quantified its loss in this regard by reference to what it paid Marex for the metal – and, in so far as Marex was the promisee of the delivery promises, Marex relies on the same measure of loss if the Court were to consider, as a matter of equitable discretion, that an order for delivery up or specific performance of the delivery promises would not be just and appropriate on the particular facts of the case." (Marex's emphasis)

24. In the course of the oral closings before me:-

(1) Each of Natixis and Marex confirmed that if they were wrong in their submission that there was a contract with Access World – i.e. there was no contract, then the estoppel case cannot arise - for otherwise, as was also confirmed by them, estoppel would be used as a sword and not as a shield which it was accepted is not permissible.

(2) Contrary to the submissions at paragraph 46(a) of its Written Closing (quoted above), in his oral closing Mr Choo-Choy realistically (and correctly), accepted that, *"the better construction and therefore the correct construction is that 'originally' means objectively original*" with the result that if there was a contractual promise by Access World it was in respect of an original/genuine warehouse receipt and in consequence Marex would then need to prove that Access World is estopped by representation from denying that the PC4-5 receipts are genuine if it were to succeed against Access World on such basis.

25. It follows from the above points that if a contract with Access World did not arise, estoppel does not assist Marex or Natixis, whilst if a contract with Access World is found, then an estoppel is needed as any such contractual promise relates to a genuine warehouse receipt.

A.4.4 Marex's claims against MCAP

26. Marex brought a claim ("the Insurance Claim") against MCAP (as representative underwriter) ("Underwriters") arising out of its reliance upon the forged warehouse receipts for an indemnity under Lloyd's marine cargo insurance policies for the 2017-2018 policy year ("the 17/18 Policy") or alternatively the 2016-2017 policy year ("the 16/17 Policy").

MCAP submitted that the claim under the 16/17 Policy was bound to fail because it said that the marine cargo policy had only been extended to cover paper losses arising out of Marex's reliance on a counterfeit "Metal Exchange warrant" and it said that a warehouse receipt is not such a document.

27. MCAP submitted that the claim under the 17/18 Policy was also bound to fail because by the time of renewal on 19 / 20 January 2017, Marex had deliberately or recklessly failed to disclose a series of highly material circumstances to the Underwriters. The 17/18 Policy covered losses arising from counterfeit documents discovered during the policy period. MCAP alleged that the evidence showed that at the time when Marex bought the nickel from CHH and sold it to Natixis, the circumstances were such that Marex were (rightly) concerned about the authenticity of the associated warehouse receipts. These concerns were not shared with the Underwriters.

28. Then, in the week before renewal of the policy, Marex discovered that warehouse receipts supplied by CHH for a proposed further transaction were fraudulent. This (said MCAP) led Marex to the reasonable (and correct) conclusion that some or all of the earlier warehouse receipts delivered by CHH and sold to Natixis were or might also be fraudulent, so that Marex would need to claim under the 17/18 Policy. Marex's broker (Mr Richard King of Lockton Companies LLP ("Lockton")) explained to Marex that the discovery of the fraud was a material circumstance. Marex told Natixis of the fraud and recommended that Natixis authenticate the warehouse receipts Marex had supplied, but did not tell the Underwriters about the fraud before renewal. MCAP's case was that this was a material non-disclosure which entitled the Underwriters to avoid the policy.

29. MCAP submitted that Marex's claim also failed for a number of subsidiary reasons. First, it alleged that many of the material circumstances had already arisen by the time that the 16/17 Policy was endorsed in early January 2017 and so the non-disclosure defence also arose for this policy. Secondly, that there was no agreement to the 17/18 Policy at all because Marex's brokers changed the counterfeit documents coverage wording from *"Metal Exchange warrant*" to *"(LME) warrants and/or other warrants and/or warehouse receipts and the like"*, because of Marex's concerns about fraudulent warehouse receipts after the broke and without drawing the change to the Underwriters' attention. Thirdly, even if there was a *consensus ad idem*, the Underwriters submitted that they were only bound by the *"Metal Exchange warrant"* terms (which did not cover warehouse receipts).

30. The claim by Marex against MCAP raised a number of issues under the Insurance Act 2015 which I was told were before a court for the first time since the passage of the Insurance Act 2015 and, as such, provided the first opportunity for a court to opine on such matters. In the event that was not to be. After Marex's witnesses (including Mr King of the broker Lockton) had been cross-examined by, amongst others, counsel for MCAP (Luke Parsons QC), and on the day that the underwriters who had written the 16/17 Policy and 17/18 Policy were due to start giving evidence (Friday 1 February 2019), I was informed that Marex and MCAP had reached a confidential settlement, pursuant to which it was agreed that Marex's claim against MCAP was to be dismissed with no order as to costs. This agreement was formalised in a Consent Order sealed on 4 February 2019, as a result of which MCAP took no further part in the trial.

31. Accordingly the issues that arose between Marex and MCAP no longer arise for determination. However some of the contemporaneous correspondence and conversations involving Marex and its brokers remain relevant in the context of the issues that do arise for determination as between Natixis, Marex and Access World (including in the context of Access World's causation and contributory negligence defences against Marex), and the evidence of Marex's witnesses in this context has been given, and is available to be taken into account as appropriate.

A.5 The Confidentiality Order

32. On the first day of trial Access World applied for measures to be put in place for the protection of confidential information in relation to particular features of Access World's warehouse receipts. The concern was that if certain features of Access World's Warehouse receipts and associated security checking were revealed in open court, this could be, as it was put, a "Fraudster's Charter". The existence of such security features reduces the likelihood of forged warehouse receipts being placed in circulation, or if placed in circulation, increases the likelihood of them being detected, which maintains confidence in the global trade in endorseable warehouse receipts.

33. In my judgment of 21 January 2019 ([2019] EWHC 191 (Comm)), and for the reasons set out therein, I put in place those measures which I considered were the absolute minimum in order to protect confidentiality whilst also ensuring open justice. In the associated Order (the "Confidentiality Order") it was ordered that:-

(1) Certain features which could reveal information that is confidential to Access World as identified in the confidential Schedule attached to the Confidentiality Order (the "Schedule"), were to be protected as follows:-

(a) Those features should not be referred to or otherwise identified in open court save in the manner defined in the Schedule.
(b) Any documents referring to those features should be redacted in order to remove reference thereto.
(c) Cross-examination should be by reference to the redacted documents.
(d) Cross-examination and submissions in relation to the Warehouse Receipt Authentication Checklist should be by reference to a hard copy of the Authentication Checklists only and the Authentication checklists should not be made publicly available.

(2) The Schedule was confidential and was not to be revealed to, or its contents otherwise communicated to, any non-party.

34. The trial proceeded in accordance with the terms of the Confidentiality Order and, in consequence, all the evidence was heard in open court, and it has also been possible to deliver this judgment in open court. The features referred to in the Schedule were "Item 1" or the "Special Test" to be used for the purpose of detecting "Item 2", as well as a feature defined as "Item 3" and a further feature defined as "Item 4". Such definitions were used in cross-examination, and in closing submissions, and are also used in this judgment where it is necessary to refer to such matters.

B. The Witnesses

B.1 The Factual Witnesses

35. I identify below the factual witness evidence relied upon by each party (both oral and in statements served where the witness was not required to give evidence). I address my findings in relation to particular witnesses, as appropriate, when considering the issues to which their evidence relates.

B.1.1 Natixis' witnesses

36. Natixis called Robert Abel and he gave oral evidence on Day 2 of the trial. Natixis also called Marie O'Malley on Day 2 although, in the event, no party had any questions for her.

Natixis also relies upon witness statements from Vikram Mansukhani, Peter Barnes and Simon Grenfell who did not give oral evidence in circumstances where no party required that they be called. In its Written Closing Submissions Natixis also refers to specific paragraphs of statements served by MCAP (paragraph 14 of Richard Burnett's 1st Statement, paragraph 9 of Roderick O'Malley's 1st Statement and paragraphs 8 and 9 of Louise Crockford's 1st Statement). As already noted the proceedings between Marex and MCAP were settled immediately before MCAP's witnesses were to give evidence.

B.1.2 Marex's Witnesses

37. Marex called the following witnesses. Kevin Nutt who gave oral evidence between Days 2 and 4, Simon van den Born who gave oral evidence on Days 4 and 5, Ian Lowitt who gave oral evidence on Day 5, Steven Tull who gave evidence on Day 6 and Richard King who also gave oral evidence on Day 6. Marex also served a hearsay notice in respect of the statement of Natalie Holland, that it also relies upon.

B.1.3 Access World

38. Access World called Png Guan Zhong ("Mr Png") who gave oral evidence on Days 7 and 8, Frankie Chen Jinlong ("Mr Tan") who gave oral evidence on Day 8, Sim Chee Boon who gave evidence on Days 8 and 9, and Alfred Vermeulen who gave evidence on Day 9. There was also a witness statement in the trial bundle from a Jane Pang Meng Ken relating to the fraud case but, in the event, it was not adduced in evidence and is not relied upon.

B.2 The Expert Witnesses

39. The parties had permission to serve, and served, expert reports from expert document examiners (Michael Hardy, John Welch and Robert Radley). In the event, and in the light of the agreement between the experts in their Joint Memorandum, none of the experts gave oral evidence or was cross-examined.

C. The Facts and Chronology of Events

C.1 Marex's Business and Repurchase Transactions

40. Marex operates as a commodities broker and trader in the Energy, Metals, Agricultural and other futures markets. Marex conducted metals financing business, whereby it entered into sale and repurchase transactions with a client to secure finance provided to that client in the form of the sale price. The repurchase was optional, so if the client did not repurchase the

metal, Marex would sell it to recover the financing payment. The metal remains in the warehouse throughout, with the client providing either a London Metal Exchange ("LME") warrant or a warehouse receipt to Marex to represent the metal. LME warrants are paper documents held by the LME in a secure, centralised depository and transferred electronically using a secure electronic system provided by the LME called "LMEsword".

41. There is no equivalent regulation of warehouse receipts, which are issued by individual warehouses such as Access World and must be presented to the warehouse either by the party to whom they are issued or by an endorsee. By their very nature, therefore, warehouse receipts are less secure than LME warrants and involve a greater risk of fraud when conducting metals financing business. In this regard it was common ground between all the parties to this action that by comparison with trading LME warrants, an "off-warrant" transfer of warehouse receipts has an inherently higher risk of fraud. This risk can be partially mitigated, though not eliminated, by sending the original warehouse receipts to the issuing warehouse for authentication using the confidential security features embedded by the warehouse in the receipts.

42. In 2014 a major fraud involving forged endorsable warehouse receipts for metals was discovered in China, centred in Qingdao. Following that fraud, banks became more cautious about repo transactions, although there remained a market in endorsable warehouse receipts in 2016/2017 (often in transactions involving Asian customers). The market existed primarily because it was more cost effective for owners, as warehouses charge a lower rent for metal held on receipts as compared to LME warrants.

43. The Purchase Contracts were true sales, but also formed the first leg of contingent repurchase transactions. Repos are true sales and purchases of a commodity but their commercial (though not legal) effect is similar to that of a secured loan. Essentially, the purchaser (commonly a bank) purchases a commodity from the "borrower" (seller) and at the same time agrees to sell it back to the borrower at a later date and for a slightly higher price. The difference between the two prices represents the interest that accrues over the period between the purchase and sale.

44. These Purchase Contracts were priced by reference to a specific LME price on the Payment Date for the Prompt Date, less a discount. On the same dates as the Purchase Contracts, contingent repurchase contracts were agreed, which granted Marex an option to purchase from Natixis, in six months' time, nickel of the same specification, brand, weight, shape

and in the same location as was sold under the Purchase Contracts. The repurchase leg was structured on an optional basis to ensure that a true sale took place and to avoid any risk of recharacterisation as an unsecured loan.

45. In a contingent repo it is crucial for the financier to ensure that, if the call option is not exercised, it will be able to sell the commodity to another buyer at or about the price it would have received from the repo counterparty. In the Purchase Contracts, this was done by pricing the repo by reference to LME futures prices and taking steps to ensure that the metal was of warrantable quality and was held in an LME registered warehouse. This meant that, if a new buyer was needed, the nickel could be put onto LME warrant and sold on the LME exchange. From the financier's perspective, everything hinges on its ability to put the nickel on LME warrant (or otherwise sell it) if the purchase option is not exercised.

46. The Maturity Date specified in each Contingent Repurchase Contract was the same as the Prompt Date under the corresponding Purchase Contract. The price payable was the LME Second Ring Closing Cash Price for the Prompt Date. Therefore, depending on market movements, the price under the Contingent Repurchase Contracts could be higher or lower than the price paid under the Purchase Contracts. The resulting exposure to market risk was hedged and these hedges were an integral part of the repo. Clause 2(e) of the Purchase Contracts obliged Natixis to sell futures contracts for the whole number of 6mt lots nearest to the Weight of Metal sold basis the LME Closing Price on the Payment Date for the Prompt Date. This hedged both the risk of a drop in the price of nickel between those two dates and the risk that Marex would not exercise its option to repurchase. The hedges were placed through Marex, so this also gave Marex an additional source of profit in the form of commission. Marex purchased the nickel from CHH with whom Marex also entered into a contingent repo transaction. Marex's case is that the Marex/CHH repo and Marex/Natixis repos were materially back-to-back.

C.2 Marex's Warehouse Receipt Financing Business

47. Marex's LME warrant financing business had largely ceased by 2015. Marex's first ever warehouse receipt financing business was, in fact, the five transactions that are the subject matter of the Purchase Contracts. As Mr Nutt accepted when cross-examined, this was a new and different type of trading for Marex, and for Mr Nutt personally. He acknowledged that it was more risky than the LME warrant finance business previously undertaken and he agreed when giving evidence (as is common ground) that there is an inherent risk of

fraud in transactions that involve the use of warehouse receipts which are riskier than LME warrants, as foreshadowed above. Mr Nutt himself acknowledged that the Qingdao scandal had made people more nervous about warehouse receipts.

C.3 The Introduction of Marex to CHH & Genesis

48. In October 2016 Judith Ferrari joined Marex's New York office as a senior LME salesperson. Ms Ferrari brought with her what was described as a *"very long personal relationship"* with Bill Silverstein. Mr Silverstein was working with Genesis Resources Inc ("Genesis") at the time. It appears that he had a long-standing (20 year) relationship with Steven Kao, Genesis' principal. In turn, it appears that Mr Kao had a long-term relationship with CHH's principal, Mr Wong.

49. Ms Ferrari had introduced Mr Silverstein, Genesis and CHH to her previous firm, ED&F Man, but had left before any transactions had taken place. As such no one at Marex had ever entered into a transaction with Genesis or CHH before PC1 and Mr Nutt had never heard of Genesis or CHH before November 2016. As at November 2016 Ms Ferrari had been with Marex for one month.

50. Ms Ferrari met Genesis in London on 1 November 2016, during LME week. That evening, Genesis introduced both Ms Ferrari and Mr Nutt to CHH at the Grosvenor House Hotel. According to Ms Ferrari's later email (on 18 January 2017) a presentation based on a number of slides (that were in the trial bundle) was given to them. In this presentation, Genesis outlined the proposed nickel repo transactions involving endorsed Access World receipts, suggesting a trial transaction of c.US$20m of nickel, followed by US$75m in Q4 2016 and US$500m in 2017. The presentation explained that this was an *"opportunity to replace an existing financier"*.

51. CHH was, in fact, desperate for money, having lost US$50m of financing when Freepoint pulled out of repo deals with CHH. In the transcript of a call made on 8 November 2016, in conversation with Mr Nutt, Ms Ferrari refers to the fact that CHH had *"to get 50 million done by the end of the month"*. In cross-examination Mr Nutt denied knowing that CHH was desperate for money, having lost Freepoint. Whilst he may not have known the name "Freepoint", I am satisfied that he knew, in November 2016, that CHH needed money. As Ms Ferrari put it to Mr Nutt on 18 January 2017 *"But they did tell us re Freepoint…just didn't know the name at the time of the meeting"*.

52. As was apparent from Mr Silverstein's email to Marex of 5 November 2016, it was envisaged from the outset that the transactions would involve the transfer of endorsed warehouse receipts and that the "exact same" receipts had to be returned at the end of the repo. This was an entirely new area of business for Marex. As Mr Nutt makes clear at paragraph 8 of his second statement, *"Marex (and I in particular) was unfamiliar with transactions involving warehouse receipts, and accordingly there was a process of learning and responding to events as they took place"*.

53. The CEO of Marex, Mr Lowitt, viewed this new business opportunity as one which *"had the potential to be an important element of"* its metals franchise. Mr van den Born's evidence was that he was *"excited about the potential of this new business line and keen to do the CHH transactions"*. In this regard Mr Nutt also confirmed when cross-examined that he and the rest of the commercial team *"were very keen to do this business"*. In financial terms, Mr Nutt stated that it was clear to him from the meeting on the evening of 1 November that CHH/Genesis was looking to do high value warehouse receipt financing transactions in the near or medium term which would be *"substantial in terms of the Metals division's profitability"*, whilst Mr van den Born's evidence was that, *"The prospective profitability of the potential deals was appealing"* and he *"considered that it could represent a 6-9% increase on the profitability of the Metals Division at that time."* The transactions were to take place in the months leading up to January 2017 (which was the time when annual bonuses were decided).

54. CHH was "onboarded" as a Marex client. There is a letter from Marex to CHH dated 16 November 2016 announcing that Marex had completed its due diligence checks *"and we are delighted to confirm that we are able to accept you as a client"*. Mr Nutt's evidence, when cross-examined, was that the Know Your Client ("KYC") AML procedures were carried out by Marex's Documentation and Risk team on CHH (though no KYC file or due diligence file was disclosed). Mr Nutt's evidence was that as part of the account opening Marex saw some financial statements from which it was apparent that CHH was a thinly capitalized Hong Kong "window company" owned by a mainland Chinese owner (i.e. without assets of its own) which he said, *"was not dissimilar to many other Hong Kong window companies that [Marex had] seen before."* Whilst he suggested that it was common to deal with "window companies" and that Marex had been told that Mr Wong, the man behind CHH, was a Chinese billionaire, no due diligence checks were carried out by Marex

to ascertain Mr Wong's financial position, and in any event Marex was contracting with CHH not Mr Wong.

55. It is apparent that little, if anything, in the way of due diligence was in fact undertaken. According to Mr Nutt, Marex principally relied on the personal relationships between Ms Ferrari and Mr Silverstein, between Mr Silverstein and Mr Kao and finally between Mr Kao and Mr Wong in order to satisfy itself that this was a customer it wanted to do business with. Mr Nutt said *"I accept that we could have done more to drill down into Mr Wong, but we had – we were very reliant on the descriptions of the relationships, which seemed very long and deep. And the fact that he was very active in this space."*

56. Mr van den Born's view on 12 January 2017 (as stated in a conversation with Mr Nutt and Ms Ferrari) was *"What worries me is actually that you know is that you know when I talked about getting to know the client and all these sorts of things – we don't know the client that well at all."* When cross-examined he confirmed that *"I did not know the client well"* and that in January 2017 he was unhappy that his team had not done better due diligence to get to know the client well, and on 18 January 2017 *"expressed that [he] was not happy that [he] did not know the client"*. Obviously there is an element of hindsight in all these comments.

57. In any event it was clear enough that CHH was a company without any substantial assets. Marex nevertheless proceeded to contract with CHH. The evidence of Natixis' witnesses is that Natixis would not, itself, have contracted with CHH as an unknown company with no track record, and as addressed below, a number of financial entities were not willing to undertake transactions involving warehouse receipts.

58. Due to liquidity constraints, Marex decided to source funds for the transaction from a bank and to ensure that the bank paid first. In this regard Mr Nutt contacted Natixis and discussed the transaction with William Rose. On 8 November 2016 Mr Nutt explained to Mr Rose that: *"The plan for this transaction is to get the warehouse receipts made out to you directly ..."* The following day, Mr Rose replied: *"Warehouse receipt to be made out to: Natixis S.A."*. Accordingly it was initially envisaged between Marex and Natixis that Marex would be delivering fresh warehouse receipts in Natixis' name.

59. However, by 11 November, it had become clear to Natixis that in fact the existing warehouse receipts would be delivered with an endorsement. Natixis was willing to enter

into the transaction on this basis. Mr Abel, and his boss Simon Grenfell, had previously worked at Deutsche Bank, where they had entered into repos on the basis of endorsed warehouse receipts and there was pre-existing internal approval for off-warrant nickel financing.

60. On 10 November Mr Nutt and Mr Rose agreed to transact with a US$10m parcel of nickel stored in South Korea, and on 11 November Mr Nutt emailed Mr Rose black and white pdf copies of (1) a draft letter from Access World to Natixis (referred to in the contemporary correspondence as PMA letters) and (2) two warehouse receipts, issued to the order of, and endorsed by, Straits Singapore Pte Ltd ("Straits") and numbered AWSG/KR/0027116 and 0027117 (the PC1-3 Receipts). Mr Rose then left the office for a two-week holiday and, from Monday 14 November, Mr Abel took over the deal for Natixis.

61. On 14 November 2016, Frankie Tan of Access World explained to Mr Nutt that *"the warehouse receipts' title owner is Straits"* and that the metal could be delivered to the proper endorsee of the Straits' warehouse receipts. He also noted that there were some missing Certificates of Analysis ("CoAs") for the parcel of 840mt.

62. It is apparent that, at this time, Mr Nutt did not fully understand what was meant by an endorsed warehouse receipt. At 1454 on 16 November he called a friend at Access World, Mr Geoff Rameaux, to ask questions about how the procedure worked, saying this was *"just for my education because we as you know we haven't dealt with a lot of warehouse receipts in the past."*. Mr Rameaux explained that Access World's preference was for cancellation and re-issue of warehouse receipts to a new owner of material, whereas endorsing an existing warehouse receipt was not "ideal".

63. After his call with Mr Rameaux, Mr Nutt spoke with Ms Ferrari in a telephone conversation on 16 November 2016. In that conversation he said that endorsement would complicate things as it would bring another party into the transaction and that he wanted to speak to Risk about it, stating that *"obviously the best way would be to get a fresh warehouse receipt made out to our bank"* and that *"it feels uncomfortable to me…Unless they can give us a good reason not to, I guess"*. Ms Ferrari agreed with Mr Nutt's concerns. When cross-examined Mr Nutt accepted that his preference was to re-issue the receipts and that insisting on a fresh receipt, rather than accepting an endorsed receipt, would have reduced the risk.

64. Mr Nutt did ask Mr Silverstein in a conversation the same day (16 November) whether it was possible to obtain a new warehouse receipt made out to the order of Natixis to which Mr Silverstein replied *"Nope, nope"*. No explanation/or good reason was ever given by CHH as to why a fresh receipt could not be issued and made out to the order of Natixis.

65. In a further telephone call that day Mr Nutt asked Ms Ferrari if she knew why CHH would not allow a new warehouse receipt to be issued to Natixis:

"KN I – do we – I mean, you know, do we know why they won't just do a new one to the bank, do we know why that is? I'm not sure I wanna ask, but I mean, do we know why? Do you have any idea?
JF No, I don't know why, and from what I've been told, you know, in transactions that they've done in the past, with other counterparties, you know, it's just a question of endorsing – I don't know what they want – you know what they don't wanna do a clean one"

66. At the same time as negotiating with Natixis, Marex was also seeking to raise finance for these repos from other banks, including the Royal Bank of Canada ("RBC") and on 17 November Mr Nutt spoke to Paul Temple of RBC (who had previously worked for Marex). At 0822 on 17 November, Mr Nutt received an email from Paul Temple of RBC saying that this metal *"has been doing the rounds as not many people will take these receipts unless they are clean. I am still waiting for a plausible reason why the owner of the metal has a problem with new/fresh receipts being issued? There is no logical reason and the risk of fraud by doing this is a lot higher…"*

67. Mr Nutt forwarded this email on to Mr van den Born and then called Mr Temple to discuss, telling Mr Temple that CHH's rationale was that they wanted the same material back. In relation to this Mr Temple stated, *"Yeah, but that's rubbish as we know, because the new one would list the same warrant numbers, the same details of the metal, the same COA's"*. Mr Nutt replied, *"Yeah no that's right, I'm not saying it's a good reason, I'm just telling you that that's the reason we've been given."*

68. During the same conversation Mr Temple also stated *"it will be very difficult for us to do it because it's just too risky and as we see it, there's no reason why anyone wouldn't be happy to have clean and new warehouse receipts unless there is something untoward"* and *"… but the truth is there's only – you know, it raises alarm bells why people don't wanna do it when there's no – to what we see – a downside from a fresh bill being issued, there's only you know questions why it wouldn't be done raised..."*

69. Mr Nutt spoke to Ms Ferrari later that day. He remained of the view that the better course was to have a fresh receipt issued, stating, *"we would not have the same concerns if they issued a fresh receipt."*

70. At 0958 on 17 November Mr Nutt spoke to Mr Tan of Access World. Mr Nutt said that he was struggling to understand why the client wanted to use endorsed receipts. When Mr Nutt asked what logical reason Mr Tan could think of as to why this should be, Mr Tan could not identify any good reason (as Mr Nutt accepted when cross-examined). Mr Nutt and Mr Tan discussed the fact that Marex would be selling nickel to Natixis and delivering warehouse receipts to it (Access World had also issued the PMA Letter to Natixis on 14 November). When cross-examined Mr Tan confirmed that Access World was aware, before 22 November, that Marex would be selling to Natixis as Mr Nutt had told him so.

71. By way of apparent reassurance to Mr Nutt, Mr Tan told Mr Nutt that there were about 10 security features on the receipt and gave him details of three. He also identified the main security feature (Item 2) and gave Mr Nutt the details of the test used to check that feature (Item 1). He also said that Access World would not release material to anyone other than the endorsee of an original warehouse receipt. Mr Tan explained that Access World would need to see the original warehouse receipts to authenticate them and that there have been occasions where someone has tried "to pull a fast one" with scanned copies of warehouse receipts. As a result, Access World would be unwilling to say "hey it's authentic" based on a scanned copy.

72. After the event (i.e. following the failed authentication of the PC6 warehouse receipts) Mr van den Born acknowledged the inherent risks Marex had faced in a telephone conversation with Mr Nutt and Ms Ferrari on 12 January 2017 in which he said, *"...what makes me nervous is that all the sorts of things that I worry about or fearful of or whatever, everyone's like don't worry, we're handling it, we're doing it yada yada yada – actually – you know the risks of doing this business are all of a sudden – everyone is like yeah, f..k yeah this is a risk. I'm like hold on a second, didn't we think about this going in? You know what I mean, it's like – we know the risk of doing this business".*

73. Returning to the chronology of events, there was a "sign off" meeting on 17 November 2016 between Mr Nutt and Ian Lowitt. At this meeting, they agreed three measures for the CHH business to reduce the additional risks associated with warehouse receipts compared

to LME warrants, namely (1) to arrange inspection of the metal at the Access World warehouse, (2) to courier the original warehouse receipts to Access World in Singapore for authentication, and (3) to ensure that there was suitable insurance in place to underwrite the risk of fraud.

74. However, Mr Lowitt and Mr Nutt decided to depart from the agreed authentication protocol for the PC1-3 warehouse receipts as CHH wanted the deal done quickly and Mr Nutt and Mr Lowitt were concerned not to lose out on the competition with the result that they would not require authentication of these receipts, but instead, a pdf scan would be emailed to Access World for checking. When cross-examined Mr Nutt confirmed that Mr Lowitt was prepared to allow this because they thought it was a good business opportunity which they didn't want to miss out on and believed that if they did not complete within CHH's timetable, they might lose the business. Mr Nutt accepted in cross-examination that he knew it would not be possible for Access World to check the main security feature (Item 2) on the basis of a scanned copy. Mr Lowitt and Mr Nutt each accepted in cross-examination, that merely emailing pdf copies for verification involved Marex taking a greater risk than sending the originals for authentication.

75. As to inspection, Mr Nutt engaged Alfred H Knight ("AHK") on 18 November to inspect the nickel at the Access World warehouse. As to insurance, Mr Nutt emailed his colleague Emre Degirmenci on 17 November 2016 to ask him to approach Marex's broker (Lockton), to determine if there was cover under the 16/17 Policy for fraudulent LME warrants and warehouse receipts, including cover for (amongst other matters) buying material against fraudulent documents.

76. On 21 November, at Marex's request as aforesaid, AHK attended AW Korea to try to inspect the 840mt parcel. As noted above, Marex already knew from Access World that not all of the COAs were available. In addition, by 0854 London time, AHK had reported to Mr Nutt that it was not going to be possible to count all of the metal in the warehouse, but that the inspector would count as much as he could.

77. Mr Dennis Siu of CHH hand delivered the original PC1 PMA letter and the two hard copy (forged) PC1-3 receipts to Marex on 21 November. This was itself somewhat unusual given that at this stage Marex was not under any contractual obligation to CHH. With the hard copies in his hands, Mr Nutt spoke to Mr Tan at 0948 and tried to check the hard copy receipts whilst Mr Tan explained various of the security features to him over the phone.

78. At 1023 Mr Nutt emailed scanned pdfs of the receipts and PMA letter to Mr Tan, saying *"Please confirm that these are copies of the documents that you have issued. I note that they have an AW sticker and an orbit watermark. The signatures also appear to be as per your signature list."*

79. Whilst waiting for Mr Tan's response to his query, Mr Nutt ordered a device from Maplin so that he could try to perform the special test himself. Mr Nutt agreed that he did so in light of his concerns, to try to fortify his level of confidence and mitigate the risk. He also notified Mr van den Born of the potential problems with CoAs and inspections identified above and a further problem with the signature list. He said *"I THINK the docs are genuine but AHK need to confirm the percentage they have been able to count."*

80. Meanwhile, in Singapore, Mr Png inspected the pdfs and sent Mr Tan Access World's standard email, which Mr Tan emailed on to Mr Nutt. Access World's standard wording as applied to the transactions in question was in the following terms: "In reply to your inquiry, we advise that based upon the photocopy document you provided and according to our records a Warehouse Receipt with cargo details and Reference No. AWSG/KR/0027116 and AWSG/KR/0027117 dated 08/11/2016 had been issued by Access World (formerly known as Pacorini Metals). We however cannot confirm the authenticity and/or validity of the photocopy document until we are in possession of the original Warehouse Receipt and have verified same to our satisfaction. Any information given and/or statement made is for information purposes only without any engagement and/or liability on our part. …"

    "In reply to your inquiry, we advise that based upon the photocopy document you provided and according to our records a Warehouse Receipt with cargo details and Reference No. AWSG/KR/0027116 and AWSG/KR/0027117 dated 08/11/2016 had been issued by Access World (formerly known as Pacorini Metals). We however cannot confirm the authenticity and/or validity of the photocopy document until we are in possession of the original Warehouse Receipt and have verified same to our satisfaction. Any information given and/or statement made is for information purposes only without any engagement and/or liability on our part. …"

81. I address in due course, in Section G below, the meaning of this wording and the distinction between "verification" and "authentication". Mr Tan's evidence was that verification was not a check of the document at all and that it was something that was simply different from an authentication. In this regard, Mr Nutt accepted that whilst this

gave a degree of comfort, it was not a guarantee and there was still a risk because physical authentication had not taken place. Whilst Mr Lowitt had stated at paragraph 21 of his witness statement that he understood the verification would be completely reliable, he accepted in cross-examination that to his knowledge at the time the verification *"wasn't completely reliable"* and that it was *"untrue"* to say in his statement that it was completely reliable.

82. The following day, 22 November, Mr Nutt realised that the scan had missed off one page and re-sent the documents to Access World, this time with complete attachments but without the endorsement page. Mr Png's evidence is that he verified the pdfs and Mr Tan subsequently emailed Mr Nutt with the standard verification wording.

83. As at 22 November, it had not been possible to count all of the material and there were still 28 lots without COAs. At 0805 that morning Mr Nutt's view was still that the best option was for CHH to cancel the receipts and re-issue them (ideally in Natixis' name), for the counted metal. That same morning the Item 1 device arrived on Mr Nutt's desk. At some time before 1012 that morning, he used it to perform the Special Test. The receipts failed the test and Nutt was unable to see Item 2.

84. At 1012 Mr Nutt emailed Mr Tan to ask about the count and the Special Test, explaining that he had acquired an Item 1 device but could not see Item 2. He asked Mr Tan whether he needed a special device to see Item 2. As I address in due course in more detail below, the sequence of events, and in particular what Mr Nutt was told by Mr Tan, is in issue.

85. In short, five minutes later, at 1017, Mr Nutt called Mr Tan and asked again about Item 2. Mr Tan responded that his understanding was Item 2 should be there - when someone showed it to him he just saw it. However, he agreed to double check the point and get back to Mr Nutt. Whilst waiting for Mr Tan's answer, Mr Nutt emailed Ms Ferrari and Mr van den Born to update them on the failure of the Special Test and on the cost of a further count (sent at 1029). At 1034 Mr Tan responded to confirm that Item 1 should reveal Item 2 on the receipts.

86. Very shortly after receiving Mr Tan's email, Mr Nutt called Ms Ferrari (at 1042) to discuss the transaction. As is recorded in that transcript, and as Mr Nutt accepted in cross-examination, he had been told by Access World that no special device was needed and a

standard device would suffice (it is now common ground that Item 2 would be revealed using any Item 1 device). This raised the question of whether the device was working properly, so Mr Nutt tested it on an everyday item (and the device worked). The lack of an Item 2 on the receipts was a factor that Mr Nutt felt uncomfortable with at the time. Whilst he said that other factors concerning him that day were resolved, he *"... totally accept[ed] that this particular item wasn't resolved"* .

87. Mr Nutt's call with Ms Ferrari took place whilst he was on his way home from the office to attend to a serious personal matter. In his absence, Ms Ferrari sent a blank email at 1301 London time to Mr Nutt and Mr van den Born with the subject *"Re: I realize both of you busy…however, this is all falling apart and I need to discuss. Dennis is on his way to London office to get receipts."*

88. Mr van den Born responded saying "*We cannot lose this"*. Immediately afterwards, Ms Ferrari rang Mr Nutt, who was still concerned about the lack of Item 2 on the receipts. He mentioned it to Ms Ferrari during the call and agreed when cross-examined that contrary to his evidence at paragraph 86 of his first statement, this issue had not dropped off his radar, but *"at this point in time it was something that was still in my mind"*.

89. Mr Nutt asked Ms Ferrari:-

"So why – I mean why; why, why are they – it just scares the s..t out of me that they're putting us under so much pressure for this.
These guys – Steven Kao is sitting in that room saying we're dealing in billions of dollars every day, y'know, he's desperate for 5 million dollars – really?"

90. When cross-examined Mr Nutt accepted that this represented his views at the time. He agreed that the pressure *"scared the s..t"* out of him, and that he felt under pressure to conclude the transaction very quickly.

91. In order for the deal to go forward, Mr Nutt and Ms Ferrari proposed that Marex sell to Natixis such of the metal that had been counted and for which Marex had COAs. Mr Nutt agreed this with Natixis and emailed Mr van den Born to update him on the new plan. This approach reduced Marex's risk in the sense that it would only be selling metal which it knew was in the warehouse. However (and as Marex's witnesses accepted in cross-examination) particular risks associated with documentary fraud remained.

92. First, there remained the risk of documentary fraud which was inherent in transactions involving warehouse fraud (as recently illustrated by the Qingdao fraud) which, as already addressed, was common ground and accepted by Marex's witnesses. For example, Mr Nutt accepted that there was a general risk of fraud inherent in transactions involving warehouse receipts, even with the best of counterparties and that Qingdao had made people *"more nervous about warehouse receipts"* . For his part Mr van den Born agreed with Mr Nutt's evidence in this regard and as he had stated in his witness statement, Marex was *"alive to the risk in the potential CHH transactions of documentary fraud"*. Equally Mr Lowitt accepted that because there is no central register for warehouse receipts, they are inherently riskier than warrants. In the present case there was also the lack of experience of Mr Nutt and Mr van den Born in relation to warehouse receipts, and the warning from RBC that CHH's unwillingness to provide fresh warehouse receipts raised "alarm bells".

93. Secondly, and as already addressed above, Marex knew that CHH was a Hong Kong window company with no apparent assets, they had not done business with them before and they had only done basic checks required by KYC and AML rather than full due diligence. As already noted, it was Mr van den Born's view, in January 2017, that Marex should have done better due diligence and did not know CHH well at all. Whilst Mr Nutt suggested when cross-examined that he found comfort in the alleged chain of longstanding relationship (through Ms Ferrari) and the suggestion that Mr Wong had assets in China, the reality was that there was no long-standing trading relationship through Ms Ferrari and no real evidence as to Mr Wong's assets (and CHH was the counterparty in any event). Mr Nutt and Ms Ferrari also knew from 1 November 2016 that a financier had pulled out of their repos with CHH, and CHH needed US$50 million within a month. When cross-examined, Mr Nutt accepted that CHH was a counterparty who was desperate for the money and who was pressurising Marex to complete the deal and that this was something which seriously scared him. As already noted Mr van den Born accepted in cross-examination that he was unhappy with the "due diligence" process carried out. There clearly was a greater risk of fraud in such a scenario as compared to a known and trusted counterparty with assets.

94. Thirdly, and as Mr Nutt and Mr Lowitt accepted when cross-examined, by only sending pdf copies for verification Marex were taking a greater risk than if authentication had taken place, as was obviously the case – authentication would have greatly reduced the risk of fraud generally, and forged warehouse receipts in particular. Indeed, Mr Nutt's view was that the key risk in these transactions was that the documents Marex received would not be

warehouse receipts but forged documents. Mr Nutt also accepted that his concern over Item 2 was never resolved and, whilst he still didn't think Item 1 was fit for purpose, it was a factor in addition to the count and the COAs that was troubling him at the time and he didn't resolve that factor before going ahead with PC1.

95. At 1443 the same day, Mr Nutt sought formal approval for his plan from Mr van den Born. When cross-examined Mr van den Born confirmed that Mr Nutt's knowledge and understanding of the risk profile of warehouse receipts generally and in relation to PC1-5, and risk minimization steps adopted including warranty of title in the sale contracts, also reflected his knowledge and understanding. Mr van den Born presented the plan to Mr Lowitt for his sign off with knowledge of the risk factors identified above. Whilst Mr Lowitt did not know of the issue surrounding Item 2, I am satisfied that he was aware of the inherent risks of trading in warehouse receipts, of the counterparty risk of trading with CHH and of the fact that there had been no authentication.

96. I address matters further in section J below, but suffice it to note at this point that I am satisfied that Marex entered into PC1 knowing of the risks I have identified above and that it made a commercial decision to nevertheless enter into the transaction which I am satisfied was driven by an anticipation of substantial profits in a new business area it was keen to develop (with the anticipated profits being at the top end of Marex's expectations for this kind of business, as Mr Lowitt accepted when cross-examined).

97. On 22 November, Mr Nutt and Mr Abel agreed that the transaction would proceed with the 402mt of metal which had been counted, although (somewhat unusually given that it had yet to purchase the remainder of the metal) Natixis would hold the receipts for the entire 840mt. Natixis' hedge was placed by Marex at 1729 on 22 November. The transaction was dated 22 November, although the operational elements were not dealt with until the next day, when Marex delivered the PC1 documents to Ms O'Malley. As subsequently transpired, the documents delivered by Marex were (unknown to Marex) forgeries. Natixis paid the purchase price at 1513 on 23 November.

98. On 21 November Mr Nutt had told Mr Abel that Marex planned to send the documents to the warehouse that morning and set out for him Access World's standard email response when asked to verify photocopy receipts. Natixis also obtained its own confirmation of this process directly from Access World. Natixis was not informed whether this verification had actually taken place or of its outcome. I address in due course below Mr Abel's

evidence and what he assumed. Natixis was not aware of the Special Test or the fact that when Mr Nutt performed it, the receipts failed the test.

99. Marex delivered the two hard copy warehouse receipts to Natixis on 23 November, the date of PC1. On the same day Mr Nutt sought an "urgent update" from Mr Degirmenci. This prompted Mr Tull to email Lockton's Richard King to enquire about cover for fraud risks for LME warrants and warehouse receipts, including where a seller sells material against fraudulent documents.

100. Mr King responded with a summary of the cover under the Warrants Clause under the 16/17 Policy. Mr Degirmenci passed this to Mr Nutt, saying *"$5m seems to be the number".* Mr Nutt replied saying he would like to know the effect on the premium of extending the cover to include warehouse receipts and to increase cover from US$5m to US$50m. He also asked how cover would work *"in relation to a claim against Marex for warehouse receipts that it had previously owned or had made certain warranties about title to the underlying metal, but it transpired that the documents were not genuine".*

101. On 24 November Mr Nutt informed Mr Abel that the count had been completed and that a further 270mt tranche of the metal shown on the two PC1-3 receipts could be sold. Natixis' hedge was placed at 1751 on 25 November and PC2 was dated that day. The purchase price was paid to Marex at 1508 on 28 November. Later, further COAs were found and another 102mt were sold to Natixis under PC3. Natixis placed its hedge on 19 December and paid the price to Marex at 1559 on 20 December. No additional original documents were delivered to Natixis in relation to PC2 or PC3. The two relevant purported warehouse receipts had already been provided on 23 November.

102. In total, of the 840.242mt shown on the two PC1-3 receipts, Natixis purchased 774.226mt. The remaining quantity was never traded and CHH did not receive payment for it. That CHH was seemingly content to leave this metal in Marex or Natixis' possession without insisting on payment or any steps to be taken to safeguard its interest was itself an oddity. Whilst this did not cause Mr Nutt concern (as he understood the requisite documentation was missing), the lack of such documentation might itself have been regarded as a cause for concern.

103. The parties had, alongside PC1-3, been discussing a larger transaction involving 13 warehouse receipts issued by AW Malaysia, which became PC4. Mr Nutt discussed the potential PC4 deal with Mr Abel on 23 November. Mr Abel stated that this further warehouse receipt business would need to be postponed until Natixis had sought legal advice about the validity of endorsed warehouse receipts. In response, Mr Nutt again expressed anxiety about losing the business if Marex raised concerns about endorsement with CHH.

104. On 8 December, Mr Nutt, Mr Tull and other Marex representatives met Mr King of Lockton to discuss renewal of the 16/17 Policy into the year commencing 23 January 2017. At this meeting, Marex asked Lockton to investigate increasing the counterfeit warrants sub-limit before renewal. Mr King told Marex at this meeting that counterfeit warehouse receipts were covered by the Warrants Clause wording in the 16/17 Policy, but that he would add wording making this clearer in the renewed policy. Deborah Harvey, Marex's Company Secretary, also enquired about the requirements imposed on Marex by the Insurance Act 2015.

105. Shortly after the meeting, Mr King sent Ms Harvey a questionnaire to be completed by Marex to follow up on "the Insurance Act requirements" discussed in the meeting. This questionnaire stated on its cover that Marex was obliged to disclose all material information that was or ought to have been known to Marex and that would influence the judgment of a prudent underwriter in establishing the premium and determining whether to underwrite the risk. The covering note stated *"it is of paramount importance that all relevant information is provided and that it is accurate … If you are unsure if information is material you should disclose it*". Marex never completed the questionnaire.

106. Mr King met Richard Burnett of Markel to discuss increasing the sub-limit on 13 December. Mr Nutt sent a chaser about the sub-limit to Mr Tull on 19 December. Mr Tull passed this query on to Mr King.

107. On 20 December Mr Siu of CHH delivered the 13 purported original warehouse receipts to Marex. Marex emailed copies of the PMA Letters and the (fake) receipts to Natixis on 21 December and 22 December respectively. Marex also sent the purported original warehouse receipts to Access World Singapore by DHL courier for authentication. Mr Png carried out the authentication on 22 December and sent an email to Mr Nutt at 1038 London time stating:

"Based on the warehouse receipts that we have received from the courier today, we have authenticated to be issued by us. The 13 sets of warehouse receipts which we have authenticated as below …" [Lists the 13 PC4 receipts]

108. The 22 December authentication email, and its meaning and relevance is addressed in detail in section H.3 below. It is common ground that it contains a representation by Access World that the original warehouse receipts which had been delivered to it by courier on 22 December were authentic warehouse receipts issued by Access World. It is also common ground that the 22 December email was not forwarded or otherwise expressly communicated to Natixis and that the purported warehouse receipts which Marex delivered to Natixis under PC4 on 28 December were forgeries.

109. Whilst the authentication of the purported receipts provided additional comfort relative to PC4-5, there remained a risk of fraud, as Marex's witnesses accepted when cross-examined. Mr Nutt confirmed that Marex was alive to the risk that the warehouse may be negligent or that the fraudsters may have someone on the inside, or the warehouse and client may be working in concert, and his evidence was that this is why Marex wanted to obtain insurance cover. He accepted that whilst steps could be taken to minimize or diminish risk it could not be eliminated. Mr van den Born agreed with Mr Nutt's evidence in this regard. The inherent fraud risk of warehouse receipts transactions, as well as the counterparty risk of trading with CHH also applied to PC4 and PC5.

110. PC4 closed on the first day after the Christmas bank holidays, Wednesday 28 December after AHK's inspection and collation of the CoAs and Marex's delivery of the purported hard copy warehouse receipts. The hedge was placed at 1503 that day and the PMA letters and purported receipts were delivered to Ms O'Malley. Mr Abel was told that before PC4 closed, Marex would arrange for a special DHL courier to take the original receipts to Singapore to be formally authenticated. Natixis was not told whether this had in fact happened or what the outcome was. I address in due course below Mr Abel's evidence that he assumed that Marex had done as planned and that in the absence of a negative indication, his assumption and belief was that Access World had confirmed the authenticity of the receipts and that he proceeded with the transactions with Marex in that belief.

111. Also on 28 December 2016, Mr King responded to Mr Tull's query about increasing the sub-limit, stating that he was in discussion with the lead underwriter (Markel). Mr King said *"regarding the description of a warrant on page 2, this will include warehouse*

receipts, however, from renewal we will have this tidied up to read along the lines of 'including transits of warrants and/or warehouse receipts and the like' ".

112. Marex offered Natixis new parcels in late 2016/early 2017, with the warehouse receipts sent under an email of Mr Nutt on 4 January. One of the parcels was 269.674mt in AW Korea represented by receipt numbered AWSG/KR/0028991. Ms Ferrari emailed a copy of the PC5 receipt, PMA letter and COAs to Natixis on 5 January.

113. Natixis had almost reached the limit of its existing approvals, so Mr Abel explained that they were preparing an application for a new approval and until that approval was obtained, no new deal would be possible. However, there was credit left on the existing approvals, so if parcels falling within the scope of those approvals could be found, the remaining credit could be used up. The 269.674mt in AW Korea fell within the existing approval. On 6 January 2017 Ms Ferrari asked Natixis to move forward with this parcel.

114. Mr Abel's evidence was that so far as he could recall, no one told him whether Marex planned to have the PC5 receipt authenticated by Access World, but that as this was a repeat transaction he assumed that Marex would have the receipt authenticated and proceeded with the transactions with Marex in that belief.

115. Around this time action was also being taken in relation to Marex's insurance cover. Mr Nutt emailed Mr Degirmenci and Mr Tull on 3 January 2017 to say that Marex *"really need the quote for the fraud risk cover"* under the 16/17 Policy because they had purchased and sold to Natixis US$28m of warehouse receipts and been offered another US$30m. He also wanted to check if this extension of cover could be retrospective. Mr Burnett of Markel met with Mr King of Lockton on 3 January 2017 to further discuss increasing the sub-limit above US$5m. Mr King did not give Mr Burnett any information regarding the reasons behind the request. Mr Burnett agreed to increase the sub-limit to US$25m for the 16/17 Policy period without an increase in premium and wrote this in manuscript on the proposed Endorsement. Mr Nutt chased Mr King for a quote for increasing the sub-limit for the 16/17 Policy "asap" on 4 January 2017. Mr King reverted to say that he had spoken to the lead underwriter, who was happy to increase the limit without an additional premium, but was yet to speak to the following market.

116. Mr Nutt responded on the same day (4 January 2017) to ask if the cover could be applied to past transactions up to 3 months ago and asked if the cover would extend to claims from

owners in the future. Mr King responded by stating that the Underwriters would only agree to the amendment applying from 1 January 2017 and explaining that the cover was for losses occurring during the policy period. Mr King obtained the other 16/17 Underwriters' agreement to the Endorsement between 4 to 16 January 2017. The other 16/17 Underwriters were not informed of the reasons behind the request.

117. Marex received the original forged PC5 receipt and a second receipt for 585mt (the "PC7 receipt") via courier on Thursday 5 January. Marex sent the receipts to Access World.

118. On 9 January Mr Png sent Mr Nutt an authentication email in relation to the PC5 receipt and the PC7 Receipt in the same terms as his 22 December email. It is common ground that the 9 January email contains a representation by Access World that the original warehouse receipts delivered to it by courier on 9 January were authentic warehouse receipts issued by Access World, that the January email was not forwarded or otherwise expressly communicated to Natixis and that the PC5 receipt delivered to Natixis was a forgery.

119. Whilst authentication had taken place, for the same reasons as already identified above, there remained the risk, as Marex knew, that the documents were forgeries, and the risks of transacting in warehouse receipts and counterparty risk remained. Indeed, such risk was acknowledged in the contemporary internal correspondence within Marex. Thus, on 6 January 2017 Mr Nutt emailed Mr van den Born to ask whether they had approval from Mr Lowitt to continue the CHH transactions, stating:

> "Did he set a max level? Lastly, I assume he is aware from Treasury that we have not yet been able to increase our counterfeit document cover. Given that we now authenticate the documents, the risk is diminished (unless of course the warehouse and the client work in concert)."

120. Mr Tull provided Mr King with some information about Marex's business on 9 January 2017, which Mr King copied into the Policy Information section in the 17/18 Policy slip. This information included a statement that in about 2013 Marex had shifted to buying and selling material within one day, transferring metal using LME warrants and warehouse receipts. This shift was said to make *"coverage for counterfeit documents much more important than it has been historically, hence the focus on it at the moment"*. The information provided by Mr Tull and used by Mr King for the Policy Information section did not explain that Marex had stopped trading LME warrants in 2015 and had first started trading warehouse receipts in November 2016 with PC1.

121. PC5 was concluded on 10 January, when Natixis placed its hedge. Marex delivered the forged PC5 receipt to Natixis and Natixis paid the purchase price to Marex. The forged PC5 receipt was endorsed by Mr Jones of Marex. He did not in fact have authority to endorse the PC5 receipt by his sole signature, and on 19 January 2018 Marex's Board resolved to ratify and affirm Mr Jones' endorsement. In the event nothing turns on the lack of authority.

122. On 10 January 2017 Marex took delivery from CHH of 6 further purported warehouse receipts (the "PC6 receipts") for a proposed sixth transaction (PC6). As with the earlier warehouse receipts they were issued by Straits and endorsed to CHH. Marex intended to do the PC6 transaction with RBC whose position on endorsed warehouse receipts had apparently softened. These receipts were couriered to Singapore for authentication by Access World on 11 January.

123. On 11 January Mr King had met Mr Burnett at the box at Lloyd's to discuss the renewal of Marex's policy for the 2017-2018 policy year. Mr King broked to Mr Burnett and presented a slip containing the Policy Information provided on 9 January 2017 and what was known as the Version A wording. Mr Burnett's notes of the oral broke record, *"Business model is to be on LME Warrant Basis"* and *"still limited in pure warrant business"*, but Marex wanted "*contract certainty"* by removing the sub-limit for counterfeit warrant cover.

124. Mr Burnett quoted for Markel to underwrite 15% of the line for the 17/18 Policy with the Version A wording by stamping the slip and scratching "TBE" (To Be Entered). Mr King met a number of other underwriters the same day who also quoted for lines under the 17/18 Policy by stamping and scratching TBE on the slip. Underwriters alleged in the action that a number of matters (as pleaded out at paragraphs 12D(1)-(24) of MCAP's Re-Re-Amended Defence) were not disclosed to them (which was not disputed by Mr King). Mr King also met with Oliver Corton of Pembroke who said he would need to speak to his boss before committing to renewal. On 19 January 2017, Mr Corton informed Mr King that if Lockton could afford to lose Pembroke, *"we'd rather not write traders whereby we provide cover against misappropriation and the like"* as a matter of principle.

125. The PC6 receipts were inspected by Mr Png on 12 January 2017, who identified that the sticker number did not match that in Access World's records. Access World accordingly

sent a Notice of Receipt of Fraudulent Warehouse Receipts by letter and email to Marex, explaining that it had concluded that the PC6 receipts were forgeries. Accordingly Marex knew of this fraud on 12 January although as appears below it did not tell Natixis until 19 January (immediately after it had heard that it had secured the renewal of its insurance).

126. Mr Nutt called Mr van den Born later on the morning of 12 January 2017 to inform him that the PC6 warehouse receipts were forgeries and to share his concern about the PC1-3 warehouse receipts. In this call, Mr Nutt expressed the view that *"we have to tell Natixis of this issue"* and recommended that Marex send the documents to Access World for verification because *"there's no point waiting six months and finding out that they are fraudulent documents"* and it was *"the right thing to do"*. He also noted that the insurance policy was one of the *"other mitigants"* if the Natixis warehouse receipts were forged.

127. A series of further calls followed between Mr Nutt, Ms Ferrari and Mr van den Born on 12 January 2017. In a call at 13:16, Mr Nutt noted that PC4 and PC5 had *"a lot less risk"* than PC1-3 and Mr van den Born responded that all of the transactions could be *"bullshit",* but agreed that they were *"fearful"* about PC1-3. He said that the downside to breaking its contracts with Natixis early was discovering that *"the f.....g 30 million isn't there"* (referring to the value of PC1-5). In response to Mr van den Born's request for solutions to the problem, Mr Nutt suggested asking Natixis to verify the warehouse receipts and Ms Ferrari suggested swapping out the two PC1-3 warehouse receipts for other warehouse receipts that had been authenticated. Ms Ferrari also said that they should notify CHH that they were holding the warehouse receipts for the 585mt worth US$6m as "collateral", provided that Nick Jones signed off on that course of action.

128. In a call at 14:45, Ms Ferrari reported that she and Mr Silverstein agreed that Marex should retain the 585mt warehouse receipt as collateral. She also said *"someone at that warehouse is not straight. It concerns me about the [warehouse receipts] we have done due diligence on"*. In a call at 16:12, Mr van den Born said *"what we do know is that there is a sophisticated programme going on here and it's likely we're caught up. What we need to do is extricate ourselves from the whole lot. Even though there's paperwork, it might look kosher but it ain't f.....g kosher"*. Mr van den Born said someone had effectively *"copied a 20 dollar bill"* by creating the fraudulent warehouse receipts and, when asked by Ms Ferrari if the fraudster had copied all the 20 dollar bills (i.e. all the warehouse receipts), he said *"yeah, probably"*. He went on to say that *"we could have a 30 million*

dollar problem. Not just a 9 million dollar problem", in reference to the value of PC1-5 and PC1-3 respectively.

129. In a call at 16:37, Mr van den Born asked Mr Nutt *"What's your gut on what this situation is"*, to which Mr Nutt replied *"I don't like that comment about 'sophisticated' – they didn't say anything about reneging on what they'd said on the earlier things, but I'm a bit nervous about this overnight report, I have to say"*. As has already been quoted above Mr van den Born said *"what worries me is that actually you know when I talked about getting to know the client and all these sorts of things, we don't know that client that well at all ... we don't know what's f.....g going on here"*. Mr Nutt then read out a draft report to be sent to the Underwriters about the incident. Mr van den Born instructed Mr Nutt to limit the report to the basic facts of the PC6 fraud and if the Underwriters *"want more they can come back"*. No report was ever forwarded to the Underwriters.

130. On the evening of 12 January 2017, Ms Ferrari spoke to Mr Silverstein to ask him to request that CHH buy back the material that was the subject of PC1-3. Ms Ferrari reported this to Mr van den Born, who suggested they speak in the morning and said *"keep email traffic to a min"*.

131. Mr Nutt instructed AHK to inspect the PC1-3 nickel on the morning of 13 January 2017. He also spoke to Mr Rameaux, who advised him *"sooner rather than later"* to verify the unauthenticated PC1-3 warehouse receipts.

132. On 16 January 2017, Mr King met with Joanne Reynolds of Argenta and broked the 17/18 Policy on the Version A wording. Ms Reynolds states, and Mr King does not dispute, that the 17/18 Policy was presented as a clean account and that he failed to disclose any of the matters at 12D(1) – 12D(28) of the Re-Re-Amended Defence (including the newly discovered PC6 fraud). Ms Reynolds then scratched TBE and stamped the slip.

133. Also on 16 January 2017, Ms Ferrari expressed the view in a call to Mr van den Born that *"there's a bigger thing going on here"* because CHH's Mr Wong was *"running scared"*. She also said *"the paper came back phoney"* and so *"there must be more phoney paper out there"*. When asked by Mr van den Born what led Marex to think that the warehouse receipts were not *"fine"*, she said *"well, that we were given a fake one"*. Ms Ferrari also said that if the Natixis warehouse receipts were fraudulent, *"we'd go after the warehouse. Our insurance kicks in at the end of the month too"*.

134. On 17 January 2017, Mr Silverstein advised Ms Ferrari to *"do your calculations"* and to *"assume that the stuff that's verified is good – stuff that isn't verified, assume it's not good"*, referring to the unauthenticated PC1-3 material.

135. Mr Wong appointed a middleman (Ben Ho), who said in an email to Ms Ferrari later on 17 January 2017 that he would *"handle the negotiations"* with Marex on the basis that Mr Wong was *"willing to compensate your loss to avoid any lawsuit"*. In circumstances where Marex had suffered no loss under PC6 Mr Ho cannot have been referring to that transaction. Mr van den Born then called Mr Silverstein. Mr Silverstein said he did not know if the CHH deals had been *"a fundamental scam from day 1"* and revealed that Mr Wong was in financial difficulties at the end of 2017 because Freepoint had ended its financing relationship with CHH early.

136. Mr van den Born then spoke to Ms Ferrari and Mr Nutt about his call with Mr Silverstein, saying:

"… that phone call wasn't good on all sorts of levels – a) they knew they were s..t b) we got f…..g lined up c) y'know – sorry it went wrong […] Completely and absolutely f….d. Completely played. Everyone knew what was going on. I f…..g wish I knew this phone call before I did this. Either he didn't tell us or … right? We got f…..g used. Absolutely f…..g used and played."

137. Mr van den Born also told Ms Ferrari and Mr Nutt that *"had I know[n] I wouldn't have gone near the f.....g thing"*. He said *"There's an outside chance that paper is kosher, and we need to figure out how to go and get it – and that's an outside chance"*. He concluded: "I wouldn't have gone anywhere near this s..t. Inconsistencies – this went wrong, that went wrong … yeah well … [Bill Silverstein] f…..g knew all this s..t. All his goal was to find a hole to fill from Freepoint – and he found one. It might cost me my job."

138. Also on 17 January 2017, Mr Tull informed Mr Nutt that Marex had secured *"the 25m counterfeit cover"* (under the Endorsement). He requested that Mr Nutt review the draft 17/18 Policy and asked *"has a decision been made re what we are going to report to Lockton re the presentation of counterfeit docs?"* Mr Nutt asked Mr Tull to call his mobile and a conversation followed, although neither could recall what was said (and there is no transcript because both spoke by mobile phone).

139. Mr Tull sent an email to Mr King at 13:30 on 18 January 2017 requesting that the Warrants Clause be expanded to include cover for counterfeit *"warehouse receipts and the like"* (the Version B wording).

140. At 13:51 on 18 January 2017, Ms Harvey emailed Mr King to say that a warehouse had informed Marex on 12 January 2017 that it held forged warehouse receipts. Ms Harvey did not mention the name of the warehouse or the client who had supplied the warehouse receipts. Nor did she explain that the client was the same client with whom Marex had just done US$30m of warehouse receipt business. Ms Harvey then asked *"what, if anything, we are required to notify our insurers of"*. There is no response from Mr King to this email.

141. Mr King spoke to Mr Tull at 14:19 on 18 January 2017 to discuss Mr Tull's comments in his email of 13:30. Mr King warned Mr Tull that *"warrants covering ... in the cargo market, or in the London market at the moment is quite a tetchy subject"* following large losses in China. Mr King and Mr Tull did not discuss Ms Harvey's email or the recent discovery of the fraudulent warehouse receipts. Mr King followed up the call with an email confirming that he would *"tidy the slip up"* by making changes to the Warrants Clause to include the *"warehouse receipts and the like wording"*.

142. At 09:39 on 19 January 2017, Mr Nutt, Mr Tull and Mr Jones of Marex spoke with Mr King about the renewal. During this phone call, Mr Tull asked Mr King for confirmation that the 17/18 Policy would cover counterfeit warehouse receipts, which Mr King provided. Mr King explained the context for the Underwriters wanting to know the split of LME warrant and warehouse receipt business was that the London market had *"jangly knees"* about this type of business and LME warrants had *"tighter controls"* than warehouse receipts. Mr Tull and Mr Nutt did not provide a straight answer to the question (and did not reveal that Marex was only conducting warehouse receipt business at this time).

143. During this conversation, Mr Jones asked Mr King about a number of hypothetical scenarios, including when an apparently authentic warrant transpires not to be authentic, when the warehouse is complicit in the fraud and issues multiple warrants and when a fraud that was committed in the last 12 months was discovered during the policy period. Mr King said that there would be coverage in these scenarios. Mr Tull also asked about the situation where Marex sold to a third party who discovered that the warehouse receipt was counterfeit then brought a claim against Marex. Mr King equivocated.

144. Later on in the call, Mr Jones asked Mr King at what point Marex would need to notify Lockton that there was a concern that a warehouse receipt was not real. Mr King referred to Ms Harvey's email and said it was a *"material fact"* to be disclosed to the Underwriters. Neither Marex nor Lockton told the Underwriters of Ms Harvey's email.

145. Mr King ended the call by saying that the Version B wording was *"not adding anything new"* and so he did not envisage any issues confirming the new (Version B) wording with the 17/18 Underwriters. Mr Tull sent an email to Mr King recapping this conversation, summarising the changes to the Warrants Clause that Marex wanted and asking for revised wording.

146. Following the call, Mr Nutt emailed Mr van den Born at 1220 on 19 January 2017 to say that counterfeit cover for transactions before 1 January 2017 was US$5m, from 1 – 22 January 2017 it was US$25m and from 23 January 2017 onwards it would be US$150m. He also said that there was US$150m cover if the warehouse had issued multiple warehouse receipts and summarised the dates and quantities for the five transactions with CHH and Natixis (revealing a misapprehension that the cover ran from the date of loss rather than the date of discovery).

147. Following this confirmation about the insurance position, Mr Nutt called and emailed Mr Abel of Natixis (on instructions from Mr Lowitt and Mr van den Born) to advise him that CHH had supplied fraudulent warehouse receipts for the PC6 transaction. Mr Nutt's evidence is that he did so because he considered it *"appropriate",* notwithstanding that Natixis was not involved in the proposed PC6 transaction. Mr Nutt recommended that Natixis send the PC1-3 warehouse receipts for authentication in Singapore because they had not previously been checked by Access World and because of the *"heightened awareness of the fraud risk in this particular market"*. Mr Grenfell's evidence was that Natixis took this notification *"very seriously"* because it *"was potentially exposed to a large-scale fraud"*.

148. Natixis immediately contacted Access World to ask for confirmation of the authenticity of the PC1-3 receipts. On Friday 20 January, Mr Tan responded to say that the (genuine) PC1-3 receipts had already been cancelled in Access World's system. The genuine PC1-3 receipts had in fact been presented by Macquarie Bank Ltd ("Macquarie") on 18 January, authenticated, cancelled, and the metal put onto LME warrants in Macquarie's name.

149. Natixis then sent copies of its PC4 and PC5 receipts to Access World on Friday 20 January. Mr Tan did not give a substantive response until Tuesday 24 January, when he confirmed that the (genuine) PC5 receipt and 8 of the (genuine) 13 PC4 receipts had also been cancelled.

150. On 27 January the fraud became public, with Access World issuing a press release encouraging holders of any endorsed Access World warehouse receipts to bring them in for authentication. On 31 January two further PC4 receipts were presented by Straits and were cancelled.

151. After lengthy negotiations, an authentication procedure acceptable to both Natixis and Access World was agreed, and on 14 February Natixis presented its 16 purported warehouse receipts for authentication at Access World's Singapore offices.

152. This inspection was conducted by Access World's Mr Tan, Rachel Ngo and Jenny Chen, using Warehouse Receipt Authentication Checklists to record their findings. All sixteen documents presented by Natixis failed the tests and were declared by Access World to be forgeries. Access World stapled a letter to this effect to each document.

153. On 17 February CIMB Bank Berhad ("CIMB") presented the final three PC4 receipts and Access World authenticated them.

154. On 20 February, Natixis wrote to Marex accepting what it considered to be their repudiatory breaches and brought the Purchase Contracts to an end. In circumstances where its receipts had been rejected by Access World, and having established that all of the genuine receipts had been cancelled, Natixis knew that there was no metal to hedge. Accordingly the futures position was no longer hedging any price or market risk but became speculative positions that left Natixis exposed to fluctuations in the market. In such circumstances, on 27 February Natixis closed out its hedges with a resulting loss of US$1,476,025.80.

155. Access World's disclosure reveals that in January and February 2017, Straits and Macquarie moved very large quantities of nickel out of its warehouses and into the facilities of its competitor, C. Steinweg. Access World has confirmed that the metal delivered up out

of its warehouses included all of the nickel covered by the false warehouse receipts, except the 42mt on AWSG/MY/0027236.

D. The Terms of the Purchase Contracts

156. By each of the five Purchase Contracts, which are dated between 22 November 2016 and 10 January 2017, Marex agreed to sell, and Natixis agreed to buy, nickel variously stored at Access World's bonded warehouses in Gwangyang, Republic of Korea (AW Korea) or Johor, Malaysia (AW Malaysia). The Purchase Contracts are on Marex's standard form as is evident from the footer to each Purchase Contract. The evidence of Mr Able of Natixis, which was not challenged, is that the representations and warranties contained therein are market standard.

157. The terms of the Purchase Contracts are identical, save that:

(1) The definitions in Clause 1 vary in order to set out the different Weights, Prices, Payment Amounts, Payment Dates and Prompt Dates.
(2) Schedule 1 to each contract sets out the brand, shape and location of each parcel of nickel, together with the Agreed Discount. This discount on the price effectively represents the interest charged by Natixis, together with the warehouse rent which will be incurred up until the Prompt Date.
(3) Each definition of Weight in Clause 1 refers to Schedule 2 of the respective Purchase Contract. In the case of PC1-3, Schedule 2 sets out specific warehouse lot numbers, as not all of the metal on the relevant receipts was being purchased. In PC4 and PC5 Schedule 2 refers to the warehouse receipt numbers which in turn refer to specific lot numbers.

158. Subject to the above distinctions, which are not material to the issues that arise, each Purchase Contract provided, amongst other matters, as follows (illustrated by reference to PC-1):-

"1. Definitions

Seller:	Marex…
Buyer:	Natixis…
Metal:	London Metal Exchange ("LME") registered grade Nickel of Specification, Brand and Shape at Location.
Brand:	The brand of metal specified in Schedule 1.
	Weight: 401.938 metric tonnes (with warehouse receipt lot numbers as specified in Schedule 2)

Shape:	shape(s) of metal specified in Schedule…
Payment:	freely transferable and immediately available funds in U.S. Dollars by telegraphic transfer to Seller's Account.
Payment Date:	the Business Day immediately following the Trade Date.
Prompt Date:	17th May 2017

…

Required Documentation means, unless otherwise agreed by the parties, the warehouse receipts, certificates of origin, certificate of analysis or such other documents as agreed to be delivered by the parties in respect of the Purchased Metal on the Trade Date, as specified in Schedule 1.

2. On the Payment Date:

(a) Seller shall sell the Purchased Metal to the Buyer for the Payment Amount.

(b) Seller shall deliver or procure delivery of the Required Documentation to Buyer by no later than 11.00 am London time.

(c) Buyer shall make payment to the Seller of Payment Amount, provided that Buyer has received the Required Documentation referred to in paragraph 2(b) above.

(d) Title to the Purchased Metal shall pass to the Buyer on receipt by the Seller of the Payment Amount; and

(e) Buyer shall, by no later than 11:00 am London time, instruct Seller to execute an order for Buyer to enter into an Exchange Contract whereby Buyer shall sell futures contracts for Metal of Weight (or the whole number of lots nearest to such Weight) (expressed in U.S. Dollars per metric tonne) basis the LME Closing Price for the Prompt Date as specified in section 1 above.

3. On the Payment Date and the Trade Date, Seller represents and warrants to Buyer that:

(a) Seller has good title to the Purchased Metal and the full and unqualified right to sell and deliver the Purchased Metal to the Buyer;

(b) the Purchased Metal is free of any mortgage, charge, lien, encumbrance or adverse claim of or by any third party; and

(c) the Purchased Metal complies in all respects with the Brand, Shape and Weight criteria.

4. On the Payment Date and the Trade Date, Seller represents and warrants to Buyer that:

(a) it is contracting as principal hereunder (and not as agent of any third party) and that it has full power and authority to enter into the Transaction and to perform its obligations thereunder.

(b) (i) it has entered into the Transaction with a full understanding of the terms and risks thereof, (ii) it is capable of assuming, and does assume, those risks, (iii) the other party is not acting as a fiduciary for or an adviser to it in respect of the Transaction, and (iv) it has not given the other party any advice concerning the investment merits of the Transaction or the accounting or taxation treatment of the Transaction; and

(c) It is acting for its own account, and it has made its own independent decisions to enter into Transactions…

5. Buyer and Seller each agree to:

(a) Execute and deliver, or cause to be executed and delivered all such instruments; and
(b) To take all such actions,
in each case as the other party may reasonably request or may be required to effectuate the intent and purposes, and to carry out the terms, of the Transactions, including the procurement of any third-party consents, including such consents as may be necessary or desirable for export of the Purchased Metal.

6. Buyer and Seller expressly agree that:

(a) Delivery of the Purchased Metal shall occur on the Payment Date provided that Buyer shall not have a legal or beneficial interest in the Purchased Metal until the Payment Date and until it has made full Payment of the Payment Amount and nothing in this agreement may be interpreted to give contrary effect.

(b) No term, condition, warranty or representation of any kind whatsoever (express or implied) is or has been given by or on behalf of Seller in respect of the Purchased Metals, other than those set out in paragraphs 3 and 4 above. Except as provided in paragraph 3(c), all terms, conditions, warrants and representations (express or implied and whether statutory, collateral hereto or otherwise) relating to the Purchased Metal, its specification, age, quality (satisfactory or otherwise), description or as to its fitness for any purpose are hereby expressly excluded.

7. Each party (the "First Party") undertakes to indemnify the other (the "Second Party") against any cost, claim, loss or expense (including legal fees and the cost of converting the Purchased Metal into good delivery form) ("Losses") which it sustains or reasonably incurs as a consequence of the First Party's failure to perform any obligation required to be performed by it hereunder, including any loss suffered by the Second Party as a result of the conversion of any unpaid amounts into any currency other than US Dollars in order to recover or attempt to recover such unpaid amounts from the First Party provided that no such indemnification shall arise if any losses arise out of the Second Party's gross negligence, bad faith or wilful misconduct.

…

13. This agreement supersedes any earlier agreements sent by the parties relating to the Transaction. The parties agree to be, and are, legally bound to the Transaction on the Trade Date upon oral agreement to the terms thereof by Seller and Buyer (whether directly or through their representative agents), subject to all other terms and conditions set forth in this agreement…

…

15. The Transaction and this agreement shall be governed by and construed in accordance with English law. Both parties submit to the non-exclusive jurisdiction of the English courts in relation hereto."

E. The Construction of the Purchase Contracts and their Breach

E.1 The Admitted Breaches of the Purchase Contracts

159. It is common ground that the documents delivered to Natixis by Marex were forged and that Natixis paid Marex under the Purchase Contracts. However, despite paying Marex, Natixis did not receive title to the nickel, unencumbered or otherwise, did not receive the nickel or the (genuine) warehouse receipts in respect of the nickel and (subject to the warranty/estoppel arguments) never received any rights to the nickel at all.

160. In such circumstances Marex admits and confirms in its Response to the Claimant's Request for Further Information dated 23 January 2019 (in relation to PC1-PC3) and in inter-counsel communications (in relation to PC4 and PC5) that absent common mistake (or any PC4 and PC5 warranty/estoppel) it breached Clauses 2(d), 3(a), 3(b) and 6(a) of the Purchase Contracts.

161.Marex was clearly right so to admit. However, to avoid any doubt as to what comprised such breaches I find as follows based on Marex's confirmation, and the ordinary and natural meaning of each of these clauses (again subject to Marex's common mistake and, in the case of PC4 and 5, warranty/estoppel arguments):-

(1) Marex breached Clause 2(d) of the Purchase Contracts as it did not pass title to the Purchased Metal to Natixis on receipt by Marex of the Payment Amounts.

(2) Marex breached Clause 3(a) of the Purchase Contracts as Marex did not have good title (or indeed any title) to the Purchased Metal and did not have the full and unqualified right to sell and deliver the Purchased Metal to Natixis.

(3) Marex breached Clause 3(b), in that the Purchased Metal was not free of any encumbrance or adverse claim of or by any third party (in this regard it is common ground that genuine warehouse receipts existed bearing the same reference numbers as the documents delivered by Marex covering the lots of nickel in question and those receipts were presented to Access World, cancelled and all but 42mt was delivered to the properly entitled third parties).

(4) Marex breached Clause 6(a) of PC4 and PC5 in that Marex failed to deliver the PC4 and PC5 Purchased Metal to Natixis on the Payment Date.

E.2 The disputed breaches of the Purchase Contracts

162. However, Marex denies that it was in breach of Clause 2(b) or Clause 5 of the Purchase Contracts. These are short points of construction as to the true and proper construction of these clauses, and Marex's construction, which is contrary to the ordinary and natural meaning of the clauses, does not bear detailed examination. In fairness to Mr Choo-Choy, he admitted, in the course of his oral closing submissions, that the construction he was placing upon Clauses 2(b) and 5 required the ordinary and natural meaning of the words to be changed by reference to the surrounding factual matrix and realistically acknowledged that his argument based on knowledge that the Purchase Contracts were part of a chain and that the reference to "Required Documentation" and "Warehouse Receipts" was, in that context to be taken to be a reference to whatever documents CHH provided to Marex (i.e. fake warehouse receipts) was *"not the strongest argument in the world, basically*". It is, however, a point of considerable importance, for if the correct construction is that advocated by Natixis that is the end of any defence based on common mistake, as Mr Choo-Choy also rightly accepted, as the risk of the warehouse receipts not being genuine would be on Marex as seller under the Purchase Contracts,

163. It will be recalled that Clause 2(b) provides*, "Seller shall deliver or procure delivery of the Required Documentation to Buyer by no later than 11.00 am London time"*, and "Required Documentation" was defined in Clause 1 as including "the warehouse receipts…as specified in Schedule 1" (Schedule 1 itself referring to "Warehouse receipts"). The ordinary and natural meaning of the words "the warehouse receipts" is to genuine warehouse receipts in respect of the nickel issued by Access World, and not to forged documents which are neither issued by the "warehouse" (Access World) nor are they a "receipt".

164. However, Marex submits that in the circumstances (i.e. the surrounding factual matrix) the promise within Clause 2(b) was a promise to deliver whatever documents were to be provided to it by Come Harvest even if, as proved to be the case, they were forgeries. This is a challenging submission. Marex elaborated upon its submission at paragraphs 13(b)-(d) of its Written Closing, as follows:-

> "(b) … delivery of warehouse receipts (by which Natixis would obtain the right to call for delivery up of the relevant metal by AW) was the means by which Marex was to perform its central obligation to deliver the Purchased Metal. No physical delivery of metal was required.
>
> (c) Importantly, the context (as known to both Marex and Natixis) in which the contracts were signed was that, prior to signing, copies of the warehouse receipts (and indeed of the certificates of analysis) to be delivered by Marex to Natixis were first sent by Marex to Natixis after Marex had obtained the same from CHH. Natixis knew in this regard that Marex was proposing to contract with it back to back with CHH, contrary to the assertion in Natixis' opening skeleton argument.
>
> (d) Construed in context, therefore, the references to warehouse receipts in Schedule 1 are properly to be understood as references to the warehouse receipts to be obtained by Marex from CHH, which were thereafter to be provided by Marex to Natixis. Thus, Marex's promise in clause 2(b) to deliver the warehouse receipts was, on proper analysis, a promise to deliver the receipts that were to be provided to it by CHH. There was no promise (or warranty) as such that those receipts would be genuine, only a common underlying assumption (backed by Marex's pre-contractual checks) that they were genuine."

165. So far as Natixis' knowledge is concerned, what Mr Abel said in paragraph 45 of his witness statement was, *"I spoke to Kevin [Nutt of Marex] on 17 November at 1210 and, as far as I can remember, this is the first time he mentioned "Come Harvest" to me. During that call, he said that Come Harvest had bought the receipts from Straits. I did not know anything about the contractual arrangements between Come Harvest and Marex, or even whether there was a direct contractual relationship"*. In cross-examination Mr Abel was asked, "*You also understood, am I correct, that Marex had a client on the other side of the deal…"* to which Mr Abel replied, *"I was aware that Marex had a client on the other side of the deal, correct"* and he also stated, "*We received copies of the warehouse receipts that Marex were scheduled to sell to us, that is correct. The origin of them was not something that we considered at the time, that we were aware of Marex purchasing from somebody else."* None of this evidence supports Marex's assertion that Natixis knew that Marex was proposing to contract with Natixis back to back with CHH. It is true that in a telephone conversation between Mr Nutt of Marex and William Rose of Natixis on 7 November 2016 there was a reference by Mr Nutt to *"we're sorta*

doing it back to back with you" but this was a statement in the most general of terms devoid of detail or common intent between Marex and Natixis.

166. On the (limited) evidence before me Marex has not established that Natixis contracted with it on the basis of knowledge that the terms were identical to those on which Marex contracted with CHH, but even if that were so it is a *non sequitur* to say that the parties agreed that whatever documents CHH supplied to Marex would fulfil Marex's obligation to Natixis under Clause 2(b) in relation to the Natixis contract even if they were forged pieces of paper and not genuine warehouse receipts. A far more logical, and business-like construction, is that Clause 2(b) in the CHH/Marex contract bore its ordinary and natural meaning and that CHH were obliged to supply objectively genuine warehouse receipts to fulfil the requirement of Clause 2(b) and that if they did not they would be in breach of contract. That is, of course, entirely consistent with the agreement that Marex entered into with CHH after the event, and pursuant to which Marex has a claim against CHH (albeit that I have to have regard to the position as at the time of contracting). Marex's submission also ignores the evidence (which I accept) that Natixis contracted with Marex because of Marex's standing, and that Natixis would not have contracted with CHH (which would be the practical effect if Marex's argument on "back-to-back" was a good one).

167. In any event Marex's construction is not the correct construction of Clause 2(b):-

(1) Pursuant to Clause 2(b), on the Payment Date the Seller is required to deliver or procure delivery of the "Required Documentation" such "Required Documentation" being defined in Clause 1 and Schedule 1 and includes "warehouse receipts".

(2) The ordinary and natural meaning of the word "warehouse" is to the warehouse (here Access World), and the ordinary and natural meaning of the word "receipt" is to a receipt issued by such warehouse – the 16 documents delivered to Natixis in this case were not issued by the "warehouse" (Access World) nor can they be properly described as "warehouse receipts". They were not "warehouse receipts" at all – they were forged pieces of paper that had not been issued by the warehouse (Access World) and were not receipts for nickel deposited with Access World. Marex's construction of Clause 2(b) does violence to the express language of Clause 2(b) and is not justified by a consideration of the admissible factual matrix.

(3) If the obligation under Clause 2(b) was to deliver whatever paper had been delivered to Marex by CHH, Clause 2(b) could, and would, have been drafted differently. Such a (different) contractual bargain could easily have been expressed as one to deliver whatever documents that CHH delivered to Marex as fulfilling Marex's delivery obligation under Clause 2(b). The Purchase Contract was Marex's in-house standard form contract and had Marex had such intention it would no doubt have drafted Clause 2(b) differently.

(4) The promise to supply (genuine) warehouse receipts is also entirely consistent with Marex's express warranty and representation at Clauses 3(a) and 3(b) that it had the full and unqualified right to sell and deliver the Purchased Metal to Natixis (reinforced by Clause 6(b) emphasising that Marex makes the warranties and representations set out in Clause 3). Whilst the question of title is separate from the question of the warehouse receipts (a warehouse receipt, as such, is not a document of title) a genuine warehouse receipt is part and parcel of the package of documents which Marex is obliged to supply and which will facilitate Natixis getting the nickel out of the warehouse, or the nickel being put on LME warrant or being the subject of a new warehouse receipt.

(5) It is also to be borne in mind that the final page of each Purchase Contract provides, "Please *confirm that the foregoing correctly sets forth all the terms and conditions of our agreement with respect to the Transaction by responding within three Business Days by signing in the space provided below …"* and each of the Purchase Contracts was signed by both parties, such parties thereby confirming that it correctly sets forth all of the terms of their agreement. If Marex's interpretation of Clause 2(b) was correct the express wording of Clause 2(b) would not suffice and it would be necessary to imply additional wording to the effect that the promise was (only) a promise to deliver the documents provided to Marex by CHH, whether or not they were genuine.

168. Marex's construction is also an uncommercial and unbusinesslike one, that finds no support in the express language of Clause 2(b). It is an uncommercial and unbusinesslike construction as the documentation provided would not amount to the "keys to the warehouse", and would not result in Access World delivering up the goods to Natixis. Natixis would effectively be purchasing worthless documents. It is difficult to see why any purchaser would (objectively) agree to such a term the effect of which would be to transfer the risk of the document being a forgery to the purchaser.

169. It would also have potentially absurd consequences. If correct, it would give

rise to the logical (but surprising) conclusion that these contracts could only be performed by tender of CHH's documents, even if they were forged, and could not be performed by tender of genuine warehouse receipts if CHH did not supply them to Marex.

170. It would also mean that Natixis had agreed to take on the risk of CHH passing forged receipts – not only is this inherently unlikely – it is also contrary to the unchallenged evidence of Mr Grenfell that Natixis would not in fact have done business with CHH directly (evidence that Mr Nutt accepted when cross-examined), and Mr Abel's evidence, which I accept, was that Natixis would not have been able to trade with such a counterparty. It was also the case that Natixis was only willing to conclude these deals because of the reputation and standing of Marex (as Mr Nutt accepted when cross-examined). Mr Abel's evidence, which I accept, being that it was essential for Natixis to have a known counterparty who they considered creditworthy, Natixis choosing to contract with people who had a track record in the market and who had substance to stand behind the warranties of title in the contracts (i.e. Marex).

171. Marex's construction would also leave Natixis, not Marex, as the party that had to pursue CHH for its fraud in order to make good Natixis' loss, despite the fact that Natixis has no contractual or other relationship with CHH, whilst Marex does. It is again inherently improbable that that was the objective common intention of the parties.

172. The risk of the documentation being passed by Marex's seller being forged is also an obvious risk – and it is a risk that one would expect to lie, in each contract, with the seller – the party obliged to provide the documentation and who is best placed to secure genuine documents and ensure that they are genuine, as well as the party that is best placed to seek a remedy against its own contractual counterparty should documentation prove to be false.

173. In clause 4(b), each of Marex and Natixis represented and warranted that they had entered into the Transaction with a full understanding of the terms and risks thereof. Whilst this clause does not identify which risks are allocated to which party the clause is recognising that there will be risks inherent within the Transaction and the party bearing such risk is acknowledging the same. One of the risks that Marex did recognise was that the documents it received from CHH might be forgeries and therefore not be warehouse receipts. For the reasons identified above the risk that such documents might be forged is a risk that one would expect to lie with the seller.

174. In the above circumstances I am satisfied, and find, that the true and proper interpretation of Clause 2(b) of the Purchase Contracts, which accords with the ordinary and natural meaning of the words used in Clause 2(b), is that Marex, as seller, is obliged to provide objectively genuine warehouse receipts to Natixis as part of the Required Documentation, and it failed to do so, and in consequence breached Clause 2(b).

175. It follows that the risk of warehouse receipts being forged, and of Marex therefore being in breach of Clause 2(b) and responsible to Natixis therefor, was contractually upon, and allocated to, Marex. This is fatal to Marex's plea of common mistake, as was common ground, as is addressed in Section F below.

176. However, as Mr Matthews pointed out in his oral closing, it would not have assisted Marex even if, contrary to my findings above, Clause 2(b) bore the meaning ascribed by Marex – i.e. that Marex were entitled to pass on such documents as they received from CHH, whether they were genuine or not. All this would have meant would have been that Marex was not in breach of Clause 2(b) in tendering fake documents – there would be no question of mistake in that context as Marex could hand over those fake documents, but Marex would still be in breach of, for example Clauses 3(a) and 3(b) and liable to Natixis for such breaches.

177. Marex also denies that it was in breach of Clause 5 of the Purchase Contracts which it will be recalled provides:-

> "5. Buyer and Seller each agree to:
>
> (a) Execute and deliver, or cause to be executed and delivered all such instruments; and
> (b) To take all such actions,
> in each case as the other party may reasonably request or may be required to effectuate the intent and purposes, and to carry out the terms, of the Transactions, including the procurement of any third-party consents, including such consents as may be necessary or desirable for export of the Purchased Metal"

178. At paragraph 34 of its Defence, Marex denies that Clause 5 is concerned with the delivery of warehouse receipts as part of the Required Documentation. Whilst it is clear that this clause covers a wide range of instruments, it is, in terms, wide enough to include warehouse receipts, and the words used are apt to cover warehouse receipts – in consisting of a general agreement by Marex to *"… deliver … all such instruments and … to take all such actions … as … may be required to effectuate the intent and purposes, and to carry out the terms, of the"* Purchase Contract. Actions required to carry out the terms of the Purchase Contract includes delivering

such documentation, including genuine warehouse receipts, as is required to effectuate the intent and purposes of the Purchase Contract – which clearly includes facilitating unencumbered access to the nickel.

179. I am satisfied, and find, that in failing to provide genuine warehouse receipts Marex was also in breach of Clause 5 of the Purchase Contracts. However whether or not that is so is academic given my findings as to the proper construction of Clause 2(b).

180. Natixis is entitled to damages in respect of the breaches of contract which Marex admits, and the breaches of contract that I have found, in relation to PC1-PC3, and PC4 and PC5 (subject to contractual/estoppel arguments addressed in Section G below) Marex's defence based on common mistake fails for the reasons already identified, and addressed in detail in the next Section (Section F). The quantum of Natixis' recoverable loss has already been identified (and is also addressed in Section M below).

F. Common Mistake

F.1 The allocation of risk

181. I have found that on the true and proper interpretation of Clause 2(b) of the Purchase Contracts, Marex, as seller, is obliged to provide objectively genuine warehouse receipts to Natixis as part of the Required Documentation, and it failed to do so, and in consequence breached Clause 2(b). It follows that the risk of warehouse receipts being forged, and of Marex therefore being in breach of Clause 2(b) and responsible to Natixis therefor, was contractually upon, and allocated to, Marex. This is fatal to Marex's plea of common mistake.

182. As Mr Choo-Choy rightly identified, and accepted in his oral closing submissions (as he had in opening), *"that's the beginning and end of the mistake argument. Because if your Lordship were to find the construction that self-evidently, either as a matter of plain and ordinary meaning or as a matter of common sense, or whatever way you look at it, it must mean, it must have been intended to mean objectively genuine receipts, then that's it."* The reason for this is that (as Mr Choo-Choy put it), *"the question of allocation of risk is a determinant of whether or not the doctrine of mistake applies. If the contract allocates the risk that you say should be catered for by mistake, then there is no room for the operation of the doctrine."*

183. As Steyn J (as he then was) stated in *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1989] 1 WLR 255 at page 268B-C:

> "Logically, before one can turn to the rules as to mistake, whether at common law or in equity, one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary. Only if the contract is silent on the point, is there scope for invoking mistake. … The first imperative must be that the law ought to uphold rather than destroy apparent contracts."

184. This passage was cited with approval by Lord Phillips MR (giving the judgment of the court) in *The Great Peace* [2003] QB 679 at [80] where he identified that the doctrine of common mistake, *"fills a gap in the contract where it transpires that it is impossible of performance without the fault of either party and the parties have not, expressly or by implication, dealt with their rights or obligations in that eventuality."*

185. It is no doubt because of this requirement that there are so few cases in which there has been a successful plea of common mistake avoiding a contract. As Lord Phillips MR said in *The Great Peace* at [85]:

> "Circumstances where a contract is void as a result of common mistake are likely to be less common than instances of frustration. Supervening events which defeat the contractual adventure will frequently not be the responsibility of either party. Where, however, the parties agree that something shall be done which is impossible at the time of making the agreement, it is much more likely that, on the true construction of the agreement, one or other will have undertaken responsibility for the mistaken state of affairs."

186. Accordingly in circumstances where Marex, as seller, is obliged to provide objectively genuine warehouse receipts to Natixis as part of the Required Documentation, the risk of warehouse receipts being forged, and of Marex therefore being in breach of Clause 2(b) and responsible to Natixis therefor, was contractually upon, and allocated to, Marex and there is no scope for the operation of the doctrine of common mistake, and I so find. Nor, as I have already identified, would there have been any scope for the operation of the doctrine of common mistake had Marex been right as to the proper construction of Clause 2(b).

187. However, for completeness, I will identify the applicable principles in relation to common mistake and briefly set out my views on the issues arising and associated evidence.

F.2 Applicable principles – common mistake

188. It is common ground that the applicable principles in relation to common mistake are set out by the Court of Appeal in *The Great Peace* at [76]:

> "… the following elements must be present if a common mistake is to avoid a contract: (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible."

F.3 Application of the principles to the facts

F3.1 The risk that the receipts were not genuine is upon Marex (element (ii))

189. Element (ii) is, on any view not met in the present case. I have found that Marex assumed the risk that the receipts were not genuine on the proper construction of Clause 2(b) – Marex warranting in such circumstances that the receipts that it delivered under PC1-5 were genuine. It is common ground that in such circumstances there is no room for the operation of the doctrine of mistake, and the Purchase Contracts are not void for common mistake as I have found. However, as I was addressed by the parties on the other elements that also have to be present for there to be a common mistake, I will deal with such matters briefly.

F3.2 The alleged common assumption (element (i))

190. Marex's case as to the alleged common assumption as to a state of affairs, was summarised by it in these terms:

> "It is clear as a matter of fact (despite Natixis' denial) that there was a common and fundamental assumption by both Marex and Natixis in connection with the financing transactions reflected in PC1-5 that (1) delivery of the relevant metal would be by means of the transfer of warehouse receipts relating to it; (2) the warehouse receipts to be delivered by CHH to Marex would thereafter be delivered on by Marex to Natixis; and (3) those warehouse receipts would be genuine (i.e. authentic) warehouse receipts, issued by AW, entitling the endorsee or transferee of those receipts to call for delivery by AW of the metal described in the receipts, upon presentation thereof to AW. Furthermore, it is now common ground that the PC1-5 receipts delivered by CHH to Marex and delivered in turn by Marex to Natixis were not authentic, and that the last (and critical) assumed fact was a mistaken assumption."
> (emphasis added)

191. The first of these points (that delivery of the relevant metal would be by means of the transfer of warehouse receipts) is not a factual assumption at all – rather it was a contractual promise (see Clauses 6(a), 2(b), Clause 1 and Schedule 1). As to the second, and whilst as

already identified, Natixis was aware that Marex was contracting with CHH, this cannot have been, and I am satisfied was not, an assumption that the parties would have had. For example, if it had been discovered by Marex that the purported receipts that CHH had given were forgeries before they were delivered to Natixis, neither party can have assumed that they would nevertheless have been handed on to Natixis or that Natixis would be obliged to pay against them. In addition, Marex could have performed its obligations by the use of re-issued (fresh) warehouse receipts (provided the warehouse lot numbers set out in Schedule 2 matched), and there was no assumption that the purported receipts provided by CHH would be passed on.

192. At this stage of the argument, the parties' submissions focussed on the third aspect i.e. the allegation that there was a common assumption that the documents supplied would be genuine (i.e. authentic) warehouse receipts. Marex submitted that both parties held such a belief – Natixis submitted that neither held such a belief.

193. As to Natixis' belief Marex rely on the evidence of Mr Abel in his witness statement (at [88]) that:-

> "As explained above, Marex did not tell me what the outcome of Access World's "authentication" was for the first two transactions. I viewed the lack of a negative as a positive. The fact that a recognised market-counterparty such as Marex was willing to enter into the trades allowed us, I believed safely to assume that the warehouse receipts were authentic. To put it another way, if we had been told that the receipts were not authentic, we would not have proceeded with the trades."
> (emphasis added)

194. Marex also rely on what Ms O'Malley said when addressing the fact that she herself sought to verify that the receipts were authentic, by checking the signatures on the documents matched those on AW's authorised signatory list. She says she did so for each transaction (i.e. PC1-PC5), she then says, *"I assumed that the warehouse receipts we had been given were genuine documents (and I did not see anything that suggested they might not be genuine)."*

195. What Ms O'Malley states in terms of her understanding post-dates the entering into of the Purchase Contracts, but Mr Abel's statement addresses (as I understand it) his state of mind at the time. At first blush, therefore, Mr Abel would appear to have assumed that the warehouse receipts were genuine. There is nothing surprising about that, given my finding that Clause 2(b) required Marex to supply genuine warehouse receipts – logically a counter-party would assume that the other party would comply with its obligations under the contract and supply genuine receipts. I suspect that what Mr Abel meant was not so much that Natixis assumed that the

warehouse receipts were genuine, but rather that Natixis assumed that Marex would deliver genuine warehouse receipts in accordance with their obligation to do so under the Purchase Contracts. However Marex is entitled to place reliance on Mr Abel's evidence on its face.

196. I am doubtful, however, whether such an assumption was an assumption which would carry with it a common mistake – the point is that Mr Abel would expect, in the ordinary course, to have genuine documents delivered to Natixis as that was Marex's obligation. He was not therefore proceeding on a mistaken common assumption given the terms of Clause 2(b). Put another way if the warehouse receipts were not genuine that would have been regarded by him and Natixis as Marex's problem and not the subject matter of a common mistaken assumption. Yet further even if Natixis did make the assumption alleged, it does not assist Marex in circumstances where the risk of providing false documents was upon Marex.

197. Natixis also submits that to found a common mistake, both parties' belief must be a positive one (and it says Marex had no such positive belief) relying on what was said by Lord Hope in *Kleinwort Benson Ltd v Lincoln CC* [199]2 AC 349 at page 410 (referred to by Lord Hoffman in *Deutsche Morgan Grenfell Group Plc v Inland Revenue* [2007] 1 AC 558 at [25]), namely:-

> "A state of doubt is different from that of mistake. A person who pays when in doubt takes the risk that he may be wrong …"

198. The *Deutsche Morgan Grenfell* case concerned a claim for restitution in relation to a mistake of law. Lord Hoffman stated as follows at paragraphs [25]-[27] of his judgment:-

> "25. There is some authority for the view that a state of doubt does not amount to a mistake: see Burrows: The Law of Restitution (2nd ed 2002) pp 139–140. In the *Kleinwort Benson case* ([1999] 2 AC 349, 410) my noble and learned friend Lord Hope of Craighead said:
>
> > "A state of doubt is different from that of mistake. A person who pays when in doubt takes the risk that he may be wrong — and that is so whether the issue is one of fact or one of law."
>
> 26. This was a very compressed remark in the course of a discussion of other matters and I do not think that Lord Hope could have meant that a state of doubt was actually inconsistent with making a mistake. Contestants in quiz shows may have doubts about the answer ("it sounds like Haydn, but then it may be Mozart") but if they then give the wrong answer, they have made a mistake. The real point is whether the person who made the payment took the risk that he might be wrong. If he did, then he cannot recover the money. Speaking for myself, I think that there is a parallel here with the question of whether a common mistake vitiates a contract. As Steyn J said in *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255, 268:

> "Logically, before one can turn to the rules as to mistake … one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary."
>
> 27. Likewise, the circumstances in which a payment is made may show that the person who made the payment took the risk that, if the question was fully litigated, it might turn out that he did not owe the money. Payment under a compromise is an obvious example: see *Brennan v Bolt Burdon* [2004] EWCA Civ 1017; [2005] QB 303. I would not regard the fact that the person making the payment had doubts about his liability as conclusive of the question of whether he took the risk, particularly if the existence of these doubts was unknown to the receiving party. It would be strange if a party whose lawyer had raised a doubt on the question but who decided nevertheless that he had better pay should be in a worse position than a party who had no doubts because he had never taken any advice, particularly if the receiving party had no idea that there was any difference in the circumstances in which the two payments had been made. It would be more rational if the question of whether a party should be treated as having taken the risk depended upon the objective circumstances surrounding the payment as they could reasonably have been known to both parties, including of course the extent to which the law was known to be in doubt."

199. In the light of my findings that common mistake is not available (given that the risk the warehouse receipts were not genuine is upon Marex) it would unduly lengthen this judgment to investigate in detail the allegations as to what Marex did or did not assume (at this point) for the purpose of common mistake. However, I will address the matters relied upon briefly.

200. Natixis submits that Marex could not have assumed that the warehouse receipts were genuine because (1) it knew of the inherent risk of documentary fraud and knew that this risk could never be completely eliminated; (2) it knew that the PC1-3 receipts had not been authenticated in hard copy; (3) Mr Nutt had not been able to conduct the test for Item 2; and (4) Marex sought to obtain insurance cover against the risk of fraud.

201. I do not consider that (1) is in point – belief in a risk of fraud is not inherently inconsistent with an assumption that the receipts were genuine. (2) is true, though there is no reason for this to negative a belief that the documents were genuine. Equally in relation to (4) the mere fact that insurance cover is sought (to guard against the risk of fraud) does not (necessarily) mean that a party did not believe the documents were genuine. This point is, however, fact sensitive. Had the point not been academic it would have been necessary to consider the available evidence in this area (as it would have been necessary to do had the claim between Marex and MCAP not settled). Put at its lowest, the evidence demonstrates that Marex was very keen to ensure that it had cover in respect of false warehouse receipts.

202. In relation to (3) (which relates to PC1-3), the fact that Mr Nutt had not been able to identify Item 2 utilising Item 1 is a point of substance (which is also of relevance in the context of the section on causation and contributory negligence – Section J). In the event there was a dispute in closing as to what the evidence showed in this regard, beyond the fact that Mr Nutt had been unable to identify Item 2 using the device he had purchased. Marex submitted that Mr Tan of Access World was uncertain as to whether Item 2 was even on the genuine PC1-3 receipts, that he said that he would come back to Mr Nutt in that regard but it is said he never did so. Marex says that Mr Nutt was also sceptical that the device he had bought from the high street would actually be able to detect Item 2 but *"thought it was worth a try",* that he could not identify Item 2, but the issue of testing for item 2, *"dropped off [his] radar",* not least because he was in hospital with his daughter immediately after he attempted the test. For its part Natixis submitted that Marex had mischaracterised the evidence on this topic.

203. I consider that the overall position is clear enough on a careful consideration of the evidence and the timing of events. Mr Nutt had been unable to identify Item 2 using the device he had purchased on the high street. He had emailed Mr Tan at 10.12am on 22 November 2016 stating that he had purchased a device for the purpose of Item 1 but that he had not been able to identify Item 2 and he had asked *"Do I need a special device?"* He had then had a telephone conversation with Mr Tan at 10.17am on 22 November (i.e. 5 minutes later) in which he asked about Item 2, and Mr Tan stated that he needed to double check but his understanding was *"there is - when someone showed it to me – I just saw it [Item 2]",* - Mr Tan asked *"but I will get back to you. Is it possible?"* to which Mr Nutt replied *"Yeah sure. Thanks"* It appears, that it was after this, at 10.17am that Mr Tan then emailed Mr Nutt again, and said *"On the [Item 2], yes, [Item 1] should reveal".*

204. I am accordingly satisfied and find that Mr Tan did reply to Mr Nutt and did so in terms that should have brought home to him that an Item 1 should have revealed Item 2 (rather than if the document included Item 2 then the device should reveal it) as Marex portrayed the answer in closing. In such circumstances I do not accept Mr Nutt's evidence at paragraph 86 of his statement that the issue of not being able to see Item 2 *"dropped off [his] radar"*, and indeed when cross-examined Mr Nutt also accepted that, *"at this point in time it was something that was still in my mind…I still didn't think that the instrument was fit for purpose, but it was a factor in addition to the count and the COA's that were…troubling me at the time."*. He continued. *"Subsequent to that, we resolved the other factors, and when I say it dropped off my radar, it means that I didn't resolve that last factor before we went ahead with the transaction"*. He was asked whether it remained a point of concern to him that it had failed that

which it ought to have passed, to which he replied*, "At that point in time it was, it was something that was in my mind but thereafter I don't come back to it and I don't remember thinking about it again."*

205. For present purposes, and having regard to such evidence of Mr Nutt, I do not consider that he had any actual positive belief that PC1-3 were genuine - at most that was what he hoped. Accordingly (had it been relevant) I do not consider that Marex themselves had the requisite assumption that PC1-PC3 were genuine for the purpose of common mistake (the position is different in relation to PC4 and PC5, which were authenticated by Access World as a result, and which no doubt gave Marex at least some comfort at the time). The point is, however, academic for the purpose of common mistake, given that the risk of whether the warehouse receipts *were* genuine was upon Marex.

F3.3 Was the non-existence of the state of affairs attributable to the fault of Marex? (element (iii))

206. The third element that must be present if a common mistake is to avoid a contract is that the non-existence of the state of affairs must not be attributable to the fault of either party. In this case the state of affairs is that the documents were genuine warehouse receipts.

207. In the *Associated Japanese Bank* case, supra, at 268G-269A Steyn J identified the fifth proposition in relation to common mistake at common law which addresses the question of fault:-

> "What happens if the party, who is seeking to rely on the mistake, had no reasonable grounds for his belief? An extreme example is that of the man who makes a contract with minimal knowledge of the facts to which the mistake relates but is content that it is a good speculative risk. In my judgment a party cannot be allowed to rely on a common mistake where the mistake consists of a belief which is entertained by him without any reasonable grounds for such belief: cf. *McRae v. Commonwealth Disposals Commission* (1951) 84 C.L.R. 377, 408. That is not because principles such as estoppel or negligence require it, but simply because policy and good sense dictate that the positive rules regarding common mistake should be so qualified."

208. The Court of Appeal in *The Great Peace* (at [91]) concurred in the summary of which the fifth proposition is part, subject to the proviso that the result in the *McRae's* case could be explained on the basis of construction. In this regard Lord Phillips MR had already identified that the second element (there must be no warranty by either party that the state of affairs exists) and third element now under consideration (the non-existence of the state of affairs must not

be attributable to the fault of either party) was well-exemplified by the decision of the High Court of Australia in the *McRae* case, as addressed at [77]-[80]:-

> "77. The second and third of these elements are well exemplified by the decision of the High Court of Australia in *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377. The Commission invited tenders for the purchase of "an oil tanker lying on Jourmaund Reef ... said to contain oil". The plaintiff tendered successfully for the purchase, fitted out a salvage expedition at great expense and proceeded to the reef. No tanker was to be found—it had never existed. The plaintiff claimed damages for breach of contract. The Commission argued that the contract was void because of a common mistake as to the existence of the tanker.
>
> 78. In the leading judgment Dixon and Fullagar JJ expressed doubt as to the existence of a doctrine of common mistake in contract. They considered that whether impossibility of performance discharged obligations, be the impossibility existing at the time of the contract or supervening thereafter, depended solely upon the construction of the contract. They went on, however, to consider the position if this were not correct. They observed that the common assumption that the tanker existed was one that was created by the Commission, without any reasonable grounds for believing that it was true. They held, at p 408:
> "a party cannot rely on mutual mistake where the mistake consists of a belief which is, on the one hand, entertained by him without any reasonable ground, and, on the other hand, deliberately induced by him in the mind of the other party."
>
> 79. They held, at p 410, that, on its proper construction, the contract included a promise by the Commission that the tanker existed in the position specified. Alternatively, they held that if the doctrine of mistake fell to be applied
> "then the Commission cannot in this case rely on any mistake as avoiding the contract, because any mistake was induced by the serious fault of their own servants, who asserted the existence of a tanker recklessly and without any reasonable ground."
>
> 80. This seems, if we may say so, an entirely satisfactory conclusion and one that can be reconciled with the English doctrine of mistake. That doctrine fills a gap in the contract where it transpires that it is impossible of performance without the fault of either party and the parties have not, expressly or by implication, dealt with their rights and obligations in that eventuality."

209. There is a difference between Natixis and Marex as to the scope of the third element, that the non-existence of the state of affairs must not be attributable to fault of either party. Mr Choo-Choy, on behalf of Marex, submits that fault is only relevant to the extent that it caused or led to the non-existence of the state of affairs, here that the documents were genuine warehouse receipts, and that facts which do not have any causal connection with the forgery of the receipts would not fall within the domain of fault – in effect that it is only permissible to look to see if Marex were in some way responsible for the documents being forgeries (there being no such evidence). He also says that it is not that the common assumption must not have been procured or contributed to by the fault of either party.

210. For his part Mr Matthews, on behalf of Natixis, submits that Marex states the test too narrowly having regard to the Court of Appeal's endorsement of the *McRae* case in *The Great Peace* as also relied upon by Steyn J in the *Associated Japanese Bank* case and that the nature of fault which undermines the common mistake defence extends beyond, on the facts of this case, who caused the forgery, and that it is wide enough to encompass whose fault it is that Marex tendered forgeries under the contracts and also whose fault it was that the parties were under a mistake (that the documents were genuine warehouse receipts).

211. There is little existing judicial consideration of the boundaries of this element of the requirements for common mistake, and I consider that a definitive consideration of the point is best undertaken in a case where the point would be determinative rather than academic. If I had to express a view, I consider that the sentiments expressed in the *McRae* case, as endorsed by the Court of Appeal in *The Great Peace*, support the view that the principle is wider than suggested by Marex. However, the position in relation to element (iii) is academic in the present case, given the common ground that common mistake cannot in any event arise in circumstances where, as I have found, the risk in relation to forged warehouse receipts is upon Marex for the purpose of the non-fulfilment of element (ii). In such circumstances I do not consider it appropriate to express a concluded view on this element having regard to the academic nature of the issue and the current uncertain state of the law in this area.

F3.4 The non-existence of the state of affairs must render performance of the contract impossible (element (iv))

212. Marex submits that this requirement is met on the basis that the warehouse receipts were the fundamental means by which Marex was to transfer to Natixis the right to call for delivery of the metal from Access World, and this was impossible utilising false receipts. In contrast Natixis submits that Marex could have performed the Purchase Contracts by purchasing the metal from the holder of the genuine receipts and either endorsing them or procuring fresh receipts from Access World. Marex denies that this is so although the basis on which it does so, as set out at paragraph 19 of Marex's Written Closing Submissions which I have had regard to, is characterised by Natixis as "obscure", a characterisation with which I agree.

213. I do not see why the non-existence of the state of affairs – i.e. finding that the warehouse receipts were false - renders performance of the Purchase Contracts impossible. Marex could have performed its obligations under the Purchase Contracts by purchasing the genuine

warehouse receipts and then delivering them (or procuring the delivery of them) or obtaining fresh warehouse receipts from Access World in respect of the very same parcels of nickel (on the instruction of the actual nickel owners) as part of the Required Documentation under Clause 2(b) to Natixis as buyer. After all there was available time after discovery of the falsity of the Purported Warehouse Receipts for Marex to negotiate and contract with the true owners of the nickel either for the genuine warehouse receipts duly endorsed or, if already cancelled, for them to facilitate the supply of fresh genuine warehouse receipts for the very same nickel. That being the case I do not consider that Marex has demonstrated element (iv). The point is again academic given the common ground that common mistake cannot in any event arise in circumstances where, as I have found, the risk in relation to forged warehouse receipts is upon Marex for the purpose of the non-fulfilment of element (ii).

F.3.5 Existence/vital attribute of the consideration to be provided/circumstances which must subsist if performance of the contractual adventure is to be possible (element (v))

214. Natixis submits that this final element is not satisfied as genuine warehouse receipts fitting the contractual description did exist and could have been supplied. Marex submits the final element is satisfied as the warehouse receipts were the fundamental means by which Marex was to transfer to Natixis the right to call for delivery of the metal from Access World. As for Natixis' submission, Marex says that this is misplaced, first because it would have been impossible for Marex to do so if Marex was only required to deliver the receipts it had obtained from CHH (my emphasis). However, I have already found that that was not Marex's obligation. Secondly, Natixis' submission is irrelevant as this element is concerned with whether the state of affairs (the receipts) were the consideration or a vital attribute of the consideration to be provided, and the answer is obviously "yes".

215. I consider that Marex is right that this element is concerned with whether the state of affairs (here that the warehouse receipts are genuine) is the consideration or a vital attribute of the consideration to be provided, or the circumstances which must persist if performance of the contractual adventure is to be possible, and that it is. Accordingly this element would have been satisfied. Once again, however, the point is again academic given the common ground that common mistake cannot in any event arise in circumstances where, as I have found, the risk in relation to forged warehouse receipts is upon Marex for the purpose of the non-fulfilment of element (ii)

F.3.6 Conclusions on Mistake

216. Marex's defence based on common mistake fails by reason of the fact that the risk of forged warehouse receipts was upon Marex. However, as identified above, other elements of common mistake were also not demonstrated by Marex, and these would also mean that there could be no defence to Natixis' claims on the basis of common mistake.

F.3.7 Restitution and Change of Position

217. As the case based on common mistake has failed, Natixis' claim in restitution does not arise. Had the Purchase Contracts been *void ab initio* for common mistake Natixis would have had a restitutionary claim and would have been entitled to recover the sum paid to Marex by Natixis, that is the sum of US$30,428,374.40, subject only to Marex's claim of change of position. As there was no common mistake, and as the Purchase Contracts were not *void ab initio* no question of a claim in restitution, or claim of change of position, arises and to address it would only add to what is already a lengthy judgment in circumstances where the point is academic.

G. Contractual Promises and Estoppel

G.1 The contractual claims

218. It will be recalled that Marex contends that Access World is contractually liable on promises (or warranties) of delivery of metal that it made to Marex and/or Natixis, as contained in:

(1) The thirteen PC4 receipts and the PC5 receipt that were expressly authenticated by Access World in its emails dated 22 December 2016 and 9 January 2017 (the Authentication Emails) ; and/or

(2) The so-called PMA letters dated 23 November 2016, 19 December 2016 and 3 January 2017 sent by Access World to [Natixis] with reference to the PC4 and PC5 receipts (the PMA letters).

219. Although there is no pleaded case of a contract between Marex and Access World, it is clear from paragraph 16 of Marex's Written Opening Submissions (as subsequently developed by Marex in its written and oral closing submissions) that what Marex is alleging is that there are warranties (contractual promises) contained in the Authentication Emails and PMA letters

which are said to amount to collateral warranties – collateral to the PC4 and PC5 contracts between Marex and Natixis. Thus it is asserted at paragraph 16 of Marex's Written Opening Submissions in relation to the Authentication Emails and the PMA Letters:-

> "The above statements had contractual effect. They are drafted in the terms of contractual warranties or promises and they are important statements intended to form the basis of legal relations and to be relied upon. Further, they relate to matters which were within AW's own knowledge and which, vis-à-vis Marex and Natixis, AW was in a better position to know or ascertain the truth of. The correct analysis therefore is that the warranties given by AW through its emails of 22 December 2016 and 9 January 2017 (collectively, the "Authentication Emails") and/or the PMA letters constituted collateral warranties – in the sense of being collateral to the PC4 and PC5 contracts between Marex and Natixis."

220. By the time of Marex's Written Closing Submissions (at paragraph 54(f)), these statements were elevated (in the alternative) to contracts in their own right:

> "In a broad sense, the warranties given by AW through its emails of 22 December 2016 and 9 January 2017 (collectively, the "Authentication Emails") and/or the PMA letters can be described as collateral warranties – in the sense of being collateral to the PC4 and PC5 contracts between Marex and Natixis, but whether or not collateral, they gave rise to contracts in their own right as between AW and Marex / Natixis as described above."

221. During the course of Marex's oral opening submissions, Mr Choo-Choy also submitted that a genuine warehouse receipt would give rise to a unilateral contract between the holder and Access World on the basis that it contains a statement made by Access World to whoever may become endorsees of the document to the effect that they will deliver the goods to the endorsee upon presentation of the original warehouse receipt – a submission that Marex maintained in closing. For its part Access World submits that such submission does not bear analysis, and is simply wrong.

222. Thus whilst Marex's submissions have developed over time – the theme that runs through all such submissions is a quest for the identification of a contract between Marex and/or Natixis and Access World. The reason for that is not hard to divine, indeed it was acknowledged at the time of oral closing submissions. Each of Natixis and Marex expressly confirmed that if they were wrong in their submission that there was a contract with Access World – i.e. there was no contract, then the estoppel case cannot arise - for otherwise, as was also confirmed by them, estoppel would be used as a sword and not as a shield which it was accepted is not permissible.

223. It is convenient to consider the nature of warehouse receipts generally, and then the terms of PC4 and PC5, before addressing the arguments in relation to the Authentication Emails and PMA Letters.

224. Two particular matters that were explored in submissions during the course of the trial were as follows:

(1) What is the nature of the relationship between a warehouse and anyone seeking delivery up of goods, in the present case the nickel held in one or more of Access World's warehouses, and

(2) What is the role of a warehouse receipt, and in particular the warehouse receipts issued by Access World?

225. A note of caution needs to be sounded in relation to these points which needs to be borne in mind when considering such matters, and the limitations (and relevance) of the submissions made. First the submissions of the parties that were made, in particular in relation to (1) the relationship between a warehouse and someone seeking delivery of metal held by it, and (2) the role of a warehouse receipt generally, largely developed as a result of questioning by the Court during the course of the trial, and as such were not as fully developed as might otherwise have been the case. Secondly, it is necessary to be alive to the fact that the nickel concerned was in warehouses in Korea and Malaysia, whilst Access World (the Singaporean defendant in this action) seeks to contract on its standard terms and conditions which provides that, *"the Agreement shall be governed by and construed in accordance with the laws of the country in which the Company that is party to this agreement is domiciled."*

226. There was no evidence before me as to the law applicable to the relationship between the warehouse holder and an entity seeking delivery up of metal in any particular country or even whether principles such as bailment form any part of the law of such country or countries. Equally so far as the role of a warehouse receipt is concerned its role has not been definitively determined even as a matter of English law (as addressed below), and there is no evidence before me that the law of any particular country is the same as English law, albeit that the parties have been content to address me on the basis that Singaporean law is the same as English law (to the extent that Singaporean law is of relevance in the context of Access World's standard terms and conditions).

G.2 The basis on which goods are stored in a warehouse

227. At first blush, and as a matter of English law, the relationship between a warehouseman and someone with a higher right to possession of goods (including the person depositing the goods in the first instance) is that of bailment (as to the nature of a claim in bailment see *East West Corpn v DKBS AF 1912 A/S* [2003] QB 1509 at [24]-[32] and *Yearworth v North Bristol NHS Trust* [2010] QB 1 at [48]). Liability in bailment has been said to be *sui generis* and is separate from any liability in tort (and the measure of damages may be more akin to that referable to breach of contract than in tort – *Yearworth* at [48(h)-(i)]).

228. The existence of a claim in bailment does not depend on contract, what is fundamental is not contract but the bailee's consent – the duties of a bailee arising out of the voluntary assumption of possession of another's goods (see *East West* at [24]). A bailee may owe duties not only to his bailor, but to a third party owner (the classic example being that of a sub-bailee) – *East West* at [25]. A bailment can exist notwithstanding that it is gratuitous (i.e. without consideration passing from the bailor to the bailee – *Coggs v Bernard* (1703) 2 Ld Raym 909, *Yearworth v North Bristol NHS Trust)* [2010] 1 QB 1 at [48(a)]). The non-contractual liability of a bailee may be modified by the doctrine of bailment on terms – see *The Pioneer Container* [1994] 2 AC 324. Under this doctrine, a bailee may, in answer to an owner's non-contractual claim for loss or damage to goods, rely upon the terms on which he voluntarily accepted the goods from his immediate bailor, if the head owner expressly or impliedly consented to the goods being bailed to the bailee on such terms (*East West* at [30]).

229. Turning to the specific context of the bailment of goods where there is a warehouse receipt it is common ground between the parties in the present case that there is a bailment of goods between the first order party, Straits (as bailor), and Access World (as bailee), that bailment being contractual in nature, and being at least evidenced by the terms of the warehouse receipt, which contains a promise that, *"Delivery will be made upon presentation of the duly completed/endorsed ORIGINAL Warehouse Receipt in the office of the undersigned Access World entity"* i.e. a promise is made to Straits to deliver up the goods to the last endorsee upon presentation of the original warehouse receipt, subject to someone demonstrating a higher right to possession than Straits/Straits' endorsee.

230. When an entity presents a duly completed/endorsed original warehouse receipt Access World will check that it is such a document and if so will (subject always to someone demonstrating a higher right to possession than Straits/Straits' endorsee) attorn to that party i.e. acknowledge that they hold the goods on behalf of that party. What happens thereafter will

depend on the wishes of the party to whom Access World has attorned – for example issue a fresh warehouse receipt to the order of that party, or place the metal on LME warrant, or indeed give physical delivery up of the metal for the purpose of its transfer to another warehouse.

231. The role of a warehouse receipt, and the question of when delivery occurs was considered by Phillips J in *Mercuria Energy Trading Pte Ltd v Citibank NA* [2015] 1 CLC 999 at [55]-[60]. In particular he stated as follows at [57]-[60] (my emphasis):

> "57. It will be apparent from the above that (absent the transfer of a document of title to the goods, namely, a bill of lading) it is only when a warehouse operator itself attorns to the buyer that delivery is effected. It is at that point that the third party becomes bailee for the buyer and the buyer acquires constructive possession of the goods. In particular, it is well established that the transfer by the seller to the buyer of a "warrant" or "receipt" issued by the warehouse operator in respect of the goods does not in itself effect delivery, even if that document promises delivery to the seller's order or to his assigns. Thus in *Farina v Home* (1846) 16 M. & W. 119, a wharfinger had handed a warrant to the plaintiff's shipping agent, making the goods deliverable to the agent or his assigns by indorsement. The warrant was thereafter being indorsed by the agent and delivered to the defendant. Parke B held that this did not constitute delivery of the goods:
>
> > "Mr Prentice insisted that there was no sufficient evidence of the actual receipt of the goods, that is, the delivery of the possession of the goods on behalf of the vendor to the vendee, and the receipt of the possession by the vendee; and that the delivery and receipt of the warrant was not in effect the same thing as the delivery and receipt of the goods; and we are all of that opinion. This warrant is no more than an engagement by the wharfinger to deliver to the consignee, or any one he may appoint; and the wharfinger holds the goods as the agent of the consignor (who is the vendor's agent), and his possession is that of the consignee, until an assignment has taken place, and the wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and then only is there a constructive delivery to him. In the meantime, the warrant, and the indorsement of the warrant, is nothing more than an offer to hold the goods as the warehouseman of the assignee."
>
> 58. That analysis was approved and applied by the House of Lords in *Dublin City Distillery (Great Brunswick Street, Dublin) v Doherty* [1914] AC 823, Lord Atkinson stating:
>
> > "The giving by the owner of goods of a delivery order to the warehouseman does not, unless some positive act be done under it, operate as a constructive delivery of the goods to which it relates: *McEwan v Smith*. And the delivery of a warrant such as those delivered to the respondent in the present case is, in the ordinary case, according to Parke B, no more than an acknowledgement by the warehouseman that the goods are deliverable to the person named therein or to any one he may appoint. The warehouseman holds the goods as the agent of the owner until he has attorned

> in some way to this person, and agreed to hold the goods for him; then, and not till then, does the warehouseman become a bailee for the latter; and then, and not till then, is there a constructive delivery of the goods. The delivery and receipt of the warrant does not per se amount to a delivery and receipt of the goods: *Farina v Home ; Bentall v Burn* .
>
> This statement of the law in *Farina v Home* is supported by many authorities, and, as I understand, was not questioned on behalf of the respondent in the present case."
>
> 59. Thus an attornment by the warehouse operator is a necessary element in the transfer of constructive possession from the seller to the buyer and, as delivery is by definition the transfer of possession, it is also a condition of delivery. The position can be contrasted with the more straightforward situation where the goods are in the possession of the seller, in which case the manner in which possession is to be transferred (including the buyer obtaining constructive possession) is purely a matter for agreement between the parties.
>
> 60. In the present case, Citi accepts that the warehouse receipts which it tendered to Mercuria were not documents of title within the meaning of s29(4) . Accordingly, applying the established principles set out above, the tender of those warehouse receipts on 22 July 2014 did not result in Mercuria obtaining constructive possession of the metal and therefore did not effect delivery within the meaning of s29(4) of the Act."

232. It is clear from the *Mercuria* decision that there is no existing relationship between a warehouseman and any buyer unless and until the warehouseman attorns to the buyer, the warehouseman holding the goods to the order of the owner until then, and it was (rightly) common ground before me that a warehouse receipt is not a document of title (within section 29(4) of the Sale of Goods Act 1979 ("SGA")).

G.3 A warehouse receipt is not a document of title

233. In this regard, as Marex identified in its Written Closing Submissions, and as is reflected in the authorities, a warehouse receipt is not a document of title, albeit that on occasions reference has been made to the commercial role of warehouse receipts, in strictly inaccurate terms, as "effectively documents of title".

234. As the editors of Benjamin's Sale of Goods (10th ed., 2017) state at [18-006]-[18-009], the expression "document of title", in its strict common law sense, refers to *"a document, the transfer of which operates as a transfer of the constructive possession of the goods covered by the document and may, if so intended, operate as a transfer of the property in them"*. As the editors also note, a document can only acquire that status as a result of a mercantile custom recognising that the transfer of the right to constructive possession of (and property in) the goods can be effected by transfer (usually by endorsement and delivery) to the holder of the

document in question (a bill of lading being a classic example). There is no suggestion of any such mercantile custom in relation to warehouse receipts.

235. The editors of Benjamin go on to point out that the expression "document of title" is sometimes used in a sense falling short of the common law definition of a negotiable or transferable document of title. For example, the definition of "document of title to goods" in s.1(4) of the Factors Act 1889, which is incorporated by reference into the SGA by s.61(1) of the SGA, might be said to be wide enough to potentially include a warehouse receipt:

> "(4) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented"

236. On occasions documents which have to be produced to a carrier, warehouseman, or other bailee of goods, by a person seeking delivery of the goods, have been referred to as being "effectively documents of title". Thus, in *Niru Battery Manufacturing Co v. Milestone Trading Ltd* [2004] Q.B. 985, Clarke LJ (with whom Sedley LJ and Dame Elizabeth Butler-Sloss P. agreed) said of warehouse warrants at [9]:

> "9. Lead is regularly traded on the LME which operates a warrant system that is described in detail by the judge in para 14 and following of his judgment [2002] 2 All ER (Comm) 705, 712. The lead is deposited by producers in LME approved warehouses in lots of 25 metric tons, each of which is individually identified and made the subject of a single warrant. The lead is traded by buying and selling the warrants, which are effectively documents of title. Physical delivery can only be obtained from the warehouse against presentation of the relevant warrant."

237. In *Impala Warehousing and Logistics (Shanghai) Co. Ltd v. Wanxiang Resources (Singapore) Pte. Ltd* [2015] EWHC 811 (Comm), at [54]-[55] Blair J stated:

> "54. Warehouse receipts are common instruments in trade and finance, and may contain, or evidence, a contract between the warehouse and the party on whose behalf the goods are stored. …
>
> 55. A warehouse receipt represents goods in the possession of a warehouse. The document gives a description of the goods, and is a receipt for the goods stored. At common law, warehouse receipts are not treated as negotiable documents of title (unlike bills of lading). However, though not in itself conferring possession of the goods on the

holder, possession of a warehouse receipt in effect gives the holder the right to possession of the goods. The evidence in this case, for example, is that without receiving the receipt back, the warehouse will not release the goods. …"

238. However it is clear that, in the common law sense, a warehouse receipt is not a document of title and ultimately Marex did not suggest otherwise.

G.4 The terms of the Warehouse Receipts in respect of PC4-PC5

239. The Warehouse Receipts provided, amongst other matters, as follows:-

"To the order of [Straits]

This is to certify that the undersigned has received the Goods (as defined) for storage in apparent good order and condition, except as noted below, subject to the Remarks/Notes.

…

Remarks/Notes:

- Fees and Charges per agreement in writing (if applicable) or quotation issues by Access World's entity.
- Location of Cargo – Refer to Attachment.

…

- Goods (as defined) are received, stored and released according to agreement in writing entered between the parties (if applicable) or prevailing Access World's Standard Terms & Conditions www.accessworld.com
- This Warehouse Receipt is only valid when duly/legibly completed, endorsed and signed. All rights in connection therewith shall not be transferred or in any way disposed without having been endorsed, signed and dated by the order party / transferee.
- Delivery will be made upon presentation of the duly completed/endorsed ORIGINAL Warehouse Receipt in the office of the undersigned Access World's entity.
- Beneficiary/Transferee of this Warehouse Receipt will be deemed to have responsibility to pay all outstanding invoices in connection with services rendered by the undersigned Access World entity.

…

Upon transfer of this warehouse receipt, kindly ensure that the warehouse receipt is duly endorsed, signed and dated by the order party (transferor). Your endorsement shall follow the below sequence of boxes."

There then followed the attachment thereto entitled "Warehouse Receipt Details" which set out in table form the lot numbers, warehouse, brand, origin, product, quantity, gross and net weights and rent start date.

G.5 The effect of any original warehouse receipts – the alleged unilateral contract

240. As is apparent, there is nothing in the wording of these warehouse receipts that takes these warehouse receipts out of the norm in relation to the principles identified above in terms of the relationship between the warehouse and a goods owner, and the role of a warehouse receipt.

The warehouse receipts are to the order of Straits, which is consistent with the contemporary emails and telephone conversations of Mr Tan of Access World with Mr Nutt of Marex, that Access World (rightly) always regarded Straits as its customer, and that Access World did not, and does not, consider an endorsee to be its customer unless the warehouse receipts are presented for authentication and cancellation and re-issued to the order of the (former) endorsee.

241. This is entirely consistent with the above analysis in the authorities – the holder of a warehouse receipt prior to presentation, authentication and an attornment is not in any form of relationship with a warehouse – still less in a contractual relationship with a warehouse. In the present case, those events never occurred and so, at least at first blush, there can be no question of a contractual relationship existing between Access World and Marex or Natixis under or by reason of the warehouse receipt itself (the suggestion of a collateral contract is addressed separately below).

242. However (and for the first time), in opening Marex suggested that a genuine warehouse receipt would give rise to a unilateral contract between its holder and Access World on the basis that it contains a statement made by Access World to whoever may become endorsee of the document to the effect that they will deliver the goods to the endorsee upon presentation of the original warehouse receipt. Such suggestion is fundamentally flawed. It fails to have regard to the fact that the relationship is one of bailment between Access World and Straits, to which neither Marex nor Natixis are party, and the fact that it is only upon attornment on presentation and authentication of a genuine warehouse receipt that any relationship is created between Access World and the endorsee. It also ignores the fact that (even on the basis of Marex's submission) no relationship still less any contract could arise until, and upon, presentation, and even then only upon the presentation of a genuine warehouse receipt. None of that ever occurred.

243. In support of its submission as to the existence of a unilateral contract between Access World and Marex or Natixis, Marex makes the following points in relation to the provisions of the warehouse receipt. None of them bears examination or assists Marex's argument:-

(1) The second bullet point contemplates the transfer of the receipt by endorsement, signature and dating: *"This Warehouse Receipt is only valid when duly/legibly completed, endorsed, signed and dated by the order party / transferee."* It is true that it is contemplated that the warehouse receipt will only be valid if it is duly/legibly

completed and signed and dated by the order party (Straits). It also contemplates the possibility that the warehouse receipt may be endorsed, but this tells one nothing about the consequences of the same. It is right that the second sentence provides that *"all rights in connection therewith" "shall not be transferred"* without having been *"endorsed, signed and dated by the order party / transferee"* but this says nothing about how or when rights are transferred (in fact by attornment on presentation of a genuine warehouse receipt).

(2) It is said that the third bullet point uses mandatory language (*"Delivery will be made")* upon presentation of the duly completed/endorsed *"ORIGINAL warehouse receipt"* (which it is now accepted by Marex is a reference to, and is limited to a reference to, the genuine Access World warehouse receipt) – but this does not occur on endorsement, but upon presentation, authentication and attornment.

(3) The fifth bullet point provides that the *"Beneficiary/Transferee of this Warehouse Receipt will be deemed to have accepted responsibility to pay all outstanding invoices in connection with services rendered by the undersigned Access World's entity*". Marex argues that this means that any transferee who accepts the endorsement and transfer of the receipt in his favour is taken by such conduct to accept responsibility to pay AW's outstanding invoices. However, it is not the acceptance of an endorsement or possession of the warehouse receipt that renders the endorsee liable to pay the storage charges – it is the offer by the endorsee (made by presentation of a genuine duly endorsed warehouse receipt) to the warehouse, which is then accepted by the warehouse, at the time of presentation and authentication, that renders the endorsee liable to pay storage charges. A warehouse receipt is not a document of title. There is no relationship between an endorsee and the warehouse, until presentation and attornment.

(4) Marex refers to the opening sentence on the reverse page as contemplating *the "transfer of this warehouse receipt"* by means of endorsement, signature and dating as set out in the sequence of six boxes. However, this does not assist Marex's argument. Once again, the words contemplate the possibility of the transfer of the warehouse receipt, and the provision makes clear that it should be ensured that the warehouse receipt is duly endorsed, signed and dated. This tells one nothing about the consequences of the same, or the timing when this becomes relevant (i.e. upon presentation to Access World and attornment).

244. Marex then submits that the statement in the third bullet point – that delivery will be made by Access World upon presentation of the duly endorsed original warehouse receipt – must objectively be intended as an open offer to deliver to any "*Beneficiary / Transferee"* of the receipt, capable of acceptance by any such beneficiary / transferee who (by endorsement) takes a transfer of the receipt, and which (thus accepted) results in that beneficiary / transferee being *"deemed to have accepted responsibility to pay all outstanding invoices"* (under the fifth bullet point) (my emphasis). It said that it is only if the third bullet point is treated as containing an open offer by Access World to deliver as set out therein, capable of binding acceptance by a person who takes a transfer of the receipt by endorsement (as contemplated in the receipt), that the resulting liability described in the fifth bullet point can arise.

245. But Marex mis-characterises the position in an endeavour to create a binding contract at the moment of transfer of the warehouse receipt (by endorsement from the order party) – but at that stage Access World's / a warehouseman's relationship is still with the order party. Any relationship of Access World with the endorsee only occurs on presentation and attornment. Once again, it is not the acceptance of an endorsement or possession of the warehouse receipt (neither of which involve the warehouse) that renders the endorsee liable to pay the storage charges – it is the offer by the endorsee to pay the storage charges (made by presentation of a genuine duly endorsed warehouse receipt) to the warehouse, which is then accepted by the warehouse, at the time of presentation and authentication, that renders the endorsee liable to pay storage charges. There is no relationship between an endorsee and the warehouse until presentation and attornment. None of the requirements for a binding contract are made out before that time.

246. Marex again fails to have proper regard to timing in its submission that:-

> "Thus, whilst in the absence of proof of a mercantile custom, a warehouse receipt in the form of the AW warehouse receipts may not be characterised as a negotiable document of title at common law (in the strict sense) and may not directly operate to transfer to a new holder the right to constructive possession of (or title to) the goods, by the terms of the receipt and the process of endorsement and transfer as described in the receipt, any new endorsee or transferee of the receipt can by its conduct in accepting endorsement and transfer in its favour thereby accept AW's standing promise to deliver as set out in the third bullet point and thereby acquire the contractual right to call on AW to make delivery of the goods in accordance with that promise."
> (emphasis added)

247. As highlighted text show Marex fails to focus upon the fact that the process of endorsement and transfer does not involve the warehouse, and it is not until the time of

presentation that there can be any possibility of offer or acceptance (or indeed intention to enter legal relations, quite apart from the absence of consideration). Whilst there are cases where a unilateral contract can arise (most obviously in the case of advertisements – of which the leading case is still *Carlill v Carbolic Smoke Ball Co Ltd* [1893] 1 Q.B. 256), such cases are rare, and the terms of Access World's warehouse receipts do not give rise to any such standing offer on their true and proper construction in circumstances where what is contemplated in relation to a warehouse receipt is presentation to Access World. There is no possibility of "acceptance" unbeknown to Access World as in a unilateral contract, and it would be absurd to suggest that Access World entered into a series of (unilateral) contracts of which it was wholly unaware as a warehouse receipt passed from hand to hand (all without Access World's involvement). There can have been no intention to enter into legal relations at such time.

248. On Marex's analysis there would be an additional contract every time there was an endorsement – so you would get multiple parties each entitled to demand delivery – each obliged to pay rent. It is inherently improbable that this reflected Access World's intention, and Marex makes no attempt to grapple with the formidable difficulties that would arise – for example what would happen with contracts with Straits, with Marex, with Natixis and so on. Each would prima facie have a contractual right to delivery – or are prior contract(s) terminated and if so how? If not it would be a recipe for havoc – multiple concurrent contracts relating to the storage of the same metal with different parties.

249. Accordingly, and for the reasons I have identified, I am satisfied that no contract arises between a warehouse and the holder/endorsee of a warehouse receipt prior to presentation and attornment (and even then it would be necessary to consider the basis of any attornment as to whether any contract arose – though that does not arise for consideration on the present facts). In such circumstances neither Marex nor Natixis was in a contractual relationship with Access World by reason of the terms of the warehouse receipts in respect of PC4-PC5, and I so find.

250. All of the above is predicated on the basis that what is presented (or on Marex's case what is endorsed) is an "ORIGINAL Warehouse Receipt". Whilst Marex previously sought to argue to the contrary, including at paragraph 46(a) of its Written Closing, in Marex's oral closing submissions, and as already foreshadowed, Mr Choo-Choy rightly accepted that *"the better construction and therefore the correct construction is that 'originally' means objectively original*. In the present case the documents relied upon by Marex and Natixis were not objectively original – they were not genuine warehouse receipts issued by Access World, indeed they cannot even properly be called warehouse receipts as they were not issued by any

warehouse (still less issued by Access World) and they were not in fact receipts, and they did not contain any promise from anyone still less Access World. The position is therefore *a fortiori* in relation to the Purported Warehouse Receipts – there can be no possible contract in respect of those receipts.

G.6 The Warranty claim

G.6.1 General principles re: a "warranty" claim

251. Marex uses the word "warranty" not in the sense of a category/type of contractual term (i.e. in terms of conditions, warranties or intermediate/innominate terms) but rather either in the sense of a collateral contract or warranty – i.e. a legally binding contract in its own right that is said to be collateral to some other contract, or (even more recently) as a free-standing contract (as per its submissions addressed above in relation to the terms of the warehouse receipts themselves).

252. As to the former see Chitty on Contracts 33rd edn. at 13-033:

"Undertakings may be given that are collateral to another contract. They may be considered to be independent of that other contract either because they cannot fairly be regarded as having been incorporated therein, or because rules of evidence hinder their incorporation, or because the main contract is defective in some way or is subject to certain requirements of form or is made between parties other than those by or to whom the undertaking is given. Such undertakings are often referred to as collateral contracts, or "collateral warranties".

253. It is well established that in order to prove a collateral contract, there must be a promise made for consideration and with an intention to contract - see the *Wells (Mersham) Ltd v Buckland Sand and Silica Ltd* [1965] 2 .B. 170, 180 (Edmund Davies J) quoted by Hoffman J in *Law Debenture Trust Corporation v Ural Caspian Oil Corporation Ltd* [1993] 1 W.L.R. 138 at 142H.

254. It is far from clear what is said to be the consideration in the present case. It was said in opening that the consideration took two forms: first, Access World has an inherent commercial interest in offering its authentication services, in order to promote the use of its receipts and ultimately the use of its warehousing services. Secondly, Access World would have stood to gain through payment of its outstanding warehousing fees by any new holder of the receipts who would have to discharge any outstanding invoices in order to obtain delivery upon metal presentation. However, I do not consider that either amounts to consideration.

255. The first is somewhat nebulous in the context of a gratuitous service and I agree with Access World's submission that it would, applied logically to any case, result in every gratuitous service offered by a commercial party being converted into a contract (assuming an intention to contract) absent an appropriate disclaimer - the provision of a reference by a bank and the supply of audited financial statements to a shareholder by an auditor being but two examples. It might be thought that this is the territory, if anything, of *Hedley Byrne* type liability and the possibility of a duty of care in tort if the requirements for such a duty were met (which Access World say they are not in this case). The second is also, as Marex identifies, past consideration as the party that deposited the goods into the warehouse will be under a pre-existing contractual obligation to pay storage fees. At best it might be said that Marex is adding its promise to pay storage fees, but any such promise is not at the time of the authentication exercise or PMA letters, and would only arise (if at all) upon presentation and in the context of any contract (at that stage) and so would not assist Marex in the context of an alleged collateral contract.

256. As for an intention to enter into legal relations, Marex submits that Access World's statements should have contractual effect on the alleged basis that *"the statements were clearly expressed in the language of promise, were made in the context of substantial commercial transactions where the fundamental importance of being able to secure the right to delivery by means of presentation of the documents was plain for all to see, and, moreover, Access World has not sought to disclaim responsibility in relation to the December and January emails unlike, for example, its disclaimer in relation to the November verification exercise ."*

257. Such submissions run into similar difficulties to those on consideration, and are firmly in the territory (if anything) of tortious liability. As Access World rightly pointed out, if Marex was right, this would mean that almost every statement made by a commercial party in the context of a substantial transaction was made with an intention to have contractual effect with the result that almost every *"Hedley Byrne"* type case would be a breach of contract case. A similar argument was decisively rejected by the House of Lords in *Independent Broadcasting Corporation v EMI Electronics* (1980) 14 Build LR 1 at pages 22 to 23:

> "…If this is right, then it would seem to me to follow that any representation, whether made innocently, negligently or fraudulently, which is intended to be acted on and which is acted on creates a contractual relationship. I do not think that this can be right."

258. In *Heilbut Symons & Co. v. Buckleton* [1913] A.C. 30 the warranty was alleged to have been given at the time the contract as to shares was entered into. The plaintiff, Lord Moulton said at p. 47, must:

"show a warranty, i.e. a contract collateral to the main contract to take the shares, whereby the defendants in consideration of the plaintiff taking the shares, promised that the company itself was a rubber company."

259. He went on to say that collateral contracts:

"must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shown."

and said at p. 51:

"In the present case the statement was made in answer to an inquiry for information. There is nothing which can by any possibility be taken as evidence of an intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement."

Lord Haldane L.C. who agreed with these observations, said at p. 38:
"Considerable confusion has arisen from failure to keep in view the simple principle … enunciated by Holt C.J. that an affirmation can only be a warranty provided it appear on evidence to have been so intended."

Although in this case that alleged warranty was not given at the time of the making of the main contract and so was not collateral to that contract, it still is essential to justify the conclusion that a legally binding contract has been made, to show clearly that each party had an animus contrahendi . In the present case I can find nothing which can by any possibility be taken as evidence that Mr Robson when he wrote his letter on the October 20, or thereafter had any intention of entering into a contract or that Mr Mears when he gave the assurance had any intention of undertaking a contractual obligation.

I would therefore reject the claim for damages based on the alleged breach of warranty…"

260. Equally, and as addressed below, I do not consider that there is anything in either the Authentication emails or PMA letters which shows that Access World had any intention of entering into a contract with Marex or Natixis respectively. It is to such documents that I will now turn.

G.6.2 The Authentication Emails

261. Marex rely in respect of the thirteen PC4 receipts provided by Marex to Natixis and provided to Access World for authentication prior to the conclusion of PC4, upon the email to Mr Nutt (of Marex) dated 22 December 2016 (at 10.38) in which Mr Png (of Access World) said:

> "Based on the warehouse receipts that we have received from the courier today, we have authenticated to be issued by us. The 13 sets of warehouse receipts we have authenticated as below".

262. Each of the warehouse receipts is then listed by serial number. Each of these receipts provided, at the third bullet point as has already been quoted and addressed above, namely:

> "Delivery will be made upon presentation of the duly completed/endorsed ORIGINAL Warehouse Receipt in the office of the undersigned Access World entity"

263. As is now accepted by Marex, that statement is made (and only made) in relation to an objectively original – that is genuine – warehouse receipt. It is also a statement made in relation to presentation of such an original warehouse receipt (and as such verified as such at the time of presentation).

264. Marex alleged in its Written Closing that, *"by confirming the authenticity of each of the PC4 receipts by its email of 22 December 2016, AW not only confirmed that the receipts delivered by Marex to AW (which were the same receipts as were delivered by Marex to Natixis) were authentic and that each receipt was the "Original Warehouse Receipt" for the purposes of the warranty contained in the receipts, but also adopted the said warranty as its own warranty."*.

265. Marex makes similar submissions in respect of the single PC5 receipt. By the email to Mr Nutt dated 9 January 2017, Mr Png referred to that receipt and another receipt (which Marex intended to be part of a future transaction and which is not material to the issues that arise) and stated:

> "Based on the warehouse receipts that we have received from the courier today, we have authenticated to be issued by us. The 2 sets of warehouse receipts which we have authenticated as below."

266. Marex alleged in its Written Closing that *"by its email confirmation of 9 January 2017, AW not only confirmed that the PC5 receipt delivered to it by Marex (and delivered by Marex to Natixis) was authentic, and that that same document was the "Original Warehouse Receipt" for the purposes of the warranty contained in the document, but it again adopted that warranty as its own warranty."*

267. It is correct that by these emails Mr Png made a statement that the documents he had received from the courier had been authenticated by Access World to be issued by Access World. That is a statement about the document he examined, and on the date in question. It is not a statement about what document delivery would be made against. That was an "Original" i.e. genuine Warehouse Receipt as Marex now accepts, and the only promise in the third bullet point of an Access World warehouse receipt was in the context of a genuine warehouse receipt.

268. There is no consideration passing for any alleged contractual warranty by such statement; it is not the language of a contractual warranty, and there is no evidence of an intention, on Access World's part, to enter into legal relations in the form of a contract, with Marex. All the points identified above in relation to collateral warranties generally apply with equal force to the Authentication Emails.

269. Another insuperable difficulty with Marex's argument is that, as already identified, the mere possession of a (genuine) warehouse receipt does not give rise to a contract between Access World and the holder/endorsee – that being so it is difficult to see how an email commenting on the authenticity of a warehouse receipt could create a contract, and I am satisfied that it does not do so. As Access World put it in closing, the email is parasitic on the receipt, and cannot create rights that do not exist in the receipt.

270. Another difficulty for Marex is that the statement made by Access World was made in respect of each document that was before it at that time which was then handed back – it is inherently improbable that Access World would contractually promise to deliver (subsequently) against a document that was handed back, in circumstances where it might be difficult or impossible to establish whether it was the same document that was later presented, and in circumstances where the document (even if the same document) would need to be re-authenticated on presentation. In this regard it is irrelevant whether (on the evidence) they were one and the same document – the point is the inherent improbability of Access World making a contractual promise in relation to a document which it then handed back.

271. In the above circumstances Marex and Natixis have failed to establish that there was any collateral contract in, or arising out of, the Authentication Emails, and indeed I am satisfied and find that there was no such contract.

G.6.3 The PMA Letters

272. On 23 November 2016 Access World provided a letter in relation to 10 of the PC4 receipts. On 19 December 2016 Access World provided a letter in relation to the other PC4 receipts.

Thereafter on 3 January 2017 Access World provided a further letter, in relation to the PC5 receipt (and another receipt). Each of those letters was addressed to Natixis but provided to Marex. They provided:-

> "We hereby confirm that, upon receiving the original warehouse receipt duly endorsed, signed and dated by the order party, and subject to payment of our warehousing fees, we will release the goods to the endorsee without further written instructions from the order party.
>
> We hereby disclaim and shall not be responsible for any liability, losses, damages, costs or expenses that you or any third party may incur arising from the release of the goods to the endorsee without further written instructions from the order party."
> (emphasis added)

273. It is said that, by the first sentence, Access World assumed a contractual responsibility (as well as alleging a duty of care in tort) and re-iterated what it alleges was the warranty contained in the PC4 receipts, whilst emphasising that delivery would be made upon presentation of the duly endorsed receipt without further instructions from the order party (in this case, Straits).

274. Quite apart from the fact that no contractual warranty was made in the PC4 receipts, the basis on which the first sentence is said to be in the nature of an assumption of contractual responsibility in the form of a contractual warranty is unclear – the language is not contractual on its face and is consistent with a conventional bailment analysis, with presentation of an original warehouse receipt and following authentication an attornment to the presenting party (upon payment of outstanding fees). Additionally, any statement that is made in respect of an "original" warehouse receipt must, in this context, as in the case of the warehouse receipts in respect of PC1-PC5, be a reference to an objectively original – that is genuine – warehouse receipt. It is also a statement made in relation to presentation of such an original warehouse receipt (and as such verified as such at the time of presentation).

275. Secondly, it is addressed to Natixis and not to Marex, and as such it could not be an offer to Marex or form the basis of a contract with Marex in such a situation. Thirdly, it is not the language of an offer, and fourthly, in any event, so far as Natixis is concerned, the evidence of Mr Abel of Natixis, which I accept in relation to these letters, is that he did not even understand the purpose of these letters (which I find unsurprising given that their purpose is far from obvious) and in such circumstances it can hardly be suggested that he was regarding them as some sort of offer which he was accepting. Thus at paragraphs 89 to 91 of his witness statement he stated:-

"89. In advance of each transaction, Marex provided Natixis with a letter on Access World headed paper and signed by Access World authorised signatories which included details of the relevant warehouse receipt numbers for this particular transaction, and contained confirmations… From my perspective, I did not pay much attention to these letters. Indeed, the wording in the letters mirrored that of the warranty provided in Access World's warehouse receipts. I did not therefore really understand what their purpose was.

90. In its Defence, Marex has referred to these letters as "Release Confirmations". I am familiar with actual release confirmations issued by warehouses and these letters are not the same.

91. I placed little value on these letters in isolation. Natixis did not ask Marex to obtain them and their receipt was not a pre-condition for Natixis to enter into the transactions."

276. In the above circumstances Marex and Natixis have failed to establish that there was any collateral contract in, or arising out of, the PMA Letters, and indeed I am satisfied and find that there was no such contract.

G.6.4 Conclusions on any contractual claims and consequences thereof

277. For the reasons that I have identified above, neither Marex nor Natixis were party to any contract or collateral contract with Access World, and accordingly any claim against Access World based on contract whether for delivery up of metal or damages for breach of contract fails. In consequence, the associated defence of Marex against Natixis based on Natixis having a contractual claim against Access World also fails.

278. Equally, and as Marex and Natixis rightly accepted, in the absence of a contract, a case based on estoppel cannot arise - for otherwise, as was also confirmed by them, estoppel would be used as a sword and not as a shield which it was accepted is not permissible. In consequence, Marex's and Natixis' claims against Access World based on estoppel also fail (as therefore does the associated defence of Marex against Natixis based on Natixis having a claim against Access World).

279. There being no contract it is academic what Access World's obligations would have been had there been a contract. However I will identify briefly what my conclusions would have been:-

(1) Any contractual obligation would only have related to an original (that is genuine) warehouse receipt.

(2) Any contract could not have transferred title to the metal.

(3) There would have been no possibility of an obligation on Access World's part to delivery up the metal in such circumstances (and in any event delivery up would have been impossible at this time due to the rights of the true owners of the metal). For the avoidance of doubt by reason of the description of the metal in each warehouse receipt the metal is that actual metal, and delivery of similar metal with similar characteristics could not be substituted (nor, in fact, was that Marex's pleaded relief).

(4) Any claim in damages would (as Marex and Natixis accepted) have been subject to Access World's standard terms and conditions (the issues thereby raised are addressed when considering any tortious liability of Access World below).

G.7 Estoppel

280. After its abandonment of its estoppel case in relation to PC1-PC3 Marex's estoppel claim was limited to a claim based on the Authentication Emails in relation to PC4-PC5 by which Marex alleges that Access World represented to Marex (and by implication, to any known or intended transferee or endorsee of Marex, such as Natixis) that the fourteen PC4 and PC5 Warehouse Receipts that were delivered to it by Marex were authentic, and Marex contends that Access World is consequently estopped from denying the right of the endorsee of those receipts to delivery up of the metal upon their presentation.

281. The insurmountable difficulty for Marex (as Marex accepts if it is found, as I have found, that there was no contract with Access World) is that in the absence of a contract a case based on estoppel cannot arise - for otherwise an estoppel would be used as a sword and not as a shield which it was accepted is not permissible. In consequence, Marex and Natixis' claims against Access World based on estoppel fail (as therefore does the associated defence of Marex against Natixis based on Natixis having a claim against Access World), and I so find.

282. The reason why an estoppel claim fails in such circumstances is because an estoppel cannot be used to create rights where they do not otherwise exist, *"it is elementary that estoppels do not found causes of action"* (per Longmore LJ in *Berezovsky v Abramovich* [2011] 1 WLR 2290 at [71]).

283. There is another fundamental reason why a claim for delivery up of the metal based on estoppel would fail in any event and that is that estoppel is personal to the parties, does not establish title against the world, and cannot be a basis on which to order delivery of goods which belong to a third party. As Brett LJ observed in *Simm v Anglo-American Telegraph Co*

5 Q.B.D. 188, 206-207 (quoted with approval by Lord Mustill giving the judgment of the Privy Council in *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 at page 94A-C):

> "…it seems to me that an estoppel gives no title to that which is the subject-matter of estoppel. The estoppel assumes that the reality is contrary to that which the person is estopped from denying, and the estoppel has no effect at all upon the reality of the circumstances… I am speaking now of the estoppels which arise upon transactions in business or in daily life, and, as it seems to me, these estoppels have no effect on the reality of the transaction. It may be that under some circumstances an estoppel will prevent a person from dealing in a particular manner with goods; for instance, if a person is estopped from denying that he has made a contract to deliver goods, and if the goods are still in his possession, in a suit to enforce performance of the alleged contract he may be obliged to hand over the goods, although, in fact, there was no contract, and he may be liable to act as if there had been a contract, and to fulfil his supposed obligation. But suppose that although a person is estopped from denying that he has made a contract to deliver goods, he has parted with the goods and has sold them to somebody else: it seems to me that although he may be estopped as against the person claiming delivery under the supposed contract, he cannot be compelled to deliver the goods, which, there being no contract, have legally passed to somebody else: owing to the estoppel he cannot deny that a contract was entered into, but he cannot fulfil it by delivering another person's goods; and therefore the only remedy against him is that he shall pay damages for not delivering the goods. In a similar manner a person may be estopped from denying that certain goods belong to another; he may be compelled by a suit in the nature of an action of trover to deliver them up, if he has them in his possession and under his control; but if the goods, in respect of which he has estopped himself, really belong to somebody else, it seems impossible to suppose that by any process of law he can be compelled to deliver over another's goods to the person in whose favour the estoppel exists against him: that person is entitled to maintain a suit in the nature of an action of trover against him; but that person cannot recover the goods, because no property has really passed to him, he can recover only damages. In my view estoppel has no effect upon the real nature of the transaction: it only creates a cause of action between the person in whose favour the estoppel exists and the person who is estopped."
>
> (emphasis added)

284. An estoppel could never give rise to the relief that Marex seeks given that the goods are owned by third parties and the warehouse receipts have been cancelled, with most of the metal having been delivered up and the remaining metal has been warranted on the LME. Even if any metal has not been delivered, Access World is under an obligation to deliver it to the lawful owner of the metal on request.

285. It is also to be borne in mind that even if an estoppel had been established, that would simply allow the court to do that which is equitable in all the circumstances (see *Roebuck v Mungovin* [1994] 2 AC 224 at 235) – it would not have been equitable to require Access World

to deliver up metal that belongs to someone else, and is also no longer in its possession. I would add that it is also difficult to see why Marex would be entitled to damages in such a situation (even assuming there was a contract which I have found there was not) as Access World would not obviously be in breach of contract in circumstances where Access World would say – I cannot deliver the goods to you because they are not your goods.

286. In such circumstances it would unduly lengthen this judgment if I were to consider further issues that would have arisen as to the requirements for an estoppel by representation had the above insurmountable difficulties not existed. The requirements for an estoppel by representation were summarised by Carr J in *Spliethoff's Bevraschingskantoor BV v. Bank of China Limited* [2016] 1 All ER (Comm) 1034 at [156]:

> "The legal requirements of an estoppel by representation of fact are well known: (i) a representation which is in law deemed a representation of fact, (ii) that the precise representation was in fact made, (iii) that the later position taken contradicts in substance the original representation, (iv) that the original representation was of a nature to induce and was made with the intention and result of inducing the party raising the estoppel to alter his position on the faith of it and to his detriment, and (v) that the original representation was made by the party sought to be estopped and was made to the party setting up the estoppels (see for example Spencer Bower, The Law Relating to Estoppel by Representation (4th edn, 2004) at paragraph 1.2.3). The representation must be clear or unequivocal, or precise and unambiguous (see Chitty on Contracts (31st edn) at paragraph 3-090)."

287. One of those requirements, therefore, is reliance on the representation and issues would have arisen in relation to reliance – in particular in relation to Natixis given that the Authentication Emails were neither addressed to Natixis nor provided to Natixis, and Mr Abel's evidence (at paragraphs 47 and 71 of his statement) was that he assumed Access World would have given what he understood was their standard response in relation to authentication (i.e. that any statement made was for information only without engagement or liability) and, although he was mistaken in this regard in relation to PC4 and PC5, given his understanding he cannot have relied, or reasonably have relied, upon any representation. It would have been no answer for Natixis to say (based on Mr Abel's written and oral evidence) that he assumed that Access World had confirmed the authenticity of the receipts, for though this was his evidence it was also his evidence that he assumed that such confirmation would have been accompanied by their standard response – so Natixis was not in a position to rely on any such representation. The point is, however, academic as the estoppel claim fails in any event by reason of the insurmountable hurdles I have identified.

288. In the above circumstances Marex and Natixis' claims against Access World based on estoppel fail, as do Marex's defence to Natixis' claim based on the existence of such a claim by Natixis against Access World.

H. Negligence and Negligent Misstatement

H.1 Applicable Principles

289. There was a large measure of common ground between Marex and Access World as to the applicable principles. Where they differed was their application to the particular facts of this case, and whether Access World did or did not owe a duty of care not to make any material misstatement in its verification (PC1-PC3) or authentication (PC4-PC5) exercises or (more accurately says Access World) whether Access World assumed responsibility for protecting Marex from the type of loss it suffered – i.e. (to adapt the words of Lord Bridge in *Caparo v Dickman* [1990] 2 A.C. 605, 627) was Access World under a duty to avoid or prevent that damage?

290. There is no general duty of care not to inflict pure economic loss on others. English law recognises, however, that a duty of care in respect of economic loss will be imposed in certain circumstances. The principles that apply in relation to the imposition of a duty of care in tort have been subject to consideration by the Supreme Court in two recent cases - *NRAM Ltd (formerly NRAM plc) v. Steel* [2018] UKSC 13, [2018] 1 WLR 1190 ("*NRAM*") and *Playboy Club London Ltd v. Banca Nazionale del Lavoro SpA* [2018] UKSC 43, [2018] 1 WLR 4041 ("*Playboy*").

291. The starting point (and Marex says the end point given the exercise being undertaken, Access World's expertise, and Access World's knowledge as to why authentication was being sought by Marex) remains *Hedley Byrne & Co Ltd. v. Heller & Partners Ltd* [1964] AC 465 ("*Hedley Byrne*"). There the House of Lords held that pure economic loss may be recovered in the tort of negligence, where the existence of a "special relationship" between the claimant and defendant made this appropriate. In that case the reasonable reliance of Hedley Byrne on the reference, combined with Heller & Partners' appreciation of the fact that they would reasonably rely on it, gave rise to a direct relationship between them involving a duty of care.

292. As Lord Sumption said in *Playboy* at [6]:

> "6. The decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* was a landmark in the development of the law of tort. Contrary to the ordinary rule as it had previously been understood, it allowed the recovery of a purely economic loss in negligence where the existence of a special relationship between claimant and defendant made this appropriate. The facts were that Hedley Byrne asked its bank, National Provincial Bank, to obtain a credit reference for a company wishing to place advertising contracts through it. The company's bank, Heller & Partners, supplied the reference to National Provincial. The Appellate Committee inferred as a matter of fact that Heller & Partners must have appreciated that National Provincial was not acting for its own account but wanted the reference for a client intending to do business with Heller's client, even though they did not know who that client was: see, in particular, pp 482 (Lord Reid), 493-494 (Lord Morris of Borth-y-Gest), 530 (Lord Devlin). The ratio of the decision was that the reasonable reliance of Hedley Byrne on the reference, combined with Heller & Partners' appreciation of the fact that they would reasonably rely on it, gave rise to a direct relationship between them involving a duty of care."

293. As Lord Goff stated in *Henderson v Merrett Syndicates* [1995] 2 A.C. 145, 178 (*"Henderson"*), the governing principles in relation to *Hedley Byrne* type liability are perhaps now perceived to be most clearly stated in the speeches of Lord Morris of Borth-y-Gest (with whom Lord Hodson agreed) and of Lord Devlin (at 526 and 528-529). In this regard Lord Morris stated at pp 502-503:

> "I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

294. Lord Devlin also made clear that the fact that a service was being rendered gratuitously did not prevent a duty arising although he recognised that the absence of consideration was not irrelevant, stating at 526 and 528-529:

> "The respondents in this case cannot deny that they were performing a service. Their sheet anchor is that they were performing it gratuitously and therefore no liability for its performance can arise. My Lords, in my opinion this is not the law. A promise given without consideration to perform a service cannot be enforced as a contract by the promisee;

but if the service is in fact performed and done negligently, the promisee can recover in an action in tort.

…

I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Nocton v. Lord Ashburton* [1914] A.C. 932 , 972 are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. Where there is an express undertaking, an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form. The service that a bank performs in giving a reference is not done simply out of a desire to assist commerce. It would discourage the customers of the bank if their deals fell through because the bank had refused to testify to their credit when it was good."

295. The facts of the *Playboy* case itself, and the decision of the Supreme Court, are informative in illustrating the operation of the *Hedley Byrne* principle and when there will be, and will not be, an assumption of responsibility and duty of care owed. In *Playboy* the first claimant, which operated a casino, wished to obtain a financial reference from the defendant bank in respect of a customer. So as to preserve the customer's confidentiality, the request for the reference was made on the first claimant's behalf by the third claimant. Without knowing the purpose for which the reference was required, the bank provided a reference, addressed to the third claimant, which confirmed that the customer was financially healthy and capable of meeting his business commitments. In reality the customer was in the process of opening an account with the bank in which subsequently there were never any funds. The reference was reviewed by the second claimant, the owner of both the first and third claimants, and a cheque cashing facility was approved for the customer. Subsequently the first claimant made losses as a result of accepting counterfeit cheques from the customer. The claimants sought damages in negligence from the bank.

296. HHJ Mackie QC (sitting as a Judge of the High Court) allowed the claim, holding, amongst other matters, that the bank owed a duty of care to the first claimant in giving the reference because there had been no attempt to restrict liability to the enquirer. The Court of

Appeal allowed the bank's appeal, concluding that no duty was owed by the bank to the first claimant and that the only duty was owed to the third claimant to whom the reference was addressed. The Supreme Court dismissed the appeal. Its reasoning is accurately summarised in the headnote:

> "recovery of purely economic loss in negligence was available where the relationship between the claimant and the defendant made it appropriate; that where there was reasonable reliance by the claimant on the particular representation combined with appreciation by the defendant of that reliance, a direct relationship arose between them involving a duty of care; but that it was the responsibility, voluntarily accepted by the defendant, towards those who acted on the representation, based either on a general relationship, or specifically in relation to a particular transaction, which created such a duty; that it was fundamental that the defendant assumed responsibility to an identifiable person or group of persons, but not to an indeterminate group or to the world at large; that the foundation of the duty was proximity so that the defendant, in giving the particular information or advice, was fully aware of the nature of the transaction in question and knew that it would be communicated to the claimant and acted on by him; that the claimant would reasonably suppose that he was entitled to rely on it for the purpose for which he had sought it; that the defendant's knowledge of the transaction was potentially relevant for the purpose, in particular, of identifying those to whom he assumed responsibility; that ordinarily where a statement was relied on by B to whom A passed it on, the representor owed no duty to B unless he knew that it was likely to be communicated to and relied on by B, and it had to be part of the statement's known purpose that it should be communicated to and relied on by B if the representor were to be taken to assume responsibility to B; that the present case was no different because the first claimant was the undisclosed principal of the third claimant; that the relationship of the bank and the first claimant was not "equivalent to contract" under the rule that an undisclosed principal might declare itself and assume the benefit of the contract and it bore no correlation to the concepts of proximity and voluntary assumption of responsibility which were critical features of the duty of care; that the law relating to undisclosed principals was in the main entirely inapposite to the law of tort; and that, accordingly, since there was no evidence that the bank had known that its reference would be communicated to or relied on by anyone other than the third claimant or had had reason to suppose that the third claimant was acting for someone else, and since it had known nothing of the first claimant so that it was plain that it had not voluntarily assumed any responsibility to it, the bank had not owed the duty of care."

297. The concept of assumption of responsibility provides its own explanation why there is no problem in cases of this kind about liability for pure economic loss. For if a person assumes responsibility to another in respect of the provision of certain services, there is no reason why he should not be liable in damages in respect of economic loss which flows from the negligent performance of those services. It follows that, once the case is identified as falling within the *Hedley Byrne* principle, there should be no need to embark upon any further enquiry whether it is "*fair, just and reasonable*" to impose liability for economic loss - see *Henderson,* supra, per Lord Goff at p 181C-D.

298. The defendant's voluntary assumption of responsibility remains the foundation of this area of law, as the Supreme Court recently confirmed after a full review of later authorities in *NRAM, s*upra, at [18]-[24] (Lord Wilson JSC). As Lord Sumption recognised in *Playboy* at [7], it is fundamental to this way of analysing the duty that the defendant is assuming a responsibility to an identifiable (though not necessarily identified) person or group of persons, and not to the world at large or to a wholly indeterminate group.

299. The scope of liability is limited by the twin concepts of (i) the reasonableness of reliance of the claimant on the statement; and (ii) the reasonable foreseeability of such reliance by the claimant. These two inquiries are related but distinct: see e.g. *NRAM* at [19] per Lord Wilson:

> "19. What is noteworthy for present purposes is the emphasis given in the decision in the *Hedley Byrne* case to the need for the representee reasonably to have relied on the representation and for the representor reasonably to have foreseen that he would do so. This is expressly stressed in the speech of Lord Hodson at p 514. In fact it lies at the heart of the whole decision: in the light of the disclaimer, how could it have been reasonable for the appellant to rely on the representation? If it is not reasonable for a representee to have relied on a representation and for the representor to have foreseen that he would do so, it is difficult to imagine that the latter will have assumed responsibility for it. If it is not reasonable for a representee to have relied on a representation, it may often follow that it is not reasonable for the representor to have foreseen that he would do so. But the two inquiries remain distinct."

300. In relation to foreseeability, and as Lord Sumption identified in *Playboy* at [8]:

> "8. In *Caparo Industries plc v Dickman* [1990] 2 AC 605, the Appellate Committee held that foreseeability, although it was a necessary condition for liability, was not necessarily a sufficient one. The foundation of the duty is proximity, which may require more than the mere foreseeability of reliance. The problem before the Appellate Committee was to identify the outer limits of the class of persons whose reliance on a statement could properly be said to give rise to a sufficiently proximate relationship. They found the relevant limiting factors in the defendants' knowledge of (i) the person known to be likely to rely on the statement, and (ii) the transaction in respect of which he was known to be likely to rely on. After reviewing the authorities supporting a duty of care for negligent statements, both before and after *Hedley Byrne*, Lord Bridge (with whom Lord Roskill, Lord Ackner and Lord Oliver agreed), summarised the position as follows at pp 620-621:
>
> "The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these

circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it. So also the plaintiff, subject again to the effect of any disclaimer, would in that situation reasonably suppose that he was entitled to rely on the advice or information communicated to him for the very purpose for which he required it. The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate. To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo CJ to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class:' see *Ultramares Corpn v Touche* (1931) 174 N.E. 441 , 444; it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement. Hence, looking only at the circumstances of these decided cases where a duty of care in respect of negligent statements has been held to exist, I should expect to find that the 'limit or control mechanism … imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence' rested in the necessity to prove, in this category of the tort of negligence, as an essential ingredient of the 'proximity' between the plaintiff and the defendant, <u>that the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind (eg in a prospectus inviting investment) and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter upon that transaction or upon a transaction of that kind</u>." (emphasis added)

301. As identified by Lord Sumption in *Playboy* at [9], in his concurring judgment in *Caparo*, Lord Oliver at page 638, identified the circumstances in which a duty of care "may typically be held to exist" as:

> "(1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment."

302. In *Playboy* at [10], Lord Sumption identified that the defendant's knowledge of the transaction in respect of which the statement is made is potentially relevant for three purposes: (i) to identify some specific person or group of persons to whom he can be said to assume

responsibility; (ii) to demonstrate that the claimant's reliance on the statement will be financially significant; and (iii) to limit the degree of responsibility which the defendant is taken to assume if no financial limit is expressly mentioned. As in *Playboy,* the present case is concerned, amongst other matters, with (i).

303. In this regard Lord Sumption continued, as follows at [10]-[11]:

> "We are presently concerned with its significance for the first of these purposes, which will vary according to what is known about the person or group expected to rely on the statement. Thus in *Hedley Byrne* itself, the defendant understood that the statement would be relied on by the unidentified, but readily identifiable, client on whose behalf National Provincial Bank was known to be making the inquiry. It was enough that the proposed transaction was said to be an advertising contract for £8,000 to £9,000. It would probably have been enough even if the transaction had not been identified as an advertising contract but simply as some kind of business transaction. For Lord Morris, for example, it was enough that the person contemplated was "some one who was contemplating doing business with Easipower Ltd": see pp 493-494. In *Caparo* on the other hand, where the persons said to have been entitled to rely on the defendant's audit report were any potential bidder for the auditor's client, the absence of a specific transaction in the defendant's contemplation assumed decisive significance.
>
> 11. Mr Salzedo QC, who appeared for the Playboy Club, accepted that there was no evidence that BNL knew that its reference would be communicated to or relied on by anyone other than Burlington. He also accepted that in the ordinary course where a statement is relied upon by B to whom A has passed it on, the representor owes no duty to B unless he knew that the statement was likely to be communicated to B. That concession was plainly justified. I would go further and say that the representor must not only know that the statement is likely to be communicated to and relied upon by B. It must also be part of the statement's known purpose that it should be communicated and relied upon by B, if the representor is to be taken to assume responsibility to B. Mr Salzedo's submission was that the present case was different because the Club was Burlington's undisclosed principal. He submitted that the relationship between BNL and the Club was, in Lord Devlin's phrase, "equivalent to contract" because in contract the Club would have been entitled to declare itself and assume the benefit of the contract. This is an ingenious argument, but in my opinion it is fallacious."
> (emphasis added)

I will need to return to the passage highlighted above as it is of potential relevance to the claims made against Access World by Marex and Natixis, in particular that made by Natixis.

304. In relation to the reasonableness of reliance or dependence Lord Morris' statement in *Hedley Byrne* at pp 502-503, which has already been quoted above, bears repetition in this context:

"I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise. "

305. As the editors of Clerk & Lindsell (22nd edn. 2017) state at [8-127]:

"…it remains the case that a claimant is much more likely to be able to show that he is entitled to depend on a service or statement where the work is undertaken by a person who is exercising a special skill in a business context. This is particularly the case when the information being given relates to matters which are within the exclusive preserve of the defendant. Thus in *Smith v Eric S Bush* [[1990] 1 A.C. 831 at 865] Lord Griffiths commented: "the valuer is discharging the duties of a professional man… The essence of the case against him is that he as a professional man realised that the purchaser was relying on him to exercise proper skill and judgment in his profession"

306. The test of whether a defendant has assumed responsibility is objective and the touchstone of liability is not the defendant's state of mind, and as a result the primary focus must be on things said or done by the defendant or on his behalf in dealings with the claimant. Thus as Lord Steyn said in *Williams v Natural Life* [1998] 1 W.L.R. 830 at 835E-G:

"… the approach to be adopted as to what may in law amount to an assumption of risk. This point was elucidated in *Henderson* by Lord Goff of Chieveley. He observed, at p. 181B-C:

"… especially in a context concerned with a liability which may arise under a contract or in a situation 'equivalent to contract,' it must be expected that an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the plaintiff:"

"The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff."

307. As to the use of the expression "assumption of responsibility" itself, this has, on occasions, been described as somewhat artificial, given that in many cases the person is treated as having assumed responsibility by reason of the relationship, rather than having consciously assumed

a responsibility. The Supreme Court in the *NRAM* and *Playboy* cases have, however, reaffirmed the concept of an assumption of responsibility as the foundation of liability in negligence in *Hedley Byrne* type situations. As Patten LJ said in *P&P Property Ltd v Owen White & Catlin LLP* [2019] Ch. 273 at [76] (by reference to Lord Wilson's judgment in *NRAM*):

> "76. As Lord Wilson JSC explains in his judgment, the requirement that there should be an assumption of responsibility is to some extent a legal construct in the sense that in many cases the defendant solicitor or other professional will be treated as having assumed responsibility to the third party for his actions by virtue of the proximity between them and the obvious effect which any failure on his part would have on the third party. There will rarely be an actual, conscious and voluntary assumption of responsibility not least because the solicitor or other professional will have a client to whom he is contractually bound. But, on the basis that the court is deciding whether to treat the defendant as having assumed legal responsibility to the third party, non-client, for his actions, it will be necessary to balance the foreseeability that the third party will rely on the professional to perform their task in a competent manner against any other factors which would make such an imposition of liability unreasonable or unfair."

308. As was common ground between the parties, cases subsequent to *Hedley Byrne* have established that other tests in addition to the principle of assumption of responsibility underlying the *Hedley Byrne* case, may also be used in deciding whether a defendant sued as causing pure economic loss to a claimant owed a duty of care in tort. In all, three tests have been identified. They were summarised by Lord Bingham of Cornhill in *Customs and Excise Comrs v Barclays Bank plc* [2007] 1 AC 181 at [4]:

> "The first is whether the defendant assumed responsibility for what he said and did vis-à-vis the claimant, or is to be treated by the law as having done so. The second is commonly known as the threefold test [in *Caparo Industries plc v Dickman* [1990] 2 AC 605]: whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant (what Kirby J in Pe*rre v Apand Pty Ltd* (1999) 198 CLR 180 , para 259, succinctly labelled "policy"). Third is the incremental test, based on the observation of Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 , 481, approved by Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 2 AC 605 , 618, that:
>
> " "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed"."

309. Lord Bingham continued at [8]:

"… the outcomes (or majority outcomes) of the leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole."

310. As identified by Sir Terence Etherton MR, Longmore and Newey LJJ in *Property Alliance Group v Royal Bank of Scotland plc* [2018] 1WLR 3529 at [62] there is overlap between parts of the threefold test and the assumption of responsibility test and they are complimentary and should not be considered in isolation from each other:

"62. It is clear that parts of the threefold test and the assumption of responsibility test overlap: *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111, at paragraph 62 (Arden LJ). The different tests usually lead to the same answer and can be used as cross-checks on each other: *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2016] EWCA Civ 457, [2016] 1 WLR 3169, at paragraph 17. They are complementary and should not be considered in isolation from each other: *CGL Group Ltd v Royal Bank of Scotland plc* [2017] EWCA Civ 1073, [2017] CTLC 97; cf *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 ."

311. The court then commented upon the *Hedley Byrne* duty of care at [63]-[64] emphasising that it is fact sensitive:-

"63. The *Hedley Byrne* common law duty of care not to misstate is, then, merely one example of a more general principle that a defendant's assumption of responsibility may give rise to a duty of care – giving rise to pure economic loss - either in relation to a particular transaction or a continuing relationship, the existence of the duty and its extent being dependent on the particular facts.

64. The *Hedley Byrne* duty has to be seen in the context of the general principle of tort that an omission does not usually give rise to a liability in tort. All other things being equal, there is no duty to speak. If, however, a defendant does speak, they fall under a duty not to be dishonest or fraudulent in what they say: *Derry v Peek* (1889) 14 App Cas 337. In certain factual circumstances, such as those outlined in the speeches in *Hedley Byrne*, the position of the defendant in relation to the claimant, combined with the defendant's conduct or omissions, may give rise to an assumption of responsibility and the imposition of a tortious duty. At its most basic, this is a duty not carelessly to make a misstatement. What amounts to a misstatement in this context will depend upon the factual circumstances of the relationship and identification of the matter for which the defendant has assumed responsibility. It is, therefore, an elastic duty that is factually sensitive. The duty is premised on the voluntary proffering of representations by the defendant, which may require further elucidation or the correction of misleading impressions on the claimant."

H.2 The question of assumption of responsibility for the type of loss suffered

312. Access World refers to the fact that when determining whether a duty of care is owed to a party whose loss is purely economic, the court has regard, amongst other matters, to the damage suffered by the claimant referring to what was said by Lord Bridge in *Caparo* at p 627C-F:

> "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless. 'The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it:' see *Sutherland Shire Council v. Heyman*, 60 A.L.R. 1 , 48, per Brennan J. Assuming for the purpose of the argument that the relationship between the auditor of a company and individual shareholders is of sufficient proximity to give rise to a duty of care, I do not understand how the scope of that duty can possibly extend beyond the protection of any individual shareholder from losses in the value of the shares which he holds. As a purchaser of additional shares in reliance on the auditor's report, he stands in no different position from any other investing member of the public to whom the auditor owes no duty."
> (emphasis added)

313. In this context, Access World submits that, in the present case, the appropriate question is not whether Access World assumed responsibility to Marex to take reasonable care in carrying out the inspections and authentications of the warehouse receipts. The correct question is whether Access World assumed responsibility for protecting Marex from the type of loss it suffered. To use the words of Lord Bridge in *Caparo v Dickman,* was Access World under a duty to avoid or prevent that damage? It is submitted that if this question is posed it leads to the conclusion that there is no (actionable) duty of care. Access World footnotes the word "actionable" in its Written Closing with the submission:

> "Even if Access World owed a duty to take reasonable care in authenticating the warehouse receipts, this duty would not be actionable because, assuming breach, it was not Access World's breach which led to Marex's loss but CHH's failure to pass title. Two points flow from this analysis: first, as the duty is not actionable it is not really a duty at all and secondly, it demonstrates that the question of duty is inextricably bound up with the issue of causation."

314. In this regard Access World also relies on what was said by Cooke J in *Barclays Bank v Grant Thornton* [2015] 1 CLC 180 at [52]:

> "52. It is accepted by Grant Thornton that an auditor may owe duties to third parties other than the members in general meeting, in certain circumstances, as other authorities make clear. In *MAN Nutzfahrzeuge AG v Freightliner Ltd [*2007] EWCA Civ 910, the Court of Appeal considered the question of the purpose for which any statement was made or report communicated. Chadwick LJ, with whom the other Lords Justices agreed, stated that there was no question of distinguishing between "the defendant's purpose" and "the claimant's purpose". The purpose for which a statement was made or communicated was to be judged objectively and the question was whether a reasonable person in the position of the claimant would conclude from the circumstances in which the statement was made or communicated to him that the purposes for which the statement was made or communicated to him included protecting him from a **type of loss** which he suffered in reliance on the statement (paragraphs 35 and 37)."
>
> (emphasis added)

315. Access World also places reliance upon what was said by Lord Oliver in *Caparo* at page 638 that has already been quoted above as to the circumstances in which a duty of care "may typically be held to exist" in particular item (3) thereof it is known either actually or inferentially, that the advice communicated is likely to be acted upon by the advisee for the purpose that has been made known, "without independent inquiry".

316. For its part Marex accepts that it is not sufficient in any particular case to simply define the scope of duty by reference to the activity that is to be performed and then go on from there to say, *"Well, if there is factual causation between a breach of the duty and the loss damages naturally flow*" (i.e. 'but for' causation) as it is also necessary that the kind or type of loss that has been suffered is within the scope of the duty (or viewing matters from a causation perspective whether the loss is legally caused by the breach).

317. However Marex's short answer is that the kind of loss suffered is within the scope of duty and the loss suffered has been legally caused by the breach. Access World knew that Marex was purchasing the metal, and was relying on Access World to use its specialist skills to validate the warehouse receipts as genuine and that, on the basis of such authentication, Marex would purchase the metal, and in the normal course of events the lawful holder of a genuine warehouse receipt would have a right to possession of the goods (and Marex adds ultimately title, as those two things are inextricably linked) and possession of the original warehouse receipt would allow it to obtain delivery up of the goods from the Access World, either by itself or by its endorsee. Whereas, as Access World also knew, if the warehouse receipts were not authentic Marex would not be able to get delivery up of the goods and would suffer loss represented by the price it had paid, or equally if its endorsee/purchaser could not obtain

delivery up by reason of the facts that the warehouse receipts were not authentic, Marex would be liable to its purchaser based on the purchase price under its sale contract.

318. Access World submits, however, that the relevant loss resulted from the failure of Come Harvest to give unencumbered title to Marex as a result of which Marex could not pass unencumbered title to Natixis and that it is not within the scope of Access World's duty to protect Marx from loss from Marex not having title, because Access World did not have any information, knowledge or understanding about title.

319. I consider that Access World's submission is artificial, and wrongly focusses on title rather than the role of a genuine warehouse receipt, and what the purpose of Access World authenticating a warehouse receipt is. It is presentation of a genuine warehouse receipt to Access World, not who has title, that allows delivery up of the goods from the warehouse by Access World and indeed if Marex/their endorsee had held the genuine warehouse receipts Access World would have delivered up the metal to Marex/their endorsee – without regard to who had title. Access World itself points out, it does not, in the ordinary course of events, know who has title – Access World had no information, knowledge or understanding about title – and it is not title that determines whether Access World will give delivery up, or will attorn to a party – rather it is who presents a genuine warehouse receipt to them. It makes no enquiry about title, and title is not a matter that it has regard to.

320. Accordingly, title does not come into matters at the time of presentation, and indeed will never come into it unless Access World faces simultaneous competing claims – and even then it would not decide matters based on title but would no doubt (in English terms) interplead in such a situation. Of course, if a warehouse receipt is genuine, the likelihood is that whoever possesses the warehouse receipt will also have title for, as Marex point out, the two usually go hand-in-hand – so when Access World authentics a warehouse receipt the recipient of such authentication will assume that it is getting title. Nevertheless, it is possession of the genuine warehouse receipt, not title, that is the basis on which Access Word will deliver up the metal. If a false warehouse receipt is presented Access World will not give delivery up – in such a situation (and as Access World would know) Marex would suffer loss as it will not be entitled to delivery up of the metal, and if it has on-sold the metal it will be liable to its purchaser for the failure to provide a genuine warehouse receipt which would allow its purchaser to get delivery up in turn.

321. In such circumstances I am satisfied, and find, that the kind of loss suffered by Marex would be within the scope of any duty of Access World (assuming a duty existed) when

performing authenticating services and such loss would be legally caused by any breach of duty (subject to any arguments on intervening cause and the like addressed in due course below). Access World knew that Marex was purchasing the metal, and was relying on Access World to validate the warehouse receipts as genuine as a result of which it would purchase the metal, and in the normal course of events the lawful holder of a genuine warehouse receipt would have a right to possession of the goods (and title) and possession of the original warehouse receipt would allow it to obtain delivery up of the goods from the warehouse, either by itself or by its endorsee, whereas if the warehouse receipts were not authentic it would not be able to get delivery of the goods and would suffer loss represented by the price it had paid, or equally if its endorsee/purchaser could not obtain delivery up by reason of the facts that the warehouse receipts were not authentic, Marex would be liable to its purchaser based on the purchase price under the sale contract.

H.3 Did Access World assume a responsibility/owe a duty to Marex?

H.3.1 PC4 and PC5 receipts - "authentication"

322. PC1-3 were not authenticated by Access World but photocopies were the subject of "verification". PC4 and 5 were authenticated by Access World. I will first address the position in relation to the PC4 and PC5 receipts and their authentication. As already identified in the chronology of events, the parties had, alongside PC1-3, been discussing a larger transaction involving 13 warehouse receipts issued by AW Malaysia which became PC4. On 20 December Mr Siu of CHH delivered 13 purported original warehouse receipts to Marex (PC4). Marex sent the receipts to Access World Singapore by DHL courier for authentication (Marex had also emailed copies of the PMA Letters and these receipts to Natixis on 21 December and 22 December respectively).

323. Mr Png carried out the authentication on 22 December and sent an email to Mr Nutt at 1038 London time stating:

> *"Based on the warehouse receipts that we have received from the courier today, we have authenticated to be issued by us.*
>
> *The 13 sets of warehouse receipts which we have authenticated as below ..." [The 13 PC4 receipts are then listed].*

324. It is common ground (List of Issues 5.2) that the 22 December authentication email contains a representation by Access World that the original warehouse receipts which had been delivered to it by courier on 22 December were authentic warehouse receipts issued by Access

World, whereas these receipts (which Marex delivered to Natixis under PC4 on 28 December) were in fact forgeries. The 22 December email was not forwarded or otherwise expressly communicated to Natixis.

325. At the end of the email chain of which the 22 December email was part it was provided, *"Access World's Standard Terms and Conditions are applicable to all offers made by Access World, all agreements concluded between Access World and a customer, and any other work carried out by Access World for the customer. A copy of the Standard Terms and Conditions will be sent to you upon request or can be found on our website at www.accessworld.com"*

326. I address in due course below in Section K the issue as to whether those Terms and Conditions apply in relation to any claim in negligence against Access World. Whilst those terms circumscribe what loss is recoverable and limit Access World's monetary liability, it is not suggested that they contain any disclaimer that would prevent there being any assumption of responsibility or any duty arising or that would prevent there being reasonable reliance on the authentication (in contrast to the disclaimer that accompanied the "verification" in respect of PC1-3 (as addressed below)). Accordingly, it is not necessary to address those Terms and Conditions at this point.

327. In relation to PC5 Marex offered Natixis three new parcels in late 2016/early 2017, with the warehouse receipts sent under Mr Nutt's 4 January email. One of the parcels was 269.674mt in AW Korea represented by receipt numbered AWSG/KR/0028991. Ms Ferrari emailed a copy of the PC5 receipt, PMA letter and COAs to Natixis on 5 January.

328. Natixis had almost reached the limit of its existing approvals, so Mr Abel explained that they were preparing an application for a new approval and until that approval was obtained, no new deal would be possible. However, there was credit left on the existing approvals, so if parcels falling within the scope of those approvals could be found, the remaining credit could be used up. The 269.674mt in AW Korea fell within the existing approval. On 6 January 2017 Ms Ferrari asked Natixis to move forward with this parcel.

329. Marex had received the original forged PC5 receipt and a second receipt for 585mt (the PC7 Receipt) via courier on Thursday 5 January, and Marex sent the receipts to Access World. On 9 January Mr Png sent Mr Nutt an authentication email in relation to the PC5 receipt and the PC7 Receipt in the same terms as his 22 December email (and there is the same reference to Access World's Standard Terms and Conditions at the end of the email chain).

330. It is common ground that the 9 January email contains a representation by Access World that the original warehouse receipts delivered to it by courier on 9 January were authentic warehouse receipts issued by Access World (List of Issues 5.2) whereas the PC5 receipt which was delivered to Natixis was a forgery (List of Issues 6.3). As with the 22 December email the 9 January email was not forwarded or otherwise expressly communicated to Natixis (List of Issues 5.4). The evidence of Mr Abel (in his statement and when cross-examined) was that so far as he could recall, no one told him whether Marex planned to have the PC5 receipt authenticated by Access World, but as this was a repeat transaction he assumed that Marex would have the receipt authenticated and proceeded with the transactions with Marex in that belief. PC5 was concluded on 10 January, when Natixis placed its hedge, Marex delivered the fake PC5 receipt to Natixis and Natixis paid the purchase price to Marex.

331. In relation to PC4-5, the authentication by Access World, in the form of a representation by Access World to Marex that the receipts were authentic warehouse receipts issued by Access World is, I am satisfied, a classic circumstance in which a *Hedley Byrne* type duty arises on the part of Access World which is owed to Marex, based on an assumption of responsibility arisen on the established principles that I have identified above, and I so find.

332. Indeed the very words of Lord Morris in *Hedley Byrne* at pp 502-503 (as quoted with approval by Lord Goff in *Henderson v Merrett Syndicates*, supra at p. 178) are apt to cover the position of Access World when undertaking the process of authenticating a warehouse receipt for Marex:

> "I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

333. In this regard, in the present case:-

(1) Access World held itself out as possessed of a special skill, namely, that it could identify whether warehouse receipts purportedly issued by it were authentic or not. This was within the "exclusive preserve" of Access World, not least because (as Access World has admitted) its warehouse receipts are known to contain security features confidential

to it, which enable it, but no other party, authoritatively to authenticate a document as a genuine warehouse receipt issued by it.

(2) Access World agreed to apply that skill for the assistance and benefit of those to whom it offered authentication services, here Marex (I address the position of Natixis separately below). It is no doubt because of its unique ability to authenticate the warehouse receipts that it had issued that Access World offered authentication services to those who dealt in those receipts and wished to obtain the authentication of particular warehouse receipts by Access World. This was no doubt not simply altruistic on Access World's part – like the bank in *Hedley Byrne* there is a benefit to Access World, as a warehouse owner storing goods held under its warehouse receipts in providing such authentications.

(3) Access World was well aware that its statements as to authenticity would be relied upon by the party to whom it provided its statement as to authenticity – here Marex (I address the position in relation Natixis separately below), and for what purpose – namely in reliance on the fact that the warehouse receipts were genuine to enter into contracts to purchase and sell metal on the basis that it/its endorsee would be able to obtain delivery up of the metal from Access World against presentation of a genuine Access World warehouse receipt. Not only was it reasonably foreseeable, Access World knew that Marex would rely on the statement made by Access World as to the genuineness of a warehouse receipt and for what purpose.

334. In this regard a reasonable person in the position of Marex would conclude from the circumstances in which the statement was made to it by Access World that the purposes for which the statement was made included protecting it from a type of loss which it suffered in reliance on the statement – namely an inability to obtain delivery up and consequent financial loss either to itself or through incurring liability to its purchaser.

335. I do not consider that the imposition of the duty is affected by the points made by Access World in rebuttal thereof. First it is said that Access World was "not aware of the terms of the relevant contracts" (i.e. the terms of PC4 and PC5). However, there is no such requirement or necessity. As identified by Marex it suffices that Access World knew (as was obvious) that confirmation of authenticity was required for transactions of a particular kind involving the warehouse receipts in question (see *Caparo* per Lord Bridge at page 621) and/or that advice was required for a purpose, the verification of warehouse receipts provided to Marex (see

Caparo per Lord Oliver at page 638), and that Marex would be likely to rely upon it in deciding whether to enter into the transactions. Secondly, it said that Access World did not know the warehouse receipts were "central" to the transactions and asserts that, "the prevailing view appears to be that receipts are of limited practical importance to such transactions". There is no such necessity – it suffices, as I am satisfied is the case, that authentication of receipts was for the purpose of the transaction. In any event Access World was well aware of the reliance that was going to be placed by Marex on the authentication and the relevance of the same, Mr Tan himself confirmed at paragraph 48 of his statement (in relation to PC4) that, "Kevin Nutt advised of his intention to courier the original receipts to Access World for authentication and…subsequently confirmed that Marex intended to sell the material to Natixis who would sell it back under a repo transaction". Thirdly, it is said that "it does not lie in Marex's mouth" to assert that the risk of CHH defaulting was reasonably foreseeable to Access World. However, that is not in point. The possibility of warehouse receipts not being genuine was the very reason for authentication and no doubt for Access World providing authentication services.

336. It is also said that it was not reasonable for Marex to rely on Access World's statements as to the authenticity of the PC4 and PC5 warehouse receipts in circumstances in which it is alleged that Marex did not do sufficient due diligence about CHH. However, as identified above these are warehouse receipts issued by Access World in relation to which Access World had (and held itself out as having) specialist knowledge and experience in relation to authentication and indeed it was the only entity aware of particular security features in its warehouse receipts. It was entirely reasonable for Marex to rely on the authentication by Access World of its own receipts.

337. Access World also relies upon what it characterises as the caveat to its representations *"Based on the warehouse receipts that we have received from the courier today"*. However, this is making clear that its representation is in respect of the warehouse receipts that it has received and examined. In consequence it will be necessary for Marex to demonstrate that the receipts subsequently presented, and found to be forgeries, were the same receipts if, as in the present case, it wishes to claim loss by reference to those (wrongly) authenticated receipts, but this does not negate the existence of an assumption of responsibility in relation to the representation made in respect of the (wrongly) authenticated warehouse receipts. It is also difficult to imagine what the worth of the authentication/duty assumed would be if it ceased upon return of the warehouse receipts. Access World chose to give the authentication other than upon the final surrender of the warehouse receipts in circumstances where it knew (as was

obvious) that reliance would be placed by Marex upon such authentication when seeking delivery up of the nickel against presentation of such authenticated warehouse receipts.

338. I should add that whilst at one stage it appeared that Access World accepted that the warehouse receipts presented for checking were the same as those authenticated, in his oral closing submissions on behalf of Access World Mr Thomas made clear that Access World still put Marex to proof of that. This raises a short point in relation to the chain of custody. Access World did not cross-examine the experts or Natixis' witnesses which speak to the chain of custody as I would have expected had any issue been taken on this point. The matter is addressed in the evidence of Mr Mansukhani, Mr Barns, and Mr Grenfell and also in the Joint Memorandum of the Experts at paragraphs 8 to 12. I am quite satisfied that the burden has been discharged that the documents authenticated by Access World are the very same documents as Marex supplied to Natixis, that were taken over to Access World in February (and found to be forgeries) and are the documents identified by the experts as being forgeries, and I so find.

339. The authentication by Access World to Marex also falls within the circumstances where a duty of care "may typically be held to exist" as identified by Lord Oliver in *Caparo* at page 638 (cited by Lord Sumption in *Playboy* at [9]), namely (1) the advice from Access World (authentication as genuine) is required for a purpose (proposed purchase by Marex) made known to Access World at the time the advice is given; (2) Access World knew actually or inferentially that its advice would be communicated to the advisee (Marex) (as it was); (3) Access World knew actually or inferentially that the advice so communicated was likely to be acted upon by Marex for that purpose without independent inquiry, and (4) it was so acted upon by Marex to its detriment – Marex purchased the metal in reliance on the advice (in circumstances where only Access World could definitively authenticate its own warehouse receipts), and Marex suffered detriment in the form of the loss it suffered.

340. Access World takes issue (amongst other matters) in relation to "without independent inquiry" – but in this context what is meant is without independent inquiry in relation to the authenticity of the warehouse receipt and not as to whether or not Marex should contract with CHH. As to the former, and due to the confidential security features, it is obvious that a party in the position of Marex would not make independent inquiry as to authenticity when being given advice by the very entity that was in a position to authenticate the warehouse receipt, and Access World knew that (actually or inferentially as it was obvious).

341. The same conclusion as to the existence of a duty of care in relation to authentication of a warehouse receipt by Access World is reached by application of the three-fold test in *Caparo* – the loss to Marex was a reasonably foreseeable consequence of what the Access World did or failed to do (wrongly authenticated/failed to advise the warehouse receipts were not genuine); the relationship between Access World and Marex was one of sufficient proximity and in all the circumstances it is fair, just and reasonable to impose a duty of care on Access World to Marex. In this regard Access World is uniquely placed to authenticate its own warehouse receipts, and it is fair just and reasonable that a duty of care be imposed. The points made about Marex being able to know and evaluate commercial and business risks do not militate against the existence of a duty (though it may be relevant in the context of causation and contributory fault).

H.3.2 PC1-PC3 receipts - "verification"

342. Marex alleges that on 21 and 22 November 2016 Access World agreed to conduct a "verification" exercise for Marex in respect of scanned copies of PC1-3. In this regard Marex refers to Mr Nutt's email to Mr Tan on 21 November 2016 in which he stated (attaching scanned copies of PC1-3):

> "Please find attached the copies of the warehouse receipts that I have been provided with by Come Harvest
>
> Please confirm that these are copies of documents that you have issued
>
> I note that they have an AW sticker and an orbit watermark. The signatures are also appear to be as per your signature list."

343. This email was followed up by Mr Nutt with a further email to Mr Tan at 14.15hrs the same day in which he said, *"Really, really need the confirmation that the doc that I sent this morning is one of yours, as far as you can tell from the copy."*

344. The response (provided by Mr Tan of Access World) at 14.35hrs the same day was as follows (my added numbering for ease of comment below):-

> "In reply to your inquiry, we advise that based upon the photocopy document you provided and according to our records

[1] a Warehouse Receipt with cargo details arid Reference No, AWSG/KR/0027116 and AWSG/KR/0027117 dated 08/11/2016 had been issued by Access World (formerly known as Pacorini Metals).

[2] We however cannot confirm the authenticity and/or validity of the photocopy document until we are in possession of the original Warehouse Receipt and have verified same to our satisfaction.

[3] Any information given and/or statement made by us is for information purposes only without any engagement and/or liability on our part.

[4] We do not make any representation or assume responsibility for the validity and/or veracity of endorsements, if any."

(emphasis added)

345. The next day (22 November 2016) Mr Nutt re-scanned and re-sent the receipts to Mr Tan (because he had noticed that there was a "warehouse receipt details" page missing from the pdfs he had sent the previous day). In the 22 November Email he received an identical response from Mr Tan (save for an added first sentence "Have checked again").

346. Both Mr Nutt and Mr Tan address these matters in their witness statements. Mr Nutt at paragraph 79 of his statement says that he understood from the 21 November/22 November Emails that, *"as far as Mr Tan could tell from the pdfs that I had provided him with that day (and I thought he would be able to tell), the warehouse receipts were authentic receipts issued by Access World. I was very pleased to receive this confirmation"*. However, I do not consider that this can be derived from those emails which do not say that – and indeed in the second sentence it is expressly provided that Access World *"cannot confirm the authenticity and/or validity of the photocopy document"*.

347. In relation to Mr Nutt's oral evidence as to a belief that Access World, whilst giving their disclaimer, would *"check the things that they could check"* it was put to him, "*Q…you accepted yesterday that your belief,,, was, that Access World would check things was an assumption; you hadn't asked them what they would check, had you?"* to which he replied, *"No, not at that time."* It is clear therefore that he had not asked Access World what they would check, and his belief in that regard was an assumption, and no more than that.

348. For his part Mr Tan said at paragraph 42 of his statement that Mr Nutt, *"was aware of the limitation of the verification check. He said to me at the start of the conversation on 21 November that if he sends a copy of the receipt, I'm going to respond with the caveat email. I agreed. However, at the end of the call, I invited him to send a scanned copy of the receipts to*

me to enable us to perform a basic check, although I made clear that our response would include the "caveat", which was a reference to the disclaimers."

349. Thus, it was clear to Mr Nutt that to the extent that there was to be any check – any responsibility would be disclaimed. This is not fertile ground for any possible assumption of responsibility (or reasonable reliance). In this regard the emails themselves are important for what they state (and what they disclaim).

350. The first sentence [1] is no more than a statement that according to Access World's records a warehouse receipt with that reference number had been issued. That sentence does not assist Marex. It was true but does not evidence any assumption of responsibility generally.

351. Access World do not "[confirm] that the doc that [Mr Nutt] sent this morning is one of [Access World's], as far as you can tell from the copy". On the contrary, the second sentence [2] provides, *"We however cannot confirm the authenticity and/or validity of the photocopy document until we are in possession of the original Warehouse Receipt and have verified same to our satisfaction"*. The sentence on its face, negates any suggestion that Access World had (negligently) authenticated the warehouse receipt – on the contrary they are disavowing any such statement ("we cannot confirm"). Marex says that this is not in point – its case (by the time of closing) was to allege that Access World was negligent in that it impliedly represented to Marex that it was not possible from its verification of the scanned copies of the PC1-PC3 receipts to determine that the receipts were not authentic (whereas, submits Marex, it was possible to make that determination by a careful comparison of the Access World signatures on the PC1-PC3 scanned copies and the reference copies printed from Access World's shared drive).

352. The alleged implied representation, on its face is a rather contrived and convoluted double-negative. No such implied representation can be derived from what was said in the 21 and 22 November emails. What is more any such alleged implied representation is simply inconsistent with Marex's knowledge that whatever was stated would be accompanied by Access World's disclaimer, and by the actual content of the disclaimer in the third sentence [3], *"Any information given and/or statement made by us is for information purposes only without any engagement and/or liability on our part."* This makes it perfectly clear that Access World is not making, and cannot have been understood to be making, any actionable statement at all as to the authenticity of the warehouse receipts – and as such it cannot be regarded as having assumed any responsibility for what was said.

353. It is well established that an effective disclaimer prevents any duty of care arising because no one can be taken as assuming responsibility in circumstances where it was specifically negatived by him (see per Lord Hodson in *Hedley Byrne v Heller* at page 514, *NRAM* supra at [19] (as quoted above), and see *Barclays Bank v Grant Thornton UK LLP* [2015] 1 CLC 181 for an illustration as to the effect of such a disclaimer). Equally in the light of the disclaimer there can be no reasonable reliance on what was said (again see *NRAM*, supra, at [197).
"Information given and/or statement made by" as a matter of the ordinary and natural meaning of words encompasses both an express statement and any statement that might otherwise be implied (and equally if an express statement is excluded it would make no sense for the disclaimer not also to apply to any implied statement). Indeed, Mr Choo-Choy acknowledged as much stating as to the meaning of the words, *"I quite accept that the language of "information given and/or statement by" is capable of applying to an implied representation"*. Equally in the light of that disclaimer I do not consider that Marex could have reasonably relied upon what was said – the disclaimer is making clear that there is no engagement or liability on Asset World's part, so Marex could not reasonably rely on what was said (Mr Nutt had no basis for his belief that Access World would "check the things they could" which he accepted was an assumption on his part, and was not based on any specific enquiry of Access World).

354. Mr Choo-Choy candidly, and rightly, stated that the 22 November disclaimer (i.e. the third sentence [3]), *"prima facie poses a serious obstacle to finding that Access World assumed any responsibility to Marex as to the authenticity"* of the PC1-PC3 receipts also described the third sentence as "*the difficult part of the disclaimer from Marex's perspective"*. Those statements are, in fact, an understatement.

355. Marex nevertheless submits that the disclaimer in the third sentence [3] does not assist Access World asserting that "It is not, however a disclaimer of responsibility in respect of any implied representation by Access World as to what it could or could not tell from its verification of the scanned copies. If there was any doubt or ambiguity in this regard as to the proper construction of part (2) of the disclaimer [the third sentence [3]], it should be construed *contra proferentem* so as to give the narrower meaning contended for by Marex."

356. Mr Choo-Choy submitted that the third sentence [3] is to be read and understood in conjunction with the immediately preceding part (i.e. the second sentence [2]) and that it is directed to the exclusion or negation of any engagement and/or liability in respect of any confirmation of the authenticity and/or validity of the photocopy document, and is not a disclaimer of responsibility in respect of any implied representation as to what one could or could not tell from the verification of the scanned copies. With the greatest of respect to Mr

Choo-Choy that submission is quite devoid of any merit. No doubt the email has to be read as a whole, and the third sentence follows the second, but the third sentence is clear and unequivocal in its terms and meaning namely that "**any** information given and/or statement made" "is for information purposes only". Any information given and/or statement, as a matter of the ordinary and natural meaning of the word "any" includes any implied statement and it is not simply directed at, or limited to or by, the subject matter of the second sentence. In consequence it prevents any statement (be it express or implied) being actionable.

357. The third sentence is not ambiguous and its meaning is clear. The third sentence is an unambiguous duty-negativing provisions and there is no reason to cut down its scope or invoke the *contra proferentem rule* (see in this regard *Taberna Europe CDO II plc v Selskabet AF1 (formerly Roskilde Bank A/S)* [2017] QB 633). In that case Moore-Bick LJ stated at [23]:

> "In the past judges have tended to invoke the contra proferentem rule as a useful means of controlling unreasonable exclusion clauses. The modern view, however, is to recognise that commercial parties (which these were) are entitled to make their own bargains and that the task of the court is to interpret fairly the words they have used. The contra proferentem rule may still be useful to resolve cases of genuine ambiguity, but ought not to be taken as the starting point: see, for example, *The Hut Group Ltd v Nobahar-Cookson [2016] EWCA Civ 128* and *Transocean Drilling UK Ltd v Providence Resources plc [2016] 2 All ER (Comm) 606."*

358. In this regard it is also well established that a disclaimer is not construed as if it were a contractual exclusion clause, but rather as one of the factors relevant to answering the question as to whether there has been an assumption of responsibility. Thus, as Hobhouse LJ (as he then was) stated in *McCullagh v Lane Fox & Partners Ltd* [1996] PNLR 205 at page 237:

> 160. "The judge avoided this conclusion by approaching the disclaimer as if it were a contractual exclusion. On such an approach it would need to be strictly construed and the argument was available that it did not as such cover an oral statement. But that is not, in my judgment, the right approach. It is not an exclusion to be construed. The right approach, as is made clear in *Hedley Byrne,* is to treat the existence of the disclaimer as one of the facts relevant to answering the question whether there had been an assumption of responsibility by the defendants for the relevant statement. This question must be answered objectively by reference to what a reasonable person in the position of Mr McCullagh would have understood at the time that he finally relied upon the representation."

359. In the present case the third sentence is an effective disclaimer to prevent any duty of care/assumption of responsibility arising, and to negative any liability in respect of what was stated, whether expressly or impliedly. The third sentence also negatives any possibility of

there being reasonable reliance. Accordingly, Access World owed no duty of care in respect of PC1-3 and I so find.

H.3.3 PC4 and PC5 receipts – Natixis

360. An issue arises as to whether Access World assumed a responsibility not only to Marex but also to Natixis, or owed a duty of care to Natixis, in relation to the authentication of PC4 and PC5 receipts.

361. As is clear from Mr Abel's evidence, and as is common ground, Natixis never requested, required or indeed was even ever told that the PC4 and PC5 receipts were authenticated, and Access World's emails containing the authentications were not passed to it, or the authentications conveyed to it. Natixis was not the addressee of any representation or authentication exercise contained in the 22 December and 9 January emails. Such matters weigh against any assumption of responsibility on the part of Access World in favour of Natixis.

362. Natixis submits that its position is not distinguishable from that of Marex and that if Access World assumed a responsibility to Marex, so Access World assumed a responsibility to it. However, as will be immediately apparent Natixis is not in the same position as Marex, not least because of the fact that it was not the addressee of the representations made, nor were such communications even provided to it.

363. Natixis' contemporary knowledge of, and reliance upon, the due diligence carried out by Marex prior to PC4 is in issue. The documents show that Mr Abel was told that before PC4 closed, Marex would arrange for a special DHL courier to take the original receipts to Singapore to be formally authenticated. Natixis was not told whether this had in fact happened or what the outcome was. Mr Abel's evidence was that he assumed that Marex had done as planned and in the absence of a negative indication, his assumption and belief was that Access World had confirmed the authenticity of the receipts and he proceeded with the transactions with Marex in that belief. In relation to PC5, and so far as Mr Abel can recall, no one told him whether Marex planned to have the PC5 receipt authenticated by Access World, but as this was a repeat transaction he assumed that Marex would have the receipt authenticated and he proceeded with the transactions with Marex in that belief.

364. It will be seen that none of Mr Abel's assumptions or beliefs come from any representation being made by Access World to Natixis, or even any direct contact in that regard with Access

World in relation to authentication. Mr Abel did not know what Access World had said about the receipts the subject matter of PC4 or that of PC5. This impacts both on whether there was an assumption of responsibility and also on reasonable reliance (as addressed below).

365. As for the position and knowledge of Access World, it is clear that Access World did know that Marex was selling to Natixis in relation to PC1-3 and PC4 (as addressed by Mr Tan in his first witness statement, and as he confirmed when cross-examined by Mr Matthews). Mr Tan also assumed the position was the same in relation to PC5 (as he confirmed when cross-examined). PMA letters were also issued to Natixis (at the request of Access World's customer Straits).

366. However, I do not consider that any of the matters relied upon by Natixis suffices for there to have been an assumption of responsibility, on Access World's part, to Natixis, in circumstances where the only representations made by Access World were made by it to Marex, the only party that it was in direct contact with it in relation to authentication. The test as to whether a defendant has assumed a responsibility to another is objective, and an objective test means that the primary focus must be on things said or done by the defendant in his dealings with the party to whom he is alleged to have assumed responsibility (see per Lord Steyn in *Williams v Natural Life Foods Ltd*, supra, at page 835). There is nothing said or done as between Access World and Natixis that supports an assumption of responsibility, nor do I consider that there is sufficient proximity.

367. Nor is there any evidence that Access World allowed its advice to be passed on to Natixis knowing that Natixis would place reliance upon it (see *Hedley Byrne* at pp 502-503 per Lord Morris). Yet further such advice was not even passed on, and Natixis did not even, or ever, enquire what that advice was but rather made an assumption that there had been authentication in circumstances where Access World did nothing to engender such assumption on the part of Natixis. In this regard what was said by Lord Sumption in *Playboy*, supra, at [11] is also apposite:-

> "11. Mr Salzedo QC, who appeared for the Playboy Club, accepted that there was no evidence that BNL knew that its reference would be communicated to or relied on by anyone other than Burlington. He also accepted that in the ordinary course where a statement is relied upon by B to whom A has passed it on, the representor owes no duty to B unless he knew that the statement was likely to be communicated to B. That concession was plainly justified. I would go further and say that the representor must not only know that the statement is likely to be communicated to and relied upon by B. It must also be part of the statement's known purpose that it should be communicated and relied upon by B, if the representor is to be taken to assume responsibility to B. Mr Salzedo's submission was

> that the present case was different because the Club was Burlington's undisclosed principal. He submitted that the relationship between BNL and the Club was, in Lord Devlin's phrase, "equivalent to contract" because in contract the Club would have been entitled to declare itself and assume the benefit of the contract. This is an ingenious argument, but in my opinion it is fallacious."
> (emphasis added)

368. I do not consider that the evidence establishes that Access World knew that the statements in the emails were likely to be communicated to, and relied upon by, Natixis. Mr Matthews put to Mr Tan that Natixis would be relying on Access World's verification (in relation to PC1-PC3) because he had been told that Marex was selling to Natixis. Mr Tan's reply was *"Yes, I know that Marex would be selling to Natixis"* which I did not understand to be an acceptance or recognition that Natixis would be likely to rely on the verification (*a fortiori* given that there was a disclaimer as addressed above in relation to PC1-PC3 preventing both any assumption of responsibility and reasonable reliance). Whilst the highest it was put to Mr Tan in cross-examination in relation to PC4 was that *"... similarly in relation to PC4, you tell us in your statement that you knew in advance that that was also sold to Natixis"* to which Mr Tan replied *"yes",* whilst in relation to PC5 Mr Tan assumed that the goods were going to Natixis. Nor do the transcripts of telephone calls such as that on 17 November 2016 between Mr Nutt and Mr Tan establish knowledge on Access World's part that the statements made by Access World were likely to be communicated to, and relied upon, by Natixis.

369. I do not consider that this evidence, or any other evidence, establishes that Access World knew that the statements in the emails were likely to be communicated to and relied upon by Natixis. But whether that is so or not, it cannot be said (still less has it been demonstrated by Natixis) that it was part of the statement's known purpose that it should be communicated to and relied upon by Natixis. The absence of such known purpose is fatal to any assumption of responsibility by the representor Access World in favour of Natixis (as opposed to the addressee, Marex).

370. Nor do I consider that there was, or could be, reasonable reliance on Natixis' part. I have already noted that Mr Abel did not know what Access World had said about the receipts the subject matter of PC4 or that of PC5. It is difficult to see how there can have been reasonable reliance on a representation that Natixis did not know (and only assumed) had been made. I consider that the reality is that Natixis was relying on its contractual counterparty Marex, its willingness to contract with Marex, and the express terms of its contract with Marex that I have found which protected its position vis-à-vis Marex rather than any representation made by Access World the contents of which, and fact of which, were unknown to Natixis. Were this

otherwise, Natixis' conduct in neither seeking authentication itself from Access World of what Marex provided to it (which might of course not be the same as Marex presented to Access World) nor even establishing as a fact that the receipts had been authenticated, would be wholly inexplicable, if not perverse.

371. I do not consider Mr Abel's evidence that he knew Marex was seeking the verification or authentication of the receipts by Access World before the transactions and had assumed that, because Marex then went ahead with the deals, Access World had provided the expected verification or authentication and that he proceeded with the transactions in that belief and confirmed that Natixis would not have done the deals if Marex had told him that Access World said the receipts were forgeries amounts to, or supports, reasonable reliance on a representation made by Access World to Marex the content of which Mr Abel had no actual knowledge. The same is true of Mr Abel's evidence (when questioned by Access World) that he had drawn an assumption from the negative. Mr Grenfell's evidence that he took comfort from the fact that Marex was carrying out steps to verify the authenticity of the receipts also takes Natixis' case on reliance no further.

372. There is the yet further point that Mr Abel's evidence (both in his witness statement at paragraphs 47 and 71 and when cross-examined) was that he understood that any response from Access World, whether to a request for verification or authentication, would be subject to the caveats set out in the 21st November email sent to him by Marex (i.e. including the disclaimer in the third sentence) that *"any information given and/or statement made by us is for information purposes only without any engagement and/or liability on our part."* Thus Mr Abel stated at paragraph 71 of his statement (in the context of PC4), *"I assumed that Marex had done as planned and that as we had not heard anything more about this, Access World had given their standard response in relation to authentication"* (evidence that he confirmed when cross-examined). In such circumstances it is difficult to see how there could be any reasonable reliance on Natixis' part given that Mr Abel expected Access World would have disclaimed any engagement or liability if they had in fact authenticated the subject matter of PC4 (or, on the same basis, also PC5). It matters not that Mr Abel was mistaken in this regard (as no such disclaimer accompanied the 22 December and 9 January emails (that Natixis was in any event wholly unaware of)).

373. Accordingly, and for the reasons given above, there was no assumption of responsibility or duty of care on the part of Access World to Natixis in respect of the authentication of the PC4 and PC 5 receipts, nor was there any reasonable reliance on Natixis' part in relation to the

same. In such circumstances Access World is not under any liability to Natixis in tort (or on any other basis in the context of my findings on Natixis' other claims against Access World).

I. Was Access World negligent in relation to the authentication of PC4-5?

I.1 The applicable standard

374. The applicable standard is that set out in *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582, 587 per McNair J, as applied to negligent misstatement in, for example, *ADT Ltd v. BDO Binder Hamlyn* [1996] BCC 808 at p 835 per May J – i.e. where a claim concerns negligence involving the use of some special skill, the standard is that of the ordinary skilled individual exercising and professing to have that special skill. An individual need not possess the highest expert skill; it is sufficient if the individual exercises the ordinary skill of an ordinary competent person exercising that particular art.

375. However Marex submits that in fact the discrepancies between the presented receipts and the original genuine receipts are so obvious that Access World would be in breach even if the standard were that of an ordinary person lacking any special skill.

I.2 Did Access World fail to exercise reasonable skill and care in its authentication of the PC4 and PC5 receipts as authentic warehouse receipts issued by Access World?

I.2.1 The 5 differences that Marex says were obvious

376. By way of preliminary points Marex notes (as is the case) that the statements in the authentication emails were unqualified i.e. that the receipts had been authenticated – the statements made were not qualified in any way (such as that it was likely they were authentic) – Access World represented that they were authentic, as is common ground as set out in the List of Issues. It is equally common ground (as is reflected in the List of Issues) that the warehouse receipts that Access World stated were authentic were forgeries (as the experts agree), so the statements made were mis-statements. Accordingly, the question is whether Access World was negligent in making these statements and in making the authentication it did. Marex submits that the answer is clearly yes. In that regard, and as Access World rightly points out, hindsight has no role to play in assessing whether Access World is liable for the negligent misstatements made and I have ensured that hindsight forms no part of my analysis or conclusions reached.

377. Both Marex and Access World submit at some length as to whether Access World was negligent in particular respects (for example as to signatures and as to Access World's

Procedure Manual). I address such submissions in due course below. However, ultimately, if (as Marex alleges) there are differences between the forged warehouse receipts and genuine warehouse receipts that are obvious even upon a cursory inspection and to the naked eye, without the benefit of hindsight, then these are matters that one would expect to be spotted by anyone exercising ordinary skill and care in authenticating the receipts, *a fortiori* any person exercising the ordinary skill of an ordinary person exercising and professing the skill of being able to authenticate their employers' own warehouse receipts as genuine.

378. The five differences that Marex rely upon in this regard (the "Differences") are:-

(1) Item 4;

(2) In the logo at the top left of the first page of the receipt, the shade of blue of the circle and the word 'ACCESS';

(3) In the logo at the top left of the first page of the receipt, the colour of the word 'WORLD' (which is grey in the forged receipts and grey-green in a genuine receipt);

(4) The colour of the footer on the first page, which is grey in the forged receipts but grey-green in a genuine receipt; and

(5) On the reverse/second page of the receipt, the colour of the pro-forma text and endorsements box. It appears in a paragraph of 4 lines of text (beginning: "*Upon transfer of this warehouse receipt ...*") and the numbers 1 through 6 and the words "Endorsement", "Signature" and "Date" (and Chinese characters following each such word), as well as the 6 boxes in which these words appear. The colour of the pro-forma text and endorsements box is grey in the forged receipts but grey-green in a genuine receipt.

379. In relation to the Differences:-

(1) Each of these differences is recorded by the experts as being visible to the naked eye (Handy para 29 (item 4), para 42 (logo, header, footer and pro-forma text on the reverse; Radley paras 67 and 138 (item 4), paras 75 and 142 (logo) and para 142 (footer)).

(2) When cross-examined, Mr. Png accepted that, in respect of the forged versions of the PC4 and PC5 receipts, if he had been comparing the forged versions with an original genuine warehouse receipt with pre-printing on it (that is, with the pre-printed AW logo and footer on the obverse and pro-forma text/endorsements box on the reverse), he would immediately have seen each of the above differences. In this regard it is not necessary (and Mr Png did not suggest that it was necessary) in order to identify these differences to compare the forged receipts with the actual original receipts. These differences are all in the pre-printed parts of a genuine Access World receipt (be that any genuine AW warehouse receipt - including a cancelled one, and any "blank" receipt (i.e., a pre-printed sheet of Access World warehouse receipt paper without details of any metal on it)), and in this regard (as Mr. Png acknowledged) a source of such paper would be the paper sitting in one of the trays of the Access World printer used for printing warehouse receipts. Of course, Mr Png would himself be very familiar with such paper in any event.

(3) In relation to the authentication exercise conducted by three other members of staff on 14 February 2017(Mr Frankie Tan, Ms Jenny Chen and Ms Rachel Ngo) they unanimously concluded that each of the 16 forged receipts (including the PC4 and PC5 receipts) (amongst other matters), failed Item 4 and failed in respect of the colour of the printing (the test referred to on the Checklists as "PRINTS/COLOR", with Mr Tan noting, in particular that the colour of the "AW logo" was different on the forged receipts compared to the genuine receipts).

380. In relation to such evidence it is to be borne in mind:-

(1) The experts bring their own expertise in relation to the exercise so it does not necessarily follow that an ordinary individual or an ordinary competent person exercising the particular art would make the same observation (although one might expect the latter person to have their own particular experience).

(2) The issue of negligence is not subjective and so ultimately what matters is not what Mr Png or other Access World employees would have noted but what an individual exercising the ordinary skill of an ordinary competent person exercising that particular art would have noted (though the evidence of Access World's witnesses may well reflect, or evidence, that).

(3) The Checklists were drawn up after the time of the authentication specifically to determine whether receipts were authentic (and so are drawn up for a specific purpose and are also not contemporaneous to the time of the earlier authentication).

(4) Hindsight must not be used when looking for differences.

381. However:-

(1) All such evidence speaks with one voice – those differences are apparent to all of the witnesses.

(2) Each of those differences is apparent to me (a person with no expertise in the matter) and I am satisfied would be apparent to anyone exercising any care. As Marex rightly submits they are obvious even upon cursory inspection and to the naked eye.

(3) I am satisfied that each such difference and all such differences would have been apparent, **without the exercise of hindsight** by anyone exercising the ordinary skill and care to be expected. In this regard the colour differences are the most obvious and are readily apparent, and I am satisfied would have been apparent contemporaneously and without any need for there to be a requirement to look for colour differences (though that would be an obvious point to look for in any event). As Access World points out it is, of course, very easy for a judge with the advantage of hindsight to identify some act on the party of an employee which would have avoided an accident occurring (see per Keene LJ in *Cooper v Carillion Plc* [2003] EWCA Civ 1811 at [13]), but this is not such a case – no hindsight is needed to look for or identify these differences.

(4) The noting of any of these differences would inevitably have set alarm bells ringing and would have alerted anyone inspecting the receipt to a need to inspect the receipt more carefully in order to exercise the ordinary skill of an ordinary competent person exercising the particular art. At which point any differences not spotted would also have been spotted. Indeed, other differences (for example as to signatures) even if not already

noted (and I address this further below) would no doubt be considered (and would be likely to have been identified by an ordinary competent person).

382. I do not consider that the obvious nature of the differences is in any way detracted from by the fact that:-

(1) It is common ground that these were sophisticated and skilfully executed forgeries (Joint Memorandum paras 5, 17(a) and 18(b)).

(2) It was the first time that such sophisticated attempts at forgery had been made (see the points relied upon by Access World at paragraph 147 of their Written Closing).

(3) Fraud prevention is an exercise in "chasing the game".

383. The purpose of authentication is to look to see if the receipts are authentic. Whatever the sophistication or skill involved in other aspects of the forgeries (for example as to the logo itself – as opposed to its colour) – the colour differences that manifest themselves were unsophisticated and a dead give-away. I consider they should have been spotted by an individual exercising the ordinary skill of an ordinary person exercising the particular art. It is not necessary to have expert evidence to support such a conclusion – given that such differences are apparent to anyone (not possessing any special skill), the position being *a fortiori* in relation to a person possessing the ordinary skill of an ordinary competent person exercising the particular art. Whilst other features (such as Item 2) may well be regarded as a "special test" introduced to keep up with the risk of forgeries, matters such as colour differences are not in the same category – no hindsight is needed to identify such matters, or to identify the need to look for such matters.

384. Access World has the following ripostes to Marex's case including in respect of such differences (each of which is considered below):-

(1) It takes, as it is entitled to take, a pleading point, submitting that Access World is confined to its pleaded case.

(2) It says that Marex adopts a fundamentally incorrect starting point and approach. What the Court should ask itself is "(a) did Mr Png properly perform the [authentication] process that he was instructed to perform and (b) to the extent that Marex is entitled to run its new case, what were the known or perceived types and levels of risks at the time

and, in the light of those risks, what steps would be considered appropriate by the notional person identified in the *Bolam* test as adequate to guard against them."

(3) There is no evidence by which the Court can judge either the conduct of Mr Png or Access World and what a competent warehouse receipt inspector/issuer would or should have done in the circumstances pertaining at the time, or indeed whether and, if so, in what respects their conduct fell short, which is the result of Marex's failure to call any admissible expert evidence on these key issues despite the parties having permission to do so.

I.2.2 Marex's Case

385. Marex's pleaded case is set out at paragraphs 29(4) and 29(5) of it Re-Re-Amended Particulars of Claim against Access World which pleaded, amongst other matters, as follows:-

"(4) Given that Access World's own position is that the Warehouse Receipts contain features which show that they are not genuine Access World warehouse receipts, Marex will say that, when authenticating …and/or verifying the very same…PC4 and PC5 Warehouse Receipts on …22 December 2016 and 9 January 2017 respectively, Access World:

(a) did not use all reasonable measures to ascertain whether the documents were genuine warehouse receipts issued by it; and/or
(b) did not take reasonable care in using the measures it did employ to that end.

(5) In particular, if (which is not admitted) the …PC4 and/or PC5 Warehouse Receipts contain features that now cause them to fail Access World's authentication tests then, had Access World exercised reasonable skill and care at the time of the original authentication, those features would have been detected and the transactions would not have proceeded. Marex will rely on (amongst other things) the February 2017 "Warehouse Receipt Authentication Checklists" disclosed by Access World (the "Checklists"). In this regard:

(a) In respect of the PC4 and PC5 Warehouse Receipts, Marex relies on the schedule summarising those Checklists that is set out in paragraph 56(2) of its Amended Reply, as if that schedule were set out in full herein. The scale and frequency with which each of the PC4 and PC5 Warehouse Receipts failed the tests described in those Checklists is such that a person exercising reasonable skill and care when inspecting those receipts in December 2016 and January 2017 would have concluded (i) that those receipts failed those tests; and (ii) accordingly that there were (at the very least) grounds for suspecting the warehouse receipts were not authentic; and (iii) therefore, that there was no proper basis for representing that those receipts are authentic."
(emphasis added)

386. Paragraphs 29(4)(a) and (b) contain wide general pleas of negligence directed at both Access World's failure to use all reasonable measures to ascertain whether the documents were genuine warehouse receipts issued by it and/or Access World's failure to take reasonable care in using the measures it did employ to that end. Those pleas are directed at Access World itself (which would also encompass anyone acting on Access World's behalf). Whilst such plea lacked full particulars of what the reasonable measures were, the plea was clearly wide enough to encompass all the matters that are the subject of the Differences, and such measures could be the subject of voluntary further information or clarification. Furthermore, had Access World taken the stance that a formal amendment was required, then it could not possibly be suggested that Access World was prejudiced by the same as it has been able to deal with all such matters (none of which require expert evidence) and any permission that was needed would have been granted. The point is, however, academic so far as the Differences are concerned as (despite Mr Thomas' impassioned submissions to the contrary) the likes of the colour differences are encompassed within the authentication process that Mr Png was instructed to perform contemporaneously (as addressed below) which Access World itself directs the Court to make findings by reference to.

387. Paragraph 29(5) is itself directed both at Access World as well as the checks carried out by Mr Png on its behalf. It is clear that in paragraph 29(5) Marex relied, and relies, on all the tests contained in the February 2017 Authentication Checklists (which as appears below includes the detailed comparison of signatures and the "special test" (as defined below)) as part of its case that in December and January 2017 Access World had negligently failed to employ all reasonable measures to authenticate the PC4 and PC5 receipts and/or failed to take reasonable care in using the measures it did employ to authenticate (paragraph 29(4)). This is clear from the plea that, *"the scale and frequency with which each of the PC4 and PC5 Warehouse Receipts failed the tests described in those Checklists is such that a person exercising reasonable skill and care when inspecting those receipts in December 2016 and January 2017 would have concluded (i) that those receipts failed those tests*…" (emphasis added) from which it was apparent that Marex was alleging that the subject matter of the Checklists (though created in February 2017) should have been deployed when authenticating the PC4 and PC5 receipts in December and January.

388. That this was Marex's case was also confirmed in Mr Choo-Choy's email of 26 January 2019 clarifying Marex's case following discussions in Court:

> "as already pleaded at paras 29(4) and 29(5) of its POAC, is that AW (as a company, not just Png individually) failed to take all reasonable measures to ascertain whether the

receipts were genuine receipts, and failed to take reasonable care in using the measures that it did use; and that the reasonable measures (or tests) relied upon by Marex are all of the measures described in the Checklists, notwithstanding that the Checklists (as documents) may only have been prepared in February 2017. Our case is that the Checklists evidence what should reasonably have been done during the authentication exercise…"|

389. Contrary to Access World's submissions in closing, this is not a new pleaded case (for the reasons I have identified above) but clarification of an existed pleaded case. If Access World had wished to adduce further factual or expert evidence on such matters it could have done so. However, Access World's factual witnesses were in a position to deal with such matters, and such matters were explored with the witnesses without any prejudice being suffered. Nor was there need for independent expert evidence in this area - those with the relevant expertise were in fact Access World's own witnesses, rather than the experts called by the parties, as they had the necessary particular expertise for the *Bolam* test – and those witnesses were candid in accepting the discrepancies that could be identified during the course of their cross-examination. If there had been any need to amend the pleading (and I am satisfied there was not) it would have been granted on established principles, Access World being in a position to deal with it as it did through their witnesses and in closing without any prejudice having been suffered. Once again, however, the point is in reality academic as in material respects that suffice for Access World to be liable in negligence, a number of the existing procedures would have revealed discrepancies (including the Differences).

390. As for the Checklists in comparison with those set out in Access World's Procedure Manual, these are addressed at paragraphs 56(1) and 56(2) of the Amended Reply which are subject to heavy redactions by reason of the confidentiality order as a result of which there is no utility in quoting the redacted versions. However, one of the pleas that is made is that many of the features relied upon by Marex (as reflected in the Checklists) were already encompassed within the Procedure Manual including as to print colour (which, of course, is the subject matter of many of the Differences) and signatures (as addressed below) as well as various other (also redacted) matters. Whilst (as addressed below) Access World do not accept such features were encompassed within the Procedure Manual the plea is clearly in play on the pleadings.

I.2.3 Access World's Procedure Manual and whether the same was complied with

391. As for Access World's Procedure Manual itself, the relevant Procedure Manual is Access World's August 2016 Procedure Manual (Revision 4 dated 31 August 2016) (the "Procedure Manual") there was a subsequent version dated 31 January 2017 which post-dates the

authentication exercises for the PC4 and PC5 receipts). This provides, amongst other matters, as follows:-

> "OBJECTIVE To verify the authenticity of Warehouse Receipts (WRC)
>
> SCOPE The procedure covers the authentication of a WRC, the response to a WRC verification inquiry and the cancellation of the original WRC upon Presentation
>
> DEFINITION A Verification inquiry is a request to confirm the existence of a WRC basis a copy whereas for a cancellation of the WRC the original document must be presented."

392. Authentication is addressed under Section B ("Cancellation of Original Warehouse Receipt") paragraph 4 ("Receipt of Original Warehouse Receipt for Cancellation At Singapore") – no doubt because authentication will usually be in the context of cancellation (but Access World agreed to authenticate the PC4 and PC5 receipts and it is Access World's case that the subject matter of the Procedure Manual was applicable in that situation). Paragraph 4.0 contains 8 bullet-pointed matters to be verified. Paragraph 4.1 provides that "The Account Holder **must** verify the following for authentication purposes..." (emphasis added) – thus these verifications are mandatory. The very first of these bullet points is as follows:-

> "Is the WRC **printed on AW security paper** with perforated 'Access World' logo at the top left and 'Access World' water mark logo across the address details in the footer"
>
> (emphasis added)

393. There is a major divergence between Marex and Access World as to what is involved in verifying that the WRC is "printed on AW security paper". Marex submits that this clearly and obviously refers to the features, and the checking of the features, of AW security paper (to demonstrate that it is "AW security paper") which includes the colour of the paper, the shape and colour of the AW logo, the font and colour of the footer and the font and colour of the pro forma text and endorsements box on the reverse side. It submits that this is so as a matter of language - the WRC is not printed on "AW security paper" unless these features are present (otherwise it is not "AW security paper"). It is the pre-printed features which must fundamentally define whether the paper in question is "AW security paper" with perforated 'Access World' logo at the top left and 'Access World' water mark logo across the address details in the footer" (emphasis added). "Perforated" in fact means "embossed" as Mr Png confirmed.

394. In contrast, Access World submits that *"without the benefit of hindsight, checking the two important security features specifically mentioned, namely whether there was indeed the embossed logo and the water mark would, it is submitted, not only be in accordance with the instructions given but constitute a sound way of checking that the receipt was on Access World's security paper"* – i.e. Access World denies that the requirement that the account holder "must verify" that the "WRC is printed on Access World paper" involves anything other than checking for the logo and watermark.

395. Access World's submission was maintained with great vigour not only in Access World's written Closing Submissions but also in its oral closing submissions. The reason for that is clear enough – if Marex is right in its construction then Mr Png and Access World were negligent in not noting the Differences (specifically the colour related differences between the submitted receipts and those always present on Access World's AW security paper which are readily apparent) and accordingly were negligent in stating that the PC4 and PC5 receipts were authentic. This point therefore cuts across (and renders academic) not only all the other alleged discrepancies, but also Access World's points on Marex's pleaded case and its case that the question to ask is "did Mr Png properly perform the authentication process that he was instructed to perform" (the answer must be no if Marex is correct on construction as the performance of such checks on the paper would have revealed that it was not "AW security paper" (due to the colour differences etc)).

396. Access World's construction does not bear examination and is absurd. First it is inconsistent with the express language of this bullet point and the ordinary and natural meaning of the words used. The first matter that must be verified is "is the WRC printed on AW security paper". As Marex rightly points out this clearly and obviously refers to the features, and the checking of the features, of the AW security paper <u>itself</u> to demonstrate that it is "AW security paper". This includes the colour of the paper, the shape and colour of the AW logo, the font and colour of the footer and the font and colour of the pro forma text and endorsements box on the reverse side. The WRC is not printed on "AW security paper" unless these features are present (otherwise it is not "AW security paper"). As Marex also rightly points out it is the pre-printed features which must fundamentally define whether the paper in question is "AW security paper <u>with</u> perforated 'Access World' logo at the top left and 'Access World' water mark logo across the address details in the footer"

397. Secondly, the use of the word "with" clearly shows that what comes first is what is to be verified (i.e. that is "printed on AW security paper") and what follows is only <u>part</u> of what must

be verified but is not the extent of the verification. Thirdly, simply checking for the Access World logo and the water mark logo is not a sound way of checking that the receipt was on AW security paper. This is nothing to do with hindsight but to do with the known and self-evident features of AW security paper which include the colour of the paper, the shape and colour of the AW logo, the font and colour of the footer and the font and colour of the pro forma text and endorsements box on the reverse side.

398. Fourthly, Access World's construction fails to give meaning and effect to all the words of the first bullet point, and it could (and would) have read differently if all that was required was a check that the perforated 'Access World' logo was at the top left and the 'Access World' water mark was across the address details at the footer. Other bullet points exist that are directed at specific features so it is a technique that is used by the draftsman in the very same paragraph.

399. Fifthly, Access World's construction, if correct, would lead to absurdity. On Access World's construction the paper could be pink with purple spots on it, or the writing could be in all the colours of the rainbow yet the requirement that it be "printed in AW security paper" would be satisfied if it nevertheless had the perforated 'Access World' logo at the top left and 'Access World' water mark logo across the address details in the footer. That cannot possibly be the purport of the first bullet point.

400. Sixthly, the context of authentication is the authentication of warehouse receipts in respect of the authentication (and in the normal course) cancellation of warehouse receipts in respect of metal worth millions of dollars which could then be withdrawn or placed on warrant. Set against such backdrop it defies belief that the Procedure Manual did not require an examination of all the features of AW security paper.

401. Seventhly, Mr Png was himself well-placed to express a view as to what he understood he was required to verify, albeit that this does not define or circumscribe what the Procedure Manual stated as a matter of ordinary language, still less what is required of a person exercising the ordinary skill of an ordinary competent person exercising the particular art. In this regard:-

(1) He accepted that verifying whether the receipt was "printed on AW security paper" (in the first bullet point) included him making sure that all the features of the pre-printed paper that was sitting in his tray (i.e. on the Access World pre-printed paper) was the same as the presented document.

(2) He would check that the AW logo in the letterhead was the same as the original, that the footer details were the same; as well as the endorsement pro forma language on the reverse page and whilst he initially denied that he was obliged to carry out specific checks of the colour (though I consider this would logically follow from his earlier answer in (1) above, and from the terms of the bullet point) he did clarify, when it was put to him that it would be wrong for him not to check this, that, *"What I mean is I can recognise my own company logo with the dark Navy blue with the grey-green, Access World", that wordings, that I can recognise the colour. So by looking at it, I can satisfy myself that, yes, it is my company logo, and in fact indeed it is embossed and the watermark is there. So that's how I satisfy myself that it is a genuine Access World security paper"* (emphasis added). It is clear, therefore, that he was familiar with the colour features of an original AW receipt and did take into account colour (including when verifying the logo) - under the first bullet point (and this was a particular difference/failing expressly noted by Mr Tan on the 14 February 14 authentication exercise). In any event, I am satisfied that Mr Png would have been aware of all the colour features, and that he ought to have taken into account such colour features, both for the purpose of discharging his responsibilities under the first bullet point, and more generally in exercising the ordinary skill and care of an ordinary competent person exercising the particular art (as addressed below Mr Png's evidence was also that the purpose of the exercise was to identify any visible suspicious features or discrepancies (which would clearly include colour discrepancies), and in this regard the terms of paragraphs 4.2 and 4.4 of the Procedure Manual are also of relevance (as addressed below)).

402. Access World itself acknowledges that quite apart from, and in addition to, the specific checks identified in paragraph 4.1, and as Mr Png accepted, he was obliged to report obvious problems with the warehouse receipts (in accordance with paragraphs 4.2 and 4.4 of the Procedure Manual as addressed below). This was confirmed by Mr Tan. I address below the requirements of paragraphs 4.2 and 4.4 of the Procedure Manual (which I am satisfied go beyond an obligation to report "obvious' problems), and which are also of relevance when considering the scope of paragraph 4.1.

403. In the above circumstances, I am satisfied and find that the first bullet point in paragraph 4.1 of the Procedure Manual in requiring the Account Holder (in this case Mr Png) to verify whether the receipt is "printed on AW security paper" must involve checking the feature (including the pre-printed features) of AW security paper including the colour of the paper,

the shape and colour of the AW logo, the font and colour of the footer and the font and colour of the pro forma text and endorsements box on the reverse side.

404. In any event, and whether or not that is mandatory under paragraph 4.1 of the Procedure Manual, in circumstances where each such matter is obvious on the face and reverse of the receipt with the naked eye to anyone examining the receipt with any care whatsoever and *a fortiori* to an Account Holder possessing the particular skills of Access World Account Holders such as Mr Png (Mr Png having confirmed that he was aware of such colour features) it would be negligent not to check for such features.

405. Put another way, the risk of forgery including attempts to match AW security paper as to colour and the like, were obvious known and perceived risks at the time and, in the light of those risks the steps that would be considered appropriate by the notional person identified in the *Bolam* test as adequate to guard against them would include checking all the (known) features of AW security paper including (but not limited to) the colour features.

406. Mr Png was negligent in not following paragraph 4.1 of the Procedure Manual and/or in not checking for such features which, in themselves, would have revealed the receipts as forgeries, and I so find. Access World is responsible for such negligence.

407. Yet further, the obligations do not stop with paragraph 4.1 of the Procedure Manual and the 8 bullet points therein, as Mr Png rightly acknowledged and accepted, as paragraphs 4.2 and 4.4 of the Procedure Manual provide as follows:-

> "4.2 The Account Holder shall further examine the original document for any alterations (example: Has a different font been used to change/add information, etc…). Any alterations must be initialled and authenticated by authorized AW signatories. Please alert the Customer Service Manager in the adverse case.
>
> …
>
> 4.4 Subject to any suspicious observations and/or diverging information, Customer Service shall inform the Customer Service Manager to include the Legal Department to determine if legal actions are required."

408. These provisions contemplate the Account Holder checking for alterations to the document and for any "suspicious observation" and "diverging information". In this regard, in relation to the authentication exercise he performed as a whole, Mr Png accepted that:-

(a) The purpose of the exercise (as he understood it) was to identify any visible suspicious features or discrepancies between the document presented and AW's internal records;

(b) Whilst following the Procedure Manual, he would be seeking to use as much possible care as he could in the circumstances to try to ensure that he made a correct determination. He accepted he was required to discover any reasonably discoverable discrepancies or any obvious discrepancies or divergences;

(c) He appreciated that "*suspicious observations*" and/or "*diverging information*" (as mentioned in paragraph 4.4 of the Procedure Manual) might not be limited to the points identified in paragraphs 4.1 or 4.2. He said he would "*do all my best to detect whatever is suspicious"*.

409. Mr Png was clearly right to accept such matters. Such matters are not only encompassed within paragraphs 4.1, 4,2 and 4.4 of the Procedure Manual but also are matters that would be required in the exercise of the ordinary skill of an ordinary competent person exercising the particular art. Once again Mr Png was negligent in failing to identify visible suspicious features and discrepancies between the receipts presented and AW security paper including, but not limited to colour differences (I address below other discrepancies – including in relation to signatures).

410. For the avoidance of doubt, and to the extent that Mr Png suggested in his evidence that he was not required to check for all known security features (including as to colour) or that he was not obliged to do any more than check the embossment and the watermark (as he did at certain points in his evidence), I reject such evidence as not reflective of what was required of him under the Procedure Manual or what was required in the exercise of the skill and care required under the *Bolam* test.

411. In this regard I also reject the submission that it necessarily follows that what was required of an Account Holder and/or of Access World itself was compliance with the Procedure Manual and nothing more (albeit the point is academic given my findings as to what was required in relation to the Procedure Manual in any event, as such requirement was not complied with).

412. This is so for a number of reasons. First, Access World and its Account Holders, in the context of statements made by them or on their behalf, are required to exercise the ordinary skill of an ordinary competent person exercising that particular art under the *Bolam* test. A particular procedure manual may or may not prescribe a reasonable set of procedures to determine authenticity which may or may not discharge the obligation upon Access World and its authenticators (it perhaps goes without saying but a negligent approach to authentication is not made non-negligent by writing it down in a procedure manual). On Access World's (narrow) construction of paragraph 4.1, the Procedure Manual would not prescribe a reasonable set of procedures to determine authenticity ignoring, as it would, obvious features of AW security paper. However, I have rejected Access World's construction of paragraph. 4.1. Secondly, it is apparent (even on Access World's case) that Access World's obligation, and that of its Account Holders is not limited to the content of paragraphs 4.1, or the express terms of paragraphs 4.2 and 4.4 but also what is implicit therein as to the reporting of obvious discrepancies. Thirdly, there are matters not (expressly) dealt with in the Procedure Manual that Marex say should have been, namely signatures, the Special Test and the Other Feature. It is most convenient to address each of them separately below. However if they should have been included in the Procedure Manual, and they were not, this could give rise to a failure to exercise care under the *Bolam* test if such matters were not considered by an authenticator.

I.2.4 Signatures

413. The question of whether or not there was a requirement to check signatures (both under the Procedure Manual and under the *Bolam* test) was another area of hot debate between the Marex and Access World. It was also an area where the evidence of Mr Sim and Mr Tan changed, and changed in respects which I find to be unsatisfactory.

414. In my view the starting point is that a signature on a warehouse is an obvious security feature in its own right (that is, after all, one of the purposes of a signature) and the existence and matching of signatures to the (copy of) the original receipt is an obvious matter to be checked when authenticating a warehouse receipt. It would be surprising, therefore, if the standard checks under the Procedure Manual (i.e. that in force in the period November 2016 to January 2017) did not include a comparison of the signatures on presented receipts and the reference copies, printed from AW's shared drive.

415. The evidence of Access World's witnesses in their original witness statements was to the effect that the standard checks under the Procedure Manual in force in the period November

2016 to January 2017 did include a comparison of the signatures on presented receipts and the reference copies, printed from AW's shared drive.

416. Thus Mr Png stated at paragraph 16 of his first statement (dated 31 July 2018) that, "… I did not conduct a detailed examination and comparison of the signatures on the warehouse receipt with the copy printed from the shared drive and I did not examine precisely where the signatures intersect the boxes and the text printed on the receipt." (emphasis added). Accordingly, and whilst he was denying that he conducted a detailed examination and comparison he was clearly acknowledging that he would conduct an examination and comparison of signatures.

417. The evidence of Mr Tan was to like effect. At paragraph 78 of his first statement (dated 6 August 2018) he said that the Authentication Checklist prepared by AW in February 2017 "*included a breakdown of the standard items to check based on the procedure set out at paragraphs 2 to 4 of the Procedure Manual"*, other than two new tests for Items 3 and 4. In circumstances where the Authentication Checklist identified, *"Signatures consistent with scanned PDF record"* it follows therefore that the test for signatures, contained in the Checklist, was one of the standard items to be checked under the Procedure Manual already in force. In cross-examination, Mr. Tan confirmed that this is what he was saying in his first statement.

418. Equally at paragraph 35 of his first statement (dated 8 August 2018) Mr. Sim referred to the tests set out in AW's Authentication Checklists as being the "*standard checks*" that were conducted prior to the discovery of forged receipts and (apart from Item 2) "*two new tests*" which were tests for items 3 and 4. Accordingly, Mr. Sim's evidence was also that the test for signatures which appears on the Authentication Checklist was one of the standard checks that AW ought to have conducted when authenticating warehouse receipts.

419. On 11 January 2019 Marex served its trial skeleton and attached a schedule which identified discrepancies between the signatures on the genuine PC1-3 receipts and the forged versions of those receipts. Shortly thereafter a supplemental witness statement was prepared for Mr Sim being signed by him on 26 January 2019. It provided at paragraph 3 as follows, "*The Checklist also includes a new test on "SIGNATURE" involving "signatures consistent with scanned PDF record." That test was not included in the Work Instructions, which are in almost identical terms to the Procedure Manual which applied between November 2016 and January 2017."* I am satisfied that in saying this was a "new test" Mr Sim was changing his evidence, and doing so without proffering any explanation for that change.

420. To like effect a supplemental witness statement was prepared for Mr Tan and signed by him on 26 January 2019. He stated that he made, *"this further statement to correct some errors in my first witness statement which I have noticed whilst re-reading it in preparation for the trial".* At paragraph 8 he stated:

> "In paragraph 78, I explain that the authentication checks included a breakdown of the standard items to check based on the procedure, as set out in paragraphs 2 and 4 of the procedure manual (31 January 2017 version), the special test and two new tests. On reviewing the authentication checklist in detail, I realise I should have said that there were three new tests in the checklist in addition to the special test. The test in the checklist named *"Signature: signatures consistent with scanned PDF record'* was not included in the original manual (2016 version) or the 31 January 2017 version and therefore was a new check. I would have expected one of my team, when carrying out an authentication check in November 2016 to January 2017, to perform a quick check to ensure (1) the person that signed the warehouse receipt being authenticated was authorised to do so and (2) the same names appeared on both the document being checked and the copy document in Access World's records. This was because paragraph 4.5 of the 2017 manual and 4.4 of the 2016 manual required any suspicious observations or diverging information to be reported to the Customer Services Manager. However, I did not consider at that time (and still do not consider) that the procedure manual dated 31 January 2017 or the 2016 version required a detailed check on the signatures and I did not require and do not believe that a detailed check on the signatures was performed by Access World employees authenticating warehouse receipts between November 2016 and January 2017."
> (emphasis added)

421. This is, on any view, a substantial rowing back, if not disavowal of the evidence in his first statement (hence the statement that he was correcting it). In disavowing a "detailed" check on signatures it appears he still acknowledged that there was and should have been some (he said "quick") check on signatures – and the reason given was the obligation under paragraph 4.2 and 4.4 that required any suspicious observations or diverging information to be reported. Of course (logically) that same rationale would apply to any obvious discrepancies between the signatures (and not only as to names).

422. Some light on the reason for this change of evidence by Access World's witnesses is shed by Mr Sim's evidence when he was cross-examined. Mr. Sim explained that a member of the AW legal team had pointed out there was a discrepancy between a skeleton argument and his witness statement and that led him to produce a new witness statement. Whilst this is a slightly Delphic comment it would seem clear enough that the witnesses were asked to reconsider their evidence either in the light of the emphasis being placed by Marex on obvious discrepancies of signatures or on the approach adopted in Access World's skeleton, either way the possibility of discrepancies coupled with Mr Sim's and Mr Tan's evidence that there would be a

comparison of signatures might in itself lead to a conclusion that Access World was negligent as there had been a failure to spot obvious discrepancies. Whilst it is both appropriate and understandable to ask witnesses to revisit their evidence in the light of how the case develops, it inevitably places in sharp focus whether their changes in evidence stand to be accepted.

423. Mr Png also back-tracked from his witness statement going so far as to say when cross-examined that he was not obliged to look at the signatures on the receipts and that a comparison of the signatures was a test he did not make, albeit that he also appeared to accept that he needed to confirm the signature was an authorised signature and that the signature "matched with the system". This all lies uneasily with paragraph 16 of his first witness as quoted above. Mr Tan also stated in cross-examination that checking signatures was not a standard test under the Procedural Manual.

424. Mr Sim's evidence was, in my view, telling. He accepted, when cross-examined, that what he had stated in his first statement reflected his understanding at the time he made his statement in August 2018. Nothing would seem to have occurred since then to justify a change in his evidence disavowing <u>any</u> comparison of the signatures (given the terms of paragraph 16 of his first witness statement). Far more credible, and consistent with his original evidence, was his evidence in re-examination (although even then I consider he downplayed the extent of the examination that would have been envisaged and expected under the Procedure Manual (in the context of paragraphs 4.2 and 4.4)):-

> Q. Now, I just want to clarify: in February 2017, what, if anything, did you understand that somebody carrying out an authentication before January 2017 was required to do in the context of the signatures on warehouse receipts?
>
> A. For the February authentication checklist under the signature part, we are referring to <u>a very – or a much more detailed</u> check to look for signatures, as in whether the curvature of the signature is consistent, how the signature handwriting intersection with the surrounding correctors or fonts, whether they are consistent with the scanned copy. That is my understanding.
>
> Q. So you said that <u>for the February authentication checklist under the signature part we are referring to a much more detailed check to look at the signatures?</u>
>
> <u>A. That's correct.</u>

(emphasis added)

Here Mr Sim is recognising that there was a check of signatures pre the Authentication Checklist in February 2017 (albeit he said not a detailed one).

425. I am satisfied that the reality is as set out in the original witness statements (which evidence I accept to the extent that it acknowledges that signatures were to be checked under the Procedure Manual and that signatures would be checked), which entirely accords with what one would expect, given the obvious relevance of the matching of signatures/the need to check for discrepancies in relation thereto. In this regard I am satisfied that that there would be a check of signatures as part of the Procedure Manual, not least in the context of paragraphs 4.2 and 4.4 thereof and the need to identify any suspicious observations or diverging information although I am also satisfied that the checking signatures when authenticating a warehouse receipt was of obvious relevance in any event.

426. I prefer this evidence to that given by Access World's witnesses in supplemental statements or cross-examination which I did not find to be convincing or credible not least given the prior evidence of the witnesses, the lack of credible explanation for the change of evidence, the remarkable coincidence that both Mr Sim and Mr Tan could coincidentally have made the same mistake in their witness statements, the obvious relevance of checking signatures, and the terms of paragraphs 4.2 and 4.4 of the Procedure Manual.

427. I accordingly find that there was an obligation under the Procedure Manual to check signatures which would include looking for discrepancies between the signatures on presented receipts and the signatures appearing on reference copies printed from Access World's shared drive.

428. However, I am also satisfied and find that if the Procedure Manual did not require the checking and comparison of signatures, then the Procedure Manual would not have prescribed a reasonable set of procedures to determine authenticity, and would not suffice for the exercise of the ordinary skill of an ordinary competent person exercising that particular art under the *Bolam* test which I am satisfied required a comparison of the signatures on the presented receipts with the signatures appearing on the reference copies printed from Access World's shared drive.

429. That leads on to the question of whether Mr Png was negligent in such checking of signatures as he undertook and whether the discrepancies should have been apparent to him applying my findings above as to what was required under the Procedure Manual and/or in the exercise of ordinary skill and care as aforesaid.

430. In this regard I did not find the exercise undertaken by Marex in the cross-examination of Mr Png to be of particular assistance. This involved blown up copies of the signatures and the like, and particular features thereof being put to Mr Png, which was an unrealistic exercise not comparable to the authentication exercise that would be undertaken by an Account Holder such as Mr Png, and it was hardly surprising (though not illuminating) that Mr Png agreed with the various features put to him showing that the signatures were forgeries.

431. Of more potential relevance was the fact that all of Access World's three checkers in February 2017 were unanimous in finding that each of the PC4 and PC5 receipts presented to them failed the signature test. I bear well in mind, however, that by this stage Access World were aware that forgeries were in circulation and the authentication Checklist involved a more detailed examination than might have been required under the Procedure Manual (an examination of the signatures being required under the Procedure Manual as I have found was required). I also bear in mind the points made by Access World that until very recently Marex did not accept that the Natixis documents were forgeries, as well as the views expressed by the experts in the Joint Memorandum (at paragraphs 17(a) and 18(b)).

432. Nevertheless, the fact is that there are, I am satisfied, obvious discrepancies in the signatures on the presented receipts as compared to the signatures appearing on the reference copies, which are apparent to me as someone with no relevant expertise, and they ought to have been noted by anyone exercising any skill and care *a fortiori* an Account Holder whose very role was to authenticate Access World's warehouse receipts including examining the signatures (as I have found). I consider that Mr Png should have noted the discrepancies and was negligent in not doing so. In reaching this conclusion I have been astute to ensure that hindsight is not involved in my analysis and I have put myself in the same situation that Mr Png faced. In this regard I consider the fact that Mr Png (negligently) did not note such discrepancies may well be due to a further (negligent) failure on his part, namely, to devote sufficient time to the examination of each individual warehouse receipt.

433. There is a further point. Discrepancies are cumulative and also inevitably lead any competent authenticator to further enquiry. Once one discrepancy was spotted any competent checker would look at other features of the same warehouse receipt and remaining warehouse receipts with particular care – this is true of other discrepancies (eg colour related discrepancies) as well as signatures, but once a false signature is spotted any competent checker would have particular regard to other signatures.

434. In the above circumstances I am satisfied, and find, that Mr Png was negligent in failing to note the discrepancies in the signatures and that, in consequence, that the PC4 and PC5 receipts were forgeries. Of course, in circumstances where I have already found that there were negligent failures in relation to verification of the security features of AW security paper (in relation to colour etc) both under the Procedure Manual and applying the *Bolam* test, it matters not whether Mr Png was additionally negligent in relation to failing to note the discrepancies in the signatures, but it is further aspect of his negligence.

I.2.5 The Other Tests

I.2.5.1 The Special Test

435. Item 2 was a security feature which could be detected using Item 1. It was specifically introduced by Access World in order to detect forgeries. Mr. Sim agreed that it was probably the most conclusive test one could have in relation to Access World warehouse receipt paper. Marex rightly points out that if the special test had been conducted, Item 2 would not have been found and all thirteen PC4 receipts, as well as the PC5 receipt, would, with certainty, have been identified as forgeries. In this regard each of the "checkers" in February 2017, when they applied the special test to the PC4 and PC5 receipts, unanimously concluded that each such receipt failed. In this regard, and by the nature of the test, Item 2 is either identified or not. The test requires no special expertise and indeed I could readily identify it when provided with Item 1 (as I was invited to do against a genuine original warehouse receipt). The result is instantaneous using the specialised device that is Item 1.

436. The reason why the special test was not conducted was because Access World deliberately did not inform Mr Png or other Account Holders of it, and it was deliberately not included in the Procedure Manual at a time when Access World management "*had confidence in the existing checks at that time*", it only being used when other checks revealed suspicious features that were referred to a customer service manager. It was only after the discovery of the widespread forgery of their warehouse receipts that Access World made the special test effectively a standard test for the authentication of warehouse receipts. Marex submits that the fact that Access World introduced the special test as a standard test almost immediately after the discovery of the forgeries shows that there was no legitimate reason why Access World could not have done so earlier, and it evidenced that management felt there was a need to strengthen the detection of forgeries and use every available security feature on every

authentication. It would, submits Marex, have been prudent for the special test to have been deployed as part of the standard authorisation and it submits that it was negligent not to do so.

437. I am not satisfied that Marex has demonstrated this to be so, at a time when Access World had not experienced such frauds on its warehouse receipts previously, had confidence in its checking procedure (which had not previously been found to be lacking) and in circumstances where there is much to be said for the existence of a secret definitive test. As was debated with the parties during their oral closing submissions it is to be borne in mind that fraud may originate within an entity (indeed it might be thought that was a particular risk for any organisation) and in this regard a secret definitive test, unknown other than to senior employees, could be a very effective final line of defence to an entity's warehouse receipts. What I consider changed, and what explains its incorporation into standard test, is the fact that Access World had been exposed to forged receipts circulating in the market, its existing checking procedures (and certainly their application) had been found wanting, and there was no doubt also a perceived need to restore customer confidence. Ultimately the burden is upon Marex to demonstrate that Access World was negligent in not previously deploying the special test as part of its Procedure Manual. They have not done so.

I.2.5.2 The Other Feature

438. The experts have identified what they characterise as another feature which is present in genuine Access World Receipts but which is not present in the forged receipts, and which Access World's employees did not test for, as its employees were apparently unaware of it (as was the evidence of Mr Png and Mr Sim). It is said this feature could be identified with the naked eye.

439. I am not convinced that this feature was fully explored in the evidence (no doubt, at least in part, as it only emerged in the expert evidence in circumstances where the experts were not called to give oral evidence). Mr Tan's evidence was that he believed that the Other Feature would only appear if there were signs of tampering with the security stickers. Marex suggests that the weight to be attached to Mr Tan's evidence in this regard is doubtful as there is no evidence that the genuine cancelled receipts were tampered with. I do not agree, and consider that Mr Tan's evidence had the ring of truth about it. I will say no more about the feature as it is confidential, but what can be discerned about it does lead to the conclusion that its purpose was in the context of tampering. As I made clear to the parties, and for my part, I struggled to identify the feature with the naked eye on an original receipt. That is not, I believe, because it

was not there (it was), or because I was lacking the experts' expertise, but rather because the feature was not designed to be manifest on an intact security sticker (even if it could be discerned with very careful examination). I do not consider Access World were negligent in failing to include a check for this feature in the Procedure Manual. There was no need to do so for the purpose for which I consider it was designed (based on Mr Tan's evidence which I accept in this regard). The fact that a further test might have been included in this regard does not, on the facts of this case, render the failure to do so negligent.

I.2.6 Conclusion re: negligence

440. In the above circumstances, for the reasons that I have given and in the respects that I have found, Access World was negligent (through Mr Png and/or themselves through its own failings) in failing to identify that the PC4 and PC5 receipts were forgeries and negligently stating that they were authentic when they were not.

J. Causation and Contributory Negligence

441. Access World submits that if (as I have found in relation to the PC4 and PC5 receipts) there was negligence on the part of Access World, any loss suffered by Marex was caused, or at least very substantially contributed to, by what is said to be Marex's reckless conduct in entering into the contracts with CHH and Natixis as a result of which it is submitted that Marex's claim against Access World either fails as a matter of causation or there should be a very substantial reduction to Marex's recoverable damages on the basis of its own contributory fault. I will first set out the applicable legal principles before applying them to the allegations made in the present case.

J.1 Applicable principles

442. Where it is found that the sole effective cause of the relevant damage is the claimant's own conduct he recovers nothing because he fails to establish causation (see *Clerk and Lindsell on Torts* (22nd edn. at 3-58)).

443. Access World submits that the causative potency of reckless or near reckless conduct is such as to break the chain of causation relying on what was said by Gross LJ in *Borealis AB v Geogas Trading SA [2011] 1 Lloyd's Rep. 482* at [45], "By its nature reckless conduct by the claimant would or would ordinarily break the chain of causation though there is no rule of law that only recklessness on the part of the claimant will do so."

444. It will be apparent from the reference to conduct that would "break the chain of causation" that conduct on the part of the claimant is (usually at least) directed at conduct of the claimant which occurs after the conduct of the defendant that has given rise to the loss. This can be seen from the judgment of Gross LJ as summarised in the headnote – each of the references to conduct there are to subsequent conduct. Different aspects of causation can arise when considering the (prior) stage of the existence and scope of the duty owed by a defendant, as has already been addressed in section H.2 above (where I concluded that the kind of loss suffered by Marex would be within the scope of duty of Access World when performing authenticating services and that such loss would be legally caused by any breach of duty by Access World (subject to questions of intervening cause or effective cause)). I address below how Marex's own conduct is to be characterised and whether or not it impacts upon Marex's recovery from Access World.

445. At common law where some fault on the part of the claimant contributed to the damage of which he complains, that contributory negligence operated as a complete defence. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 removed the complete bar on claims and provided for apportionment of the loss. For present purposes the parties agree that Singapore law is materially the same as English law.

446. By section 1(1) of the Law Reform (Contributory Negligence) Act 1945:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage"

"Fault" is defined in section 4 as meaning:

> "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence"

447. A number of relevant principles arise, which were either common ground, or are supported by existing authority.

448. Firstly, the contribution is to the "damage" suffered, and not to the occurrence inflicting the damage – see Clerk and Lindsell on Torts (22nd edn). at 3-58 – the classic illustration often given is a failure to wear a seatbelt – this in no way contributes to the accident occurring but it

can contribute to the extent of the damage (see also what Lord Reed JSC said in *Jackson v Murray* [2015] UKSC 5, [2015] 2 All ER 808 at [20] which is quoted below).

449. Secondly, any contributory negligence on the part of the claimant, however imprudent the behaviour, must be shown to be a cause of the relevant damage – see Clerk and Lindsell at 3-58 and 3-59, and Lord Atkin in *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] A.C. 152 at 165: *"If the [claimant] were negligent but his negligence was not a cause operating to produce the damage there would be no defence. I find it impossible to divorce any theory of contributory negligence from the concept of causation.*"

450. Thirdly, it is necessary when applying section 1(1) of the 1945 Act, to take account *"both of the blameworthiness of the parties and the causative potency of their acts"* (*Jackson v Murray,* supra at [40]). The consequence of this is that *"[f]ault not causally contributing to the damage cannot be taken into account in the first place"* for the purposes of assessing apportionment (see McGregor on Damages (20th edn.) at 7-009 and see also in this regard *Sahib Foods Ltd v Paskin Kyriadkides Sands (A Firm)* [2003] EWCA Civ 1832, [2004] PNLR 22 at [69] per Clarke LJ giving the judgment of the Court. The scope of the defendant's duty and the extent to which that duty is to guard against the claimant's negligence are relevant to what the relative blameworthiness and causative potency of the parties' respective faults are (*Sahib Food* at [66]). At paragraphs 68 and 69 of the judgment in *Sahib Foods* Clarke LJ stated as follows:-

> "…it would only be a case in which, … it could be seen that the whole of the responsibility for the damage was the defendants' failure to protect the claimants' against their own negligence, that it would be appropriate to hold that the claimant was not guilty of contributory negligence. As was stressed by Lord Hobhouse and Lord Millett in *Platform Home Loans v Oyston [2002] 2 AC 190* at pages 211 and 214 respectively, a reduction for contributory negligence should only be applied to damage for which the claimants are partly responsible. See also *Rahman v Arearose [2001] QB 351* , where Laws LJ said at page 367 that "the real question is what is the damage in question should be held *responsible* " (Laws LJ's italics). We accept the submission that that approach is also relevant to contributory negligence.
>
> 69.. The correct question in each case is identified by the words of section 1(1) of the 1945 Act and is thus whether the case is one in which the claimant suffered damage "as the result partly of his own fault and partly of the fault" of the defendant. If the answer to that question is yes, the damages must be reduced "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage". It is well understood that the concept of fault includes considerations of both blameworthiness and causative potency. It is not in dispute that it is open to the court to conclude that the share of a claimant's responsibility is so small by reference to that of the defendant that it would not be just and equitable to reduce the damages at all."

451. Fourthly, the burden of proof is on the defendant (see *Booth v White* [2003] EWCA Civ 1708 at [7]). This is both as to causation and blameworthiness.

452. Fifthly, just as carelessness in ordinary actions in negligence requires foreseeability of harm to others, so contributory negligence requires foreseeability of harm to oneself (see Clerk and Lindsell at [3-78]).

453. Sixthly, where a claimant has been "reasonably induced to believe that he may proceed with safety, a lesser degree of care and circumspection may be required of him" (Clerk and Lindsell at [3-80]): "This simply reflects the requirement to exercise reasonable care in all the circumstances".

454. Seventhly, if a claimant's fault lies within the very risk which it was the defendant's duty to guard him against, then contributory negligence may not be available as a defence. As Sedley LJ stated in *Pride Valley Food v Hall & Partners* [2001] EWCA Civ 1001, [2001] Con LR 1 at p. 59, "*It is only if his fault was not, or not wholly, within the causative reach of the defendant's own neglect that the question of relative culpability enters into the picture."*

455. Eighthly, the exercise of apportionment is highly fact sensitive – see e.g. Clerk and Lindsell at [3-59] citing *The Volute* [1922] 1A.C. 129 at 144, per Lord Birkenhead: *"The question of contributory negligence must be dealt with somewhat broadly and on commonsense grounds as a jury would probably deal with it."* The nature of the task is also such that there is no "demonstrably correct" apportionment. As was said in *Jackson v Murray,* supra at [20] and [27]:

> "Section 1(1) does not specify how responsibility is to be apportioned, beyond requiring the damages to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage (not, it is to be noted, responsibility for the accident). Further guidance can however be found in the decided cases. In particular, in *Stapley v Gypsum Mines Ltd* [1953] AC 663, 682, Lord Reid stated:
>
> > 'A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but 'the claimant's share in the responsibility for the damage' cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness.'"
>
> …

> The problem is not merely that the factors which the court is required to consider are incapable of precise measurement. More fundamentally, the blameworthiness of the pursuer and the defender are incommensurable. The defender has acted in breach of a duty (not necessarily a duty of care) which was owed to the pursuer; the pursuer, on the other hand, has acted with a want of regard for her own interests. The word 'fault' in section 1(1), as applied to 'the person suffering the damage' on the one hand, and the 'other person or persons' on the other hand, is therefore being used in two different senses. The court is not comparing like with like."

456.. In terms of an illustration of the application of the principles in relation to contributory negligence both Marex and Access World place reliance on the decision of *Football League Ltd v Edge Ellison (a firm)* [2006] EWHC 1462, [2007] PNLR 2 (a solicitor's negligence case). In this regard Marex relies upon what was said by Rimer J at [330] and submits that the same is true in relation to Access World with its special expertise in authenticating warehouse receipts:-

> "It is only in rare cases that a solicitor is able to advance a plea of contributory negligence with any real prospect of success, and for obvious reasons. That is because his breach of duty will usually be in relation to a matter within his special expertise as a solicitor, being a duty which is not usually one relating to a purely commercial matter of judgment falling squarely within the client's own competence. It will usually relate to a matter upon which the client is depending upon the solicitor's special expertise".

457. For its part Access World draws attention to the facts of that case and what Rimer J went on to say and conclude. In that case if the solicitors had (contrary to the judge's findings) owed a particular duty to the Football League ("FLL") it was submitted that the FLL was guilty of a material degree of contributory negligence, because the solicitor's breach of duty was one for failing to advise, or prompt, the FLL to consider a commercial aspect of the transaction which the FLL admitted was one about which it was capable of forming its own view without the need for advice or prompting by Edge Ellison, and moreover, one about which it had formed its own view.

458. After stating as quoted above Rimer J continued at [330]-[331] as follows (concluding that had the solicitors been in breach of duty the FLL was guilty of a contributory negligence and were 75% to blame):-

> "The present case is, however, different in kind. Assuming, as I must, that Mr Alderson had a duty to advise or prompt the FLL to consider the question of bidder solvency and parent company guarantees, this was, I find, a matter which was still primarily one for the FLL to consider and assess for itself without any need for such advice or prompting. I have found that it concluded that ONdigital was a sufficiently strong counterparty that it could deal with it alone. The consequence of any advice or prompting by Mr Alderson

would, so I have also found, have been that the Committee would have re-considered the assessment it had itself made and have decided, as a matter of caution, to ask for guarantees that it had itself tacitly concluded were unnecessary. Whilst it can therefore be said that Mr Alderson's breach of duty caused loss to the FLL, the FLL also made its own commercial decision on the same matter, being a decision which, with hindsight, it now regrets.

I see no good reason why, in these circumstances, the FLL should not be regarded as contributing to its own loss. I find that it was guilty of contributory negligence since I consider that the relevant issue was one that was primarily for it to decide upon for itself rather than for Mr Alderson to prompt it to consider. I regard the FLL's contribution as substantial. I assess it at 75%."

459. Access World submits that this illustrates that there is an important distinction between the scope of Access World's duty in relation to the authentication of the warehouse receipt and the wider commercial considerations which were solely for Marex.

J.2 Discussion and application of the principles

460. When considering the issues that arise matters need to be considered contemporaneously and it is important to avoid hindsight. Contemporaneously the risk of forged warehouse receipts was known both generally and to Marex (as addressed in detail in the chronology of events in Section C above) but what was not known was that CHH was (or might be) involved in the supply of forged warehouse receipts or that any of the warehouse receipts were in fact forged. This raises the question as to whether Marex was negligent in relation to what it did or did not do in relation to transacting with CHH and in relation to the warehouse receipts supplied and whether any such negligence had causative potency (before considering relative blameworthiness if it did have causative potency).

461. In this regard it was Mr Abel's evidence (which was not challenged) that *"From my experience of doing deals in the Asian market whilst at Deutsche Bank, it is not uncommon for repo counterparties to use endorseable (or transferable) warehouse receipts"*. I accept that evidence which is entirely consistent with the fact that Access World itself provides and continues to provide an endorseable warehouse receipt facility, supported by an authentication process provided by it. Thus the mere willingness to contract with a counterparty on the basis of an endorseable warehouse receipt is not *per se* negligent. However, what must then be done is to exercise reasonable skill and care when contracting with a counterparty that involves the use of endorseable warehouse receipts, and the relevant context in that regard is that it is known, and was known to Marex, that the risk of fraud is a lot higher in relation to endorseable

warehouse receipts than with the use of warrants, which is of relevance when considering what must be done if reasonable skill and care is to be exercised.

462. I am satisfied that this (1) involves undertaking due diligence in relation to the counterparty (here CHH) and taking proper account of what was or should have been known as a result and (2) taking such reasonable steps as are possible to reduce the risk of warehouse receipt fraud in relation to the transactions and the warehouse receipts concerned.

463. I have already addressed the evidence in detail in the chronology of events. Marex knew that CHH was a Hong Kong window company with no apparent assets, they had not done business with them before and they had only done basic checks required by KYC and AML rather than full due diligence. It was Mr van den Born's view, in January 2017, that Marex should have done better due diligence and did not know CHH well at all, and I consider that Mr van den Born was right to express such a view and that it was not a view that was simply the product of hindsight (although there was no doubt an element of hindsight in play). Whilst Mr Nutt suggested when cross-examined that he found comfort in the alleged chain of longstanding relationship (through Ms Ferrari) and the suggestion that Mr Wong had assets in China, the reality was that there was no long-standing trading relationship through Ms Ferrari and no real evidence as to Mr Wong's assets (and CHH was the counterparty in any event). Mr Nutt and Ms Ferrari also knew from 1 November 2016 that a financier had pulled out of their repos with CHH, and CHH needed US$50 million within a month. When cross-examined, Mr Nutt accepted that CHH was a counterparty who was desperate for the money and who was pressurising Marex to complete the deal and that this was something which seriously scared him. As already noted Mr van den Born accepted in cross-examination that he was unhappy with the "due diligence" process carried out. There clearly was a greater risk of fraud in such a scenario as compared to a known and trusted counterparty with assets. None of these matters, however, meant that CHH was, or should have been known to be, a fraudster. For example, commercial pressure is a factor of business life and counterparties often put the other party under considerable time pressure, and the mere fact that an entity is in need of money does not in of itself mean that it will act fraudulently (though the risk of it so acting may be heightened).

464. Whilst there was no evidence of actual fraud on CHH's part there was at least one warning sign (in addition to the matters identified above) which I consider should have alerted Marex to the fact that there was at least a risk that a fraud was being perpetrated. This was the fact that CHH offered no satisfactory explanation for why it was not prepared to issue fresh warehouse receipts. A commercial party could choose only to transact on such basis but the point of

distinction here is that the explanation that CHH chose to give did not bear examination, as Marex knew. That said, it was also clear that Access World would deliver against a (genuine) endorsed warehouse receipt and CHH (through Straits) had procured the issue of PMA letters by Access World directly to Natixis and these were delivered by Marex to Natixis. Access World was also in direct contact with Marex. Such matters would offer some reassurance to a party in Marex's position albeit the risk of a forged endorsed warehouse receipt was not ameliorated thereby.

465. I also consider that it would have been prudent for Marex to have undertaken further due diligence in the form of further investigation into CHH's financial position. It is true that such investigations might have revealed some positive information (that Mr Wong through CHH or his other entity Mega Wealth had engaged in hundreds of millions of dollars' worth of warehouse receipt transactions with other counterparties including ED&F Man and ANZ) but appropriate due diligence would have driven home that CHH was a Hong Kong window company with no apparent assets, and one that was in urgent need of money.

466. I do not, however, accept Access World's submission that Marex would not have entered into the transactions if appropriate due diligence had been done. Marex was itself clearly extremely keen to enter into the transactions as is apparent from the contemporary internal emails and I do not consider that appropriate due diligence would have caused it not to enter into the transactions. Expressed sentiments to the contrary (for example from Mr van den Born in January) have all the hallmarks of hindsight. Marex had strong commercial reasons why it wished to do the trades and it was not intrinsically negligent, still less reckless, to trade with CHH in relation to endorseable warehouse receipts.

467. The matters identified above only go to a heightened risk of fraud. However, the one thing that was not done which might have revealed CHH's underlying fraud, and the forgery of warehouse receipts, was if the original PC1 to PC3 warehouse receipts had been sent to Access World for authentication. As Mr Nutt and Mr Lowitt accepted when cross-examined, by only sending pdf copies for verification Marex were taking a greater risk than if authentication had taken place, as was obviously the case – authentication would have greatly reduced, though not eliminated, the risk of fraud generally, and forged warehouse receipts in particular. I consider it important that Mr Nutt also accepted that his concern over Item 2 was never resolved and whilst he did not think Item 1 was fit for purpose it was a factor in addition to the count and the COAs that was troubling him at the time and he did not resolve that factor before going ahead with PC1.

468. I consider that it is negligent to trade in endorseable warehouse receipts without sending the originals for authentication if that possibility exists (as it did in this case) *a fortiori* in the present case given the (apparent) inability to pass Item 2 using an Item 1. The obvious thing to do in such circumstances was to send the warehouse receipts to Access World for authentication. I consider that Marex was negligent in not doing so. In this regard I consider that it allowed its commercial motivation to prevail over what would have been the appropriate (and non-negligent) course of conduct.

469. It is possible that this would have revealed the fraud and in such a scenario Marex would not have proceeded. In such circumstances I consider that Marex's negligence was a cause of the loss. However, I consider its negligence has a relatively low causative potency as it is far from clear that Access World would have identified the forgery and indeed it may well have authenticated the PC1 to PC3 receipts with Access World thereafter negligently authenticating PC4 and PC5. It is to be borne in mind that Mr Png authenticated the PC4 and PC5 receipts and so he may also have authenticated the PC1 to PC3 receipts on this hypothetical scenario assuming, as I consider likely, that the receipts would still have been sent to him notwithstanding the failure of Mr Nutt to see Item 2 (given that Mr Nutt did not think his Item 1 was fit for purpose). However, it is also possible that the receipts might have been sent to Mr Tan (though this would not have been the norm) who would have been in a position to apply the special test (if he considered that necessary) resulting in a possibly different outcome.

470. I do not consider, however, that Marex was reckless in its actions or inactions or that they resulted in the chain of causation being broken or it being the effective cause of its own loss. The matters stand to be addressed as a matter of contributory negligence.

471. It is then necessary to consider relative causative potency and relative blameworthiness. This necessitates a consideration of the fault and blameworthiness of Access World as compared to Marex. I have already found that Access World was negligent in a number of respects and that had it not been negligent it would have identified that the warehouse receipts the subject matter of PC4 and PC5 were forgeries before the relevant purchase contracts were entered into. Access World's negligence was of high potency – it was such authentication which reassured Marex and led Marex to enter into PC4 and PC5. Marex clearly would not have done so had Access World discharged its responsibilities and not been negligent. Equally in terms of relative blameworthiness Access World must take the lion's share of the blame. It was Access World that had the specialist knowledge and expertise in relation to the authentication of its own warehouse receipts, and it was Access World that had special

knowledge of the security features of its own warehouse receipts. It was entirely reasonable for Marex to place the reliance it did on such authentication notwithstanding the residual risk that remained in relation to fraud (such as fraud within Access World).

472. In such circumstances I consider, and find, that Access World's breaches were of very high relative causal potency in relation to the losses and that they also bear the lion's share of relative blameworthiness when compared to Marex's contributory negligence. Having regard to the relative causal potency of their acts and relative blameworthiness of Access World and Marex as identified above, I consider and find that it is just and equitable to reduce the damages recoverable by Marex from Access World by 25%.

K. Access World's Terms and Conditions

473. Access World submits that it is entitled to rely upon its Terms and Conditions to limit its liability to EURO 100,000 in respect of each warehouse receipt authenticated by it, by reference to Clauses 10.2 and 10.5 thereof. Marex's riposte is to say firstly that if (as I have ruled) there is no binding contract between Access World and Marex there is no proper basis for holding Marex to be bound by Access World's Terms and Conditions. However, secondly, if they do apply to the relationship between Marex and Access World, it submits that the liability cap contained in Clause 10.5 is unreasonable within the meaning of the Singaporean equivalent to UCTA 1977.

474. In relation to the latter, it is submitted that the clause purports to limit liability for the very thing that Access World had undertaken and that only Access World, as issuer of its warehouse receipts, could undertake to do (namely, to determine the authenticity of the receipts); that it is a particularly onerous and Draconian provision as it purports to limit liability to a tiny proportion of the actual liability; that no attempt was made to bring it specifically to Marex's attention; and that, in any event, it was a "take it or leave it" condition which (if it applied) would limit liability for any representation of authenticity that Access World made even though it is said that only Access World could realistically determine the authenticity of the receipts. In contrast Access World submits that the cap of EURO 100,000 is a reasonable figure and indeed is at least as reasonable, if not more generous, than other caps in the same trade. It also submits that it is an integral part of any assumption of responsibility in relation to statements made by it.

475. In circumstances in which Marex accepts that if there were a contract with Access World it would be subject to Access World's Terms and Conditions (though Marex would still take

issue with the application of particular clauses including as to reasonableness) this creates what might be thought to be a very odd state of affairs on Marex's case, namely that if Marex contracted with Access World, and it got remunerated for that, Access World could limit its liability in relation to an authentication (subject to reasonableness etc) whereas if Access World authenticated a warehouse gratuitously it could not (on Marex's case) and Marex could claim all its loss from Access World. Mr Choo-Choy did not shy away from this consequence when it was put to him replying "absolutely", albeit he said that that was a consequence of his submission which was that the Terms and Conditions are designed to apply, and only apply, to a contractual relationship.

K.1 The Terms and Conditions

476. There are two sets of Access World's Terms and Conditions one dated 1 July 2016 and one dated 1 January 2017. However, nothing turns on that distinction as the limitation of liability provisions in Clauses 10.1 to 10.9 are substantially the same. Access World's Terms and Conditions (the "Terms and Conditions") provide amongst other matters as follows:-

> "These Standard Terms and Conditions (hereinafter referred to as "Conditions"), electronically published at http://www.accessworld.com, as amended, **set out the general standard terms on which any company or subsidiary belonging to the Access World Group of companies performs any Services**. In addition to these Conditions, certain sectoral terms and conditions, as detailed in Appendix 1, subject to Section 4 of these Conditions, apply with respect to Services rendered by Access World (Vlissingen) B.V., Access World (Rotterdam) B.V., Access World Terminals B.V., Access World (Italia) Sri., and any subsidiary belonging to Access World (RF) (Pty) Ltd…"

(emphasis added)

477. The Terms and Condition further provided as follows:-

> "In these Conditions, the following words and expressions shall have the following meanings, save where the context otherwise requires:
>
> **"Agreement"** means any agreement, whereby the Company and/or an authorized agent of the Company offers and the Customer accepts the provision of the Services, or where the Company has started performance of an order, and shall include without limitation any written contract agreed and/or correspondence by post, fax and/or email between the Company and/or an authorized agent of the Company and the Customer, and these Conditions;

"Company" means the Access World entity that has concluded the Agreement;

"Customer" means the party to whom the Company's offer is addressed and/or the party entering into the Agreement with the Company, and/or the party to whom the Company shall provide the Services pursuant to the Agreement;

"Goods" mean any goods handled, transported, stored or otherwise dealt with by or on behalf of or at the instance of the Company, or which come under control of the Company or its agents, servants or nominees on the instructions of the Customer, and includes any container, transportable tank, flat pallet, flat rack, package or any other form of conveyance, covering, packaging, container or equipment used in connection with or in relation to such goods;

"Group" means the Company and the related companies of the Company collectively;

"in writing" shall mean any written correspondence sent by post, fax, or email between the Company and/or its authorized agents and the Customer;

"Loss" includes (without limitation) loss (including theft), destruction, damage, unavailability, contamination, deterioration, delay, non-delivery, mis-delivery, unauthorized delivery, non-compliance with instructions or obligations, or incorrect advice or information;

"**Order"** means the Customer's request for Services using its own format;

"Price" means the rates which shall be chargeable by the Company to the Customer for the provision of the Services as set forth in the Agreement;

and

"Services" shall mean any and all services provided or to be provided by the Company to the Customer pursuant to the Agreement."

478. Clause 3 (entitled "Applicability and Interpretation") provided, amongst other matters, as follows:-

> "3.1 Unless otherwise agreed in writing, these Conditions apply to all offers made by the Company and/or its authorized agents, all business relations between the Company and/or its authorized agents, and any Agreement concluded.
>
> 3.2 The Company shall not be bound by any conflicting standard terms and conditions (howsoever called) used by the Customer and such terms and conditions shall not be applicable to the Agreement unless the terms and conditions have been accepted in writing by the Company. These Conditions may only be varied in writing by an authorized representative of the Company. If a Customer's acceptance document, purchase Order or other documentation, received by the Company before or after notification of these Conditions, contains terms at variance with these Conditions, then every such terms shall be of no effect.
>
> 3.3 Failure of the Company to invoke or enforce compliance with any provisions of the Conditions shall not constitute a waiver by the Company of its right to insist

upon strict compliance with all other provisions of the Conditions or invoke the respective provision in other circumstances.

3.4 If any of the terms of these Conditions is repugnant to or in conflict with applicable law, then and in such event the conflicting term shall be deemed to be deleted, amended and/or altered to conform therewith, and such deletion, amendment and/or alteration shall not in any way affect the remaining provisions of these Conditions."

479. Clause 5 (entitled "Offers, Acceptance of Orders and Modifications to an Agreement") provided, amongst other matters, as follows:-

5.1 All offers made by the Company and Order(s) submitted to the Company are non-binding until an Agreement has been concluded. An Agreement shall be deemed concluded the earlier of a written confirmation being sent by the Company to the Customer confirming the Agreement, the Customer accepting the Company's offer in writing, or the Company starting performance of the Services pursuant to the Customer's Order."

480. Clause 10 (entitled "Liability") provided, amongst other matters, as follows:-

"10.1 Where an Agreement is subject to sectoral terms and conditions under Section 4 (Applicability of Sectoral Terms and Conditions and Jurisdiction Specific Legislation), and where liability is specifically addressed in the sectoral terms and conditions, the Company's liability shall be determined by the applicable sectoral terms and conditions. However, in cases where the sectoral terms and conditions do not specifically determine such liability, the following provisions shall apply.

10.2 To the extent that any Loss is directly caused by gross negligence of the Company, its employees (acting in furtherance of their duties as employees) or sub-contractors or agents (acting in furtherance of their duties as subcontractors or agents), subject to Clause 10.3 and 10.4, the Company will accept liability for any such Loss assessed on the applicable legal principles but not exceeding the limit fixed by Clause 10.5. Any quantification of value includes duties and taxes.

10.3 In no case shall the Company be liable, whether in contract or tort, for any lost profit, income or savings, wasted expenditure, or indirect or consequential loss, whether or not the Company knows or has previously been advised of the possibility of such loss or damage.
…
10.5 In regards to the Company's limitation of liability for any Loss, the sectoral terms as set forth in Appendix 1 shall apply if applicable. In the event no sectoral terms as set forth in Appendix 1 apply, in those cases where the Company is liable to the Customer under Clause 10.2, in no such case whatsoever shall any liability of the Company, howsoever arising, exceed whichever is the least of the following respective amounts:

10.5.1 the actual direct damages incurred; or

10.5.2 the actual value of the Goods (as evidenced by the relevant documentation or declared by the Customer for customs purposes
or for any purposes connected with their transportation); or

10.5.3 the values of the Goods as declared for insurance purposes; or

10.5.4 EUR 100,000 (or equivalent amount in the local currency of the country in which the Company that is party to the Agreement is domiciled) per event, or series of events arising from one and the same cause."

K.2 The Applicability of the Terms and Conditions

481. Marex says that the Terms and Conditions are not available to Access World on the basis of two submissions. First that the Terms and Conditions only apply where there is a contractual agreement between Access World and the other party, and secondly that the Terms and Conditions do not fall into what Marex says is the relatively narrow category of non-contractual disclaimer or notice that can take effect in tort so as to exclude or limit a tortfeasor's liability or duty in negligence, as reviewed by the Court of Appeal in *Taberna Europe CDO Plc v Selskabet ADI,* supra.

482. For its part Access World submits that Marex does not adopt the correct approach to whether a party's terms and conditions apply to a claim in tort – which depends on notice (as opposed to contractual principles of "incorporation") and the Terms and Conditions are in any event wide enough to extend to the gratuitous authentication services that Access World agreed to provide to Marex.

483. In this regard Marex accepts at paragraph 161 of its Closing Submissions that there may be situations where a party's standard terms and conditions can have effect as a non-contractual notice in so far as they may be relevant to determining, whether for instance, any representations were in fact made by the alleged representor (i.e. a type of duty negativing clause) by reference to what was said by Moore-Bick LJ in *Taberna* (see [5] and [18]-[23] thereof). However, as is clear from *Taberna* and what was said by Moore-Bick LJ in that case, such principles apply not only to "duty negativing" clauses but also "liability negativing clauses" (such as limitation clauses).

484. In *Taberna* the Court was considering a presentation produced by a bank for use at a "non-deal roadshow" but which was also published on a website. A disclaimer was made in the terms set out at paragraph [5] of the judgment. That disclaimer included not only "duty negativing clauses" (which purport to restrict the scope of any apparent representation) (paragraphs (b)

and (e)), but also "liability negativing clauses" (which purport to exclude or limit liability for misstatement rather than qualifying the scope or nature of the statements), the relevant paragraphs (c) and (d) providing:-

> "(c) "No liability whatsoever is accepted as to any errors, omissions or misstatements contained herein,…"
>
> "(d) "neither the bank not any officers or employees accepts any liability whatsoever arising directly or indirectly from the use of this presentation for any purpose…"

485. Moore-Bick LJ addressed both types of clause at paragraphs [18]-[23] of his judgment. As to "liability negativing clauses" he stated as follows:-

> "21. Paragraphs (c) and (d) of the disclaimer differ from paragraphs (b) and (e) in that they purport to exclude liability for any misstatement rather than qualify the scope or nature of the statements which the document contains. In other words, they are liability-negating clauses rather than duty-negating clauses. The judge was content to proceed on the assumption that they could be effective, despite the fact that they too did not form part of any relevant contract between Roskilde and Taberna, and held that they satisfied the requirement of reasonableness. None the less, he held that the words used were insufficiently clear to exclude liability for damages for misrepresentation.
>
> 22. In the light of Toulson J's observations in *IFE Fund SA v Goldman Sachs International* it might be said that since those paragraphs have not been incorporated into a contract between Roskilde and Taberna they have no effect. Notwithstanding those observations, however, I can see no reason in principle why a person should not be able to publish information of the kind contained in the investor presentation on the basis that he is not willing to take responsibility for it, at least where it is reasonable for him to do so (as the judge found it was in this case), provided, of course, that he makes the position clear. So in principle I agree with the judge that, subject to any rules of construction which cut down the scope of such clauses, Roskilde is entitled to rely on them.
>
> 23. In the past judges have tended to invoke the contra proferentem rule as a useful means of controlling unreasonable exclusion clauses. The modern view, however, is to recognise that commercial parties (which these were) are entitled to make their own bargains and that the task of the court is to interpret fairly the words they have used. The contra proferentem rule may still be useful to resolve cases of genuine ambiguity, but ought not to be taken as the starting point: see, for example, *The Hut Group Ltd v Nobahar-Cookson* [2016] EWCA Civ 128 and *Transocean Drilling UK Ltd v Providence Resources plc* [2016] 2 All ER (Comm) 606. In my view paragraphs (c) and (d) are couched in language that makes it quite clear that Roskilde accepts no responsibility for the information contained in the investor presentation. There is no ambiguity of the kind that can properly be resolved by invoking the contra proferentem rule."

486. I am satisfied that "liability negativing clauses" can be effective either to limit or exclude liability provided that reasonable notice is given of the non-contractual notice. In *Taberna* Moore-Bick LJ stated at [16]:

> "Since it is common ground that there was no contract between Roskilde and Taberna which incorporated the disclaimer, it must be effective, if it is to be effective at all, simply as a notice to the reader of the document that Roskilde is unwilling to accept liability for its contents. Mr. Lord submitted that, since it was tucked away at the back of the document in fairly small print, the court could not be satisfied that the reasonable reader would have seen it and taken it in. I cannot accept that. The document was intended to be read by experienced professional investors, such as Taberna, who must be taken to be well aware that it is necessary to read a document of this kind in its entirety. Nor, for much the same reasons, can I accept that the disclaimer could reasonably be understood as relating only to those parts of the document which contained forecasts or estimates. In my view, read fairly as a whole, it contained a clear message: fraud apart, Roskilde was not willing to accept any
> liability for the accuracy of the document's contents."

487. In B*DW Trading Limited v Integral Geotechnique (Wales) Limited* [2018] EWHC 1915 (TCC), where the claimant housebuilder accepted that the defendant engineers would have contracted with the vendor of the land on commercial terms, which may have included limitations, but had not sought to ascertain what those terms might be, Davies J. found that the defendant did not owe a duty of care to the claimant but said (at [173]) that if he had come to a contrary view, *"I would have concluded that [the defendant] could not fairly, justly or reasonably be treated as having assumed liability to [the claimant] … in any event in excess of the £300,000 limitation of liability."*

488. As is clear from paragraph [16] of *Taberna,* what is required is reasonable notice of the disclaimer, and the party relying on the disclaimer does not have to show that the claimant actually knew about it. As is said by the editors of *Charlesworthy & Percy on Negligence 14th edn.* at para 2-223:-

> "In *Hedley Byrne* the defendants expressly disclaimed any responsibility on their part. All of their Lordships were agreed the defendants were not liable. Lord Morris maintained that the claimant could not accept a reply given with a stipulation and then reject the stipulation. <u>The reason is found in the principle of notice. The defendant must give reasonable notice of the disclaimer, but does not have to show that the claimant actually knew about it and voluntarily assumed the risk of harm.</u> However, the impact of a disclaimer in this context is subject to the provisions of the Unfair Contract Terms Act 1977 or the Consumer Rights Act 2015. The latter now applies in "consumer" cases, as defined, and the former continues to apply in other cases."

(emphasis added)

489. As is rightly identified by Access World, the question of what amounts to reasonable notice involves a consideration of two inter-related issues. First are the provisions of Access World's terms and conditions particularly onerous or unusual? Secondly, did Marex have sufficient notice of those provisions? These are interrelated questions because the more outlandish a particular clause is, the greater degree of notice required - see *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 443 per Bingham LJ at p. 443 (described by Gross LJ in *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] BLR 491 at [101] as "a sliding scale").

490. As to the first question, the mere fact that the clause in question is a limitation or exclusion clause does not of itself mean that it is onerous or unusual. As Coulson LJ stated in *Goodlife* at [35] everything turns on the context. In this regard Access World refers to what was stated by Bingham LJ in *Interfoto* at page 445, "*to the extent that the conditions so displayed were common form or usual terms regularly encountered in this business, I do not think that the defendants could successfully contend that they were not incorporated into the contract*."

491. In the present case Mr Abel's evidence (at paragraph 32 of his witness statement) was that in his experience it is market practice for warehouses to have terms and conditions to which the holders of the receipts are subject and he was generally familiar with the kind of terms and conditions to be expected, which he confirmed when cross-examined meant that they included exclusions and limitations and so forth. He also confirmed that prudent banks like Natixis will factor these terms and conditions into their assessment of the risks and dangers of any particular transaction. Mr Nutt of Marex confirmed in oral evidence that he agreed with Mr Abel's witness statement and would expect Access World to have terms and conditions. He said that he had not himself looked at them but said that due to the very long relationship with Marex, he assumed that they would probably have been reviewed by Marex at some time.

492. The evidence before me from Mr Vermeulen (exhibited to his statement) is that the Terms and Conditions are comparable to (and in some cases more generous than) others in industry trade associations and warehousing (I address such evidence further below in the context of the issue of reasonableness under the Singaporean equivalent of UCTA). I do not consider that the Terms and Conditions, and in particular, Clause 10.5, are either onerous or unusual. Rather I am satisfied that they are of a nature that anyone familiar with this market, including Mr Nutt and Mr Abel, would have expected. They are not comparable to the "very onerous clause" in

Interfoto, and the sentiments expressed in that case are not apposite when considering Clause 10.5.

493. Marex submits that the application of the limitation of liability clause to a negligent misstatement case would be "*exceptionally onerous and unusual*" because it would purport effectively to exclude liability for the "very thing" that Access World had warranted. I do not agree. The imposition of a limit on liability is commonplace and indeed to be expected (as reflected in the evidence of Mr Abel and Mr Nutt). Indeed one can well see why an entity in Access World's position might only be willing to offer authentication services with a limitation of liability.

494. Marex relies (although as I understand it now only in the context of reasonableness) upon *obiter* remarks of Christopher Clarke J in *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] 2 Lloyd's Rep 629 in which (in the context of an assumption that it was impossible for Borealis ever to comply with the contract) he found that it would be unreasonable for them to exclude their liability for something which was contrary to both parties' assumptions stating that "*In those circumstances a blanket exclusion of any liability whatever is prima facie unreasonable*." I do not consider such statement is apposite on the facts of the present case, and the limitation of liability in Clause 10.5.

495. In any event, such sentiments did not find favour with the Court of Appeal in the *Goodlife* case it being emphasised that regard must be had to all of the parties' rights and obligations in the round and the relevant statement or obligation cannot be looked at in isolation. In that case, the defendant had agreed to provide a fire suppression system, but it had agreed to do so on terms that severely limited its liability for future claims. The Court held that one part of this package of rights and obligations should not be considered in isolation. Thus Coulson LJ stated at [84] to [86]:-

> "84. That leaves Mr Christie QC's final submission that, because Hall Fire were seeking to avoid their core obligation of providing a proper fire suppression system, clause 11 should be regarded as unreasonable. In making that submission, Mr Christie QC relied heavily on the judgment of Christopher Clarke J in *Balmoral v Borealis*, and also on *Charlotte Thirty*.
>
> 85. I do not accept that submission for a number of reasons. First, the contention that this went to the assumption at the heart of the contract ignores clause 11 itself. When looking at the parties' rights and obligations, the contract has to be looked at as a whole. Thus, although Hall Fire had agreed to provide the fire suppression system, they had agreed to do so on the basis that they had severely limited their liability for any future claims. The supply of the system cannot be looked at in isolation from the terms on which Hall Fire were prepared to supply and install it. So, clause 11 cannot be left out of account when

considering the parties' core obligations. In my view, that provides a very powerful answer to Mr Christie QC's submission.

86. Secondly, I should say that, in my view, *Balmoral* was a very different case. There, on the facts assumed by the judge for his obiter analysis, it was impossible for Borealis ever to comply with the contract. He therefore found that it would be unreasonable for them to exclude their liability for something which was contrary to both parties' assumptions. But that is not this case: there is no suggestion of impossibility here. In addition, because of the insurance element and the fact that Balmoral could not contract elsewhere, *Balmoral v Borealis* was a long way from the facts of this case. I do not think it is of assistance in the more typical circumstances that arose here."

496. In the present case Access World was prepared to make statements as to the authenticity of its warehouse receipts on the basis of its Terms and Conditions under which its liability was limited. The approach of the courts to party autonomy in this regard is also reflected in the observations of Gross LJ in *Goodlife* at [99] –[103] (quoted below in Section K.3 in the context of the consideration of the requirement of reasonableness) but is equally apposite at this point.

497. In the present case I have already noted the evidence of Mr Abel and Mr Nutt, which I accept, that they expected Access World to have terms and conditions, and Mr Abel's confirmation that he expected such terms to include exclusions and limitations. This is entirely consistent with the documentary material before the Court from which it is apparent that Marex and Natixis were on notice of Access World's Terms and Conditions. References to Access World's Terms and Conditions is made in all email communications from Access World employees, on warehouse receipts, warrants, credit notes and some invoices. Access World (including through its predecessor Pacorini Metals) has had a business relationship with Marex and Natixis since 2007, having provided services to both in connection with both LME warranted and non-warranted material.

498. The evidence is that Access World has issued thousands of LME warrants to Marex and Natixis (as named broker) since 2007. In this regard the reverse of each warrant expressly refers to the Terms and Conditions:-

"The legal relationship between the Access World entity indicated on the front of the warrant (the "Warehouse") and the warrant holder is subject in all respects to the rules and regulations set out by the London Metal Exchange (the "LME"), applicable local law and regulations of the jurisdiction where the metal is stored, and the standard terms of the Warehouse available as www.accessworld.com."

499. Access World (and previously Pacorini Metals) has also issued invoices to Marex and Natixis, which refer to the Terms and Conditions in the following terms:-

> "Access World's General Terms and Conditions are applicable to all offers made by Access World, all agreements concluded between Access World and a customer, and any other work carried out by Access World for the customer. A copy of the General Terms and Conditions will be sent to you upon request or can be found on our website at www.accessworld.co." (emphasis added).

500. An identical statement is contained in emails sent by Pacorini and Access World to Marex referring to the application of its terms and conditions to "*...all offers made by ...., all agreements concluded*.... and any other work carried out*...*" (emphasis added). I am satisfied that as a matter of the ordinary and natural meaning of the words used this is (viewed objectively) intended to apply to any work carried out and accordingly whether that work be carried out pursuant to a contract or gratuitously i.e. that any work (which will encompass any services or statement made authenticating a warehouse receipt) is subject to the Terms and Conditions.

501. I consider this to be a point of particular importance, as such a reference appears in every email sent by Access World and received by Marex. In the case of short emails it will be on the very same page as the content of the email itself. In a lengthy chain it may appear at the end, but Marex cannot suggest that it was not aware of such provision. Indeed such statements appear as part of the email chain that contains the authentication emails of 22 December and 9 January. There are also specific examples of Mr Nutt receiving emails referring to Access World's Terms and Conditions and him replying accepting Access World's services over the period of time in question (for example in an email chain on 23 December 2016).

502. I am satisfied that, in the context of the long standing relationship between Marex and Access World; the numerous references to the Terms and Conditions in various forms of communication between Access World and Marex as identified above; the specific references to the Terms and Conditions in the emails concerning the very authentication services being performed and Mr Nutt's evidence as to knowledge that there would be limitations of liability clauses and that someone at Marex would have read Access World'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 Marex's attention.

503. Marex submits that even if reasonable notice was, given then the Terms and Conditions do not apply to a free-standing tort claim when there is no contract between Access World

based on the language of the Terms and Conditions themselves. Access World's riposte is that this is wrong both as a matter of approach and as a matter of language.

504. As to the former, I consider that what was said by Hobhouse LJ in *McCullagh v. Lane Fox & Partners Ltd,* supra, at p. 237 in relation to disclaimers (as has already been quoted earlier when considering the 22 November email) is in point. In that case the disclaimer went to negate the assumption of responsibility but I consider it could equally qualify the basis on which there is an assumption of responsibility (i.e. to assume responsibility for statements made but on the basis of a limitation of liability of which reasonable notice had been given):-

> "The judge avoided this conclusion by approaching the disclaimer as if it were a contractual exclusion. On such an approach it would need to be strictly construed and the argument was available that it did not as such cover an oral statement. But that is not, in my judgment, the right approach. It is not an exclusion to be construed. The right approach, as is made clear in Hedley Byrne, is to treat the existence of the disclaimer as one of the facts relevant to answering the question whether there had been an assumption of responsibility by the defendants for the relevant statement. <u>This question must be answered objectively by reference to what a reasonable person in the position of Mr McCullagh would have understood at the time that ·he finally relied upon the representation.</u>" (emphasis added)

505. In the present case, and as already noted, emails sent by Access World to Marex (including the 22 December and 9 January emails but extending to many before that) referred to the application of the Terms and Conditions to *"…all offers made by…, all agreements concluded… <u>and any other work carried out</u>"* (emphasis added). A reasonable person in the position of Marex would have understood that the Terms and Conditions applied to *"any other work carried out"* including work gratuitously performed such as the authentication of the warehouse receipts the subject matter of PC4 and PC5, and I so find. In such circumstances, Access World's assumption of responsibility was on the basis that any statements made by it were subject to its Terms and Conditions including the limitation clause therein. It is neither necessary nor appropriate to construe the Terms and Conditions like a contract.

506. However to the extent that it is appropriate to have regard to the language of the Terms and Conditions then I consider they do encompass claims in tort, and the limitation of liability clauses do apply to such claims (subject to the requirement of reasonableness).

507. The first point is that the opening words of the Terms and Conditions are broad and are directed at all services (albeit as defined) provided by Access World or its subsidiaries: "*These Standard Terms and Conditions (hereinafter referred to as "Conditions"), electronically*

published at http://www.accessworld.com, as amended, set out the general standard terms on which any company or subsidiary belonging to the Access World Group of companies performs any Services"

508. "Services" is defined as meaning, "any and all services provided or to be provided by the Company to the Customer pursuant to the Agreement" (so it extends to any and all services), whilst "Agreement" is defined as meaning *"any agreement, whereby the Company and/or an authorized agent of the Company offers and the Customer accepts the provision of the Services, or where the Company has started performance of an order, and shall include without limitation any written contract agreed and/or correspondence by post, fax and/or email between the Company and/or an authorized agent of the Company and the Customer, and these Conditions"* (emphasis added). An agreement is thus a wide concept that applies to correspondence including by email. There is no reason to construe this narrowly as only applying to contractual agreements or contractual correspondence. "Loss" is also widely defined and includes *"(without limitation) loss (including theft), destruction, damage, unavailability, contamination, deterioration, delay, non-delivery, mis-delivery, unauthorized delivery, non-compliance with instructions or obligations, or incorrect advice or information"* (emphasis added) and again there is no reason to construe it as applying only to advice given pursuant to a contract.

509. Marex relies upon Clause 3.1 which provides, "Unless otherwise agreed in writing, these Conditions apply to all offers made by the Company and/or its authorized agents, all business relations between the Company and/or its authorized agents, and any Agreement concluded". However this again appears to be a wide provision designed to cover all offers made by the Company (which could include gratuitous offers to authenticate) and refers to "all business relations between the Company and/or its authorized agents" which must be a reference to the business relations between the Company or its authorized agent and the customer (as "business relations between the Company … or its authorized agent" would otherwise make no sense).

510. Equally, there is nothing in Clause 10 which limits the application of the matters there set out (or the Terms and Conditions as a whole) to contractual claims. I do not consider that Marex's construction of Clause 10.1 is correct when it submits that the terms are only intended to apply where there is an underlying contract between Access World and the party intended to be bound by the Terms and Conditions. It will be recalled that Clause 10.1 provides*, "Where an Agreement is subject to sectoral terms and conditions under Section 4 (Applicability of Sectoral Terms and Conditions and Jurisdiction Specific Legislation), and where liability is*

specifically addressed in the sectoral terms and conditions, the Company's liability shall be determined by the applicable sectoral terms and conditions. However, in cases where the sectoral terms and conditions do not specifically determine such liability, the following provisions shall apply." That is simply saying that where there are sectoral terms and conditions the Company's liability shall be determined by those, but otherwise the provisions of Clauses 10.2 to 10.9 apply. It is not a fundamental premise for the application of Clauses 10.2 to 10.9 that there is a contract between Access World and the party sought to be bound by the Terms and Conditions (and in the context of the reference to "Agreement" that is also widely defined as identified above).

511. Clause 10.2 relates to gross negligence (an apt characterisation of Access World's negligence in this case) and it is not qualified as being only negligence if you're a party to a contract. Clause 10.3 expressly contemplates the Company being liable "whether in contract or tort", whilst Clause 10.5 limits liability in respect of "any Loss", "Loss" being defined as extending to "incorrect advice or information" as already noted, and again there is no reason to construe it as applying only to advice given pursuant to a contract.

512. Accordingly, even if it was appropriate to approach matters from the construction of the clauses of the Terms and Conditions, rather than by reference to what a reasonable person in the position of Marex would have understood at the time that the statement was relied upon (i.e. that the statement was subject to Access World's Terms and Conditions), those Terms and Conditions extend to a claim in tort for negligence/negligent mis-statement and the limitation of liability clauses apply to such claims (subject only to the requirement of reasonableness).

K.3 Reasonableness

513. Marex contends that in so far as the liability cap in Clause 10.5 applies to the damages recoverable by Marex (as I am satisfied it does in the circumstances addressed above), that cap is unreasonable within the meaning of sections 2(2), 3(2) and 11(5) of the Singapore Unfair Contract Terms Act (Chapter 396) and that Access World cannot rely upon the same (the parties proceeding on the basis that Singapore law is the same as English law in this regard). The burden is upon Access World to prove the reasonableness of its terms (section 11(5)). For its part, Access World submits that all the exclusion and limitation of liability clauses in its Terms and Conditions (including Clause 10.5 which is the Clause specifically focussed upon by Marex) are entirely reasonable in all the circumstances.

514. As an overarching submission, Access World relies upon the observations of Lord Wilberforce in *Photo Productions Ltd v Securicor Transport Ltd* [1980] AC 827 at p. 843 where Lord Wilberforce observed that:

> "After [UCTA], in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions."

515. It is apparent that such sentiments remain apposite, as is addressed by Gross LJ in *Goodlife* at [99] – [105] (and see also *McCullagh,* supra, per Hobhouse LJ at p. 239 and *Barclays Bank v Grant Thornton*, supra, per Cooke J at [91]). In *Goodlife* Gross LJ stated, in particular, as follows at [99] – [103]:-

> "99. An important pillar of English common and commercial law is party autonomy. Parties are free to contract on terms they choose, to allocate risks as they see fit - and the court will enforce their bargains. Outside the scope of application of the Unfair Contract Terms Act 1977 ("UCTA") but taking account of its enactment, as Lord Wilberforce observed in *Photo Production Ltd v Securicor Transport Ltd* [1980] I Lloyd's Rep 545; [1980] AC 827 at page 843:
> "After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said ... for leaving the parties free to apportion the risks as they think fit and for respecting their decisions."

516. Lord Diplock, in his speech, put the same concept in these terms (at page 848):

> "A basic principle of the common-law of contract . . . is that parties to a contract are free to determine for themselves what primary obligations they will accept . .. ".
>
> 100. The common-law was, of course, alive to the difficulties posed by exemption clauses and addressed them, for a time, through the doctrine of fundamental breach and, enduringly, through the techniques of requiring adequate notice and a process of strict construction so as to narrow their scope.
>
> 101. With regard to the question as to the adequacy of notice, the common-law in effect operated a sliding scale, tellingly encapsulated by the observation of Bingham LJ (as he then was) in *lnterfoto Library Ltd v Stiletto Ltd* [1989] I QB 433, at page 443:
> " ... the more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given."
>
> In essence the question of the reasonableness of notice entails "a principle of fair and open dealing" (Bingham LJ in ln*terfoto,* at page 439) or avoiding the "mischief of ignorance" (to paraphrase HHJ Waksman's summary, in *Allen Fabrications Ltd v ASD*

Ltd (t/a ASD Metal Services and/or Kockner & Co Multi Metal Distribution) [2012] EWHC 2213 (TCC) at paragraph 62).

102. As already mentioned, the common-law circumscribed the operation of exemption clauses by adopting an approach of strict construction. When the legislature intervened by enacting UCTA, it adopted a different technique, requiring the clauses in question to satisfy the requirement of "reasonableness". UCTA applies to the present contract because it was based on Hall Fire's standard terms; hence the need for clause II to satisfy the requirement of reasonableness.

103. However, even where UCTA is applicable, at least in the case of commercial contracts between parties of broadly equal bargaining power, considerations of party autonomy and freedom of contract remain potent. Thus, in *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317; [2001] BLR 143; [2001] I All ER (Comm) 696, Chadwick LJ said this:

"55. Where experienced businessmen representing substantial companies of bargaining power negotiate an agreement, they may be taken to have had regard to the matters known to them. They should, in my view, be taken to be the best judge of the commercial fairness of the agreement which they have made; including the fairness of each of the terms in that agreement. They should be taken to be the best judge on the question whether the terms of the agreement are reasonable. The court should not assume that either is likely to commit his company to an agreement which he thinks is unfair, or which he thinks includes unreasonable terms. Unless satisfied that one party has, in effect, taken unfair advantage of the other - or that a term is so unreasonable that it cannot properly have been understood or considered - the court should not interfere."”

517. In Section K.2, when considering the question of notice, I have already referred to the evidence of Mr Abel that in his experience it is market practice for warehouses to have terms and conditions to which the holders of the receipts are subject and he was generally familiar with the kind of terms and conditions to be expected, which he confirmed when cross-examined meant that they included exclusions and limitations and so forth. This is important as it shows he was aware that there would be such exclusions and limitations of liability. He also confirmed that prudent banks like Natixis will factor these terms and conditions into their assessment of the risks and dangers of any particular transaction. I have also already referred to the fact that Mr Nutt confirmed in oral evidence that he agreed with Mr Abel’s witness statement and would expect Access World to have terms and conditions and that whilst he had not himself looked at them, that due to the very long relationship with Marex, he assumed that they would probably have been reviewed by Marex at some time.

518. I am satisfied that Marex (and Natixis) are commercially sophisticated and, as appears from Mr Vermeulen’s evidence, Marex is an LME Category 1 broker and Natixis is an LME Category 2 broker, and each had access to legal advice. Indeed the evidence is that Natixis

actually undertook an analysis of the risks including as to terms and conditions which it factored into its decision whether to do the business in the first place (Natixis' contemporary documentation contains a reference to warehouse terms and conditions, and Mr Abel confirmed, when cross-examined, that in assessing the risks and dangers of any particular transaction, part of the approach of Natixis in prudent assessment of that was to take into account the terms and conditions which the warehouse operated on). It was equally open to Marex to do so, whether or not it chose to do so.

519. I have already addressed in Section K.2 (in the context of notice) why I do not consider that the Terms and Conditions, and in particular Clause 10.5 are either onerous or unusual. Rather I am satisfied that they are of a nature that anyone familiar with this market, including Mr Nutt and Mr Abel would have expected. They are not comparable to the "very onerous clause" in *Interfoto,* and the sentiments expressed in that case are not apposite when considering Clause 10.5. Clause 10.5 is the sort of clause that would be expected and is not properly characterised as a clause, *"buried away in a raft of small print"* (per Coulson LJ in *Goodlife* at [53]). Nor is it a clause that is so onerous that it would be required to be brought specifically to Marex's attention (of the type envisaged in *Interfoto* or as famously envisaged by Lord Denning in *J. Spurling Ltd. v. Bradshaw* [1956] 1 W.L.R. 461 , 466 as requiring that it be printed in red ink with a red hand pointing to it). On the contrary, it was precisely what one might expect (as evidenced by industry standard limitation clauses identified in the evidence, as addressed below).

520. I have also already addressed, in Section K.2, in the context of notice, a number of the other points made by Marex. I have rejected Marex's submission that the application of the limitation of liability clause to a negligent misstatement case would be "*exceptionally onerous and unusual*" because it would purport effectively to exclude liability for the "very thing" that Access World had warranted. The imposition of a limit on liability is commonplace and indeed to be expected (as reflected in the evidence of Mr Abel and Mr Nutt). Indeed one can well see why an entity in Access World's position might only be willing to offer authentication services with a limitation of liability.

521. I have also addressed in Section K.2 why I do not consider that the *obiter* remarks of Christopher Clarke J in *Balmoral Group Ltd v Borealis (UK) Ltd,* supra, in which (in the context of an assumption that it was impossible for Borealis ever to comply with the contract) he found that it would be unreasonable for them to exclude their liability for something which was contrary to both parties' assumptions stating that "*In those circumstances a blanket*

exclusion of any liability whatever is prima facie unreasonable" are apposite on the facts of the present case, and the limitation of liability in Clause 10.5. The limitation of liability in Clause 10.5 is not a blanket exclusion of liability but a monetary limitation of liability and the cap itself (as addressed below) is comparable to, and in some cases more generous than, those of other industry trade associations and warehousing companies. In any event, as already noted, such sentiments did not find favour with the Court of Appeal in the *Goodlife* case it being emphasised that regard must be had to all of the parties' rights and obligations in the round and the relevant statement or obligation cannot be looked at in isolation. It is readily understandable why a warehouse in the position of Access World would only be willing to assume a responsibility for authentication services on the basis of a limitation of monetary liability.

522. Turning to the evidence of monetary limitation clauses of other industry trade associations and warehousing companies. In *Overseas Medical v Orient Transport* [1999] 2 Lloyd's Rep. 273, Potter LJ identified (relying on *Sonicare International Ltd v East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep 48 at p.55 per Judge Hallgarten QC) that, in cases of limitation rather than exclusion of liability, the size of the limit compared with other limits in widely used standard terms may be relevant. The evidence before me from Mr Vermeulen (exhibited to his statement) is that the Terms and Conditions are comparable to (and in some cases more generous than) those of other such companies and associations. That evidence includes BIFA, 75,000 SDR in respect of any one transaction, Singapore Logistics Association, $100,000 in respect of any one claim, Dutch Warehousing Conditions, 2SDR's per kilogram damaged or lost gross weight with a maximum of 100,000 SDRs per event or series of events with the same cause of damage, C. Steinweg Logistics, (Pty) 20,000 South African Rands for any one incident or occurrence.

523. Marex seeks to make much of the fact that such limits, and the limit in Clause 10.5 (applied, rightly in my view per warehouse receipt authenticated), represents only a small percentage of the value of each cargo the subject matter of a warehouse receipt but that point applies equally to clauses across the industry, and it is clearly the norm that warehouses and the like limit the sums recoverable to such figures notwithstanding that the potential loss to a customer could (self-evidently) be much higher. Marex's Clause 10.5 is not an outlier, but rather is comparable, to similar clauses in the market which is a relevant consideration when considering reasonableness. Nor do I consider it tenable to suggest (as Mr Choo-Choy attempted to do in his oral closing submissions) that the caps throughout the industry are to be regarded as unreasonable – rather I consider that they are regarded as appropriate in circumstances where the warehouse company has no knowledge of the commercial

considerations and risks that are in play, in contradistinction to the customer who can assess those risks and take other steps to ameliorate the risks it faces. The cap in Clause 10.5, and within the industry, is not (contrary to Marex's submission) tantamount to a complete exclusion of liability, nor is it repugnant to the assumption of responsibility. On the contrary it is an integral part of such assumption of responsibility (as addressed further below).

524. Of course the customer is best placed to know, and evaluate, the commercial risks that arise in respect of a transaction (and guard against them commercially or by way of insurance) in contrast to a warehouse that is not in a position to evaluate those risks. That is especially so on the facts of the present case. As between Marex and Access World it was Marex (and to a large extent Marex alone) that was in a position to know and evaluate the risk of the transactions Marex was proposing to embark upon. Actual events well illustrate the difference in the respective knowledge of Marex and Access World in relation to those risks. I have already addressed Marex's knowledge in that regard in the context of the chronology of events and the question of contributory negligence, the risks of dealing with CHH and the undoubted concerns that Marex had. These were all matters within the knowledge and provenance of Marex but were unknown to Access World (as they would be to any warehouse in the position of Access World). I consider that this imbalance of information and availability of information supports the need for, and reasonableness of, Access World's limitation of liability in Clause 10.5. To put matters at their starkest were this not so Access World would not only be the guarantor of Marex's commercial venture, but the guarantor of a commercial venture entered into without sufficient due diligence on Marex's part.

525. Marex also submits that the parties were not of equal bargaining power which, if demonstrated, is a relevant factor under UCTA - see *Overseas Medical Supplies Ltd v. Orient Transport Services Ltd* [1999] 2 Lloyd's Rep 273, 277 per Potter LJ. Access World rightly accepts that the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met is a relevant consideration under UCTA. However, the question of equality of bargaining position (which may be of particular importance in some cases) is, I consider, of only limited relevance in the present case where what is being performed is a gratuitous service – it does not involve negotiation of terms or a stronger company forcing its terms on a weaker company as part of a commercial negotiation or commercial transaction.

526. Access World is not receiving <u>any</u> payment for authenticating the warehouse receipts and Marex is not even Access World's customer (the amount of the price being paid is a relevant

factor when assessing reasonableness – see per Gross LJ in *Goodlife*, supra at [109]). It is true that Access World is no doubt receiving some collateral benefit as a warehouse in maintaining the integrity of its warehouse receipts and supporting its warehousing business, but the present circumstances are unusual in that the context in which authentication usually takes place is upon surrender. Here there is a wholly gratuitous authentication during the life of a warehouse receipt. There is nothing to suggest that Access World was deriving substantial commercial benefit from ad hoc authentications of warehouse receipts in the hands of a third party, and at a time when the same had not been presented for surrender.

527. Nor is it as if Marex was forced to accept the terms, including Clause 10.5 having tried to negotiate away from those terms – indeed it appears Marex simply assumed that Access World would have terms and conditions which would apply. Indeed I consider that Marex implicitly accepted and consented to the application of the Terms and Conditions given that all Access World's emails to Marex contained the statement that Access World's terms and conditions applied to *"…all offers made by…, all agreements concluded… and any other work carried out"* and Marex did not object thereto. It also appears that contemporaneously, at least, Marex was, in reality, simply seeking reassurance by virtue of authentication (though it made a commercial decision to live without it in relation to PC1-PC3) whilst it looked to its insurance to protect itself (as appears from the chronology of events and Marex's eagerness to ensure it was insured in respect of warehouse receipt fraud). It did not bother to investigate, still less seek to negotiate, the applicable terms and conditions with Access World.

528. I consider that the gratuitous nature of the service is relevant in another respect. As I have found, Access World's assumption of responsibility was on the basis that any statements made by it were subject to its Terms and Conditions including the package of limitation clauses therein. The fact that the inclusion of a limitation clause is an integral part of the very assumption of responsibility itself weighs heavily in favour of such limitation clause satisfying the requirement of reasonableness. Any intervention by the Court would be to disrupt the equilibrium of the very circumstances in which an assumption of responsibility arose, and is a further reason why the Court should be extremely reluctant to intervene applying the sentiments expressed by Gross LJ in *Goodlife.*

529. Whilst it is true that only Access World could authenticate its own warehouse receipts due to their inherent security features (a feature that Marex places much stress upon) it was still a commercial decision on Marex's party to enter into the commercial deal it did and take the commercial risks it took. The fact that Access World gave assurances that it would be able to authenticate its warehouse receipts (albeit that, as already noted Marex's witnesses knew that

a risk of fraud remained) goes to the reasonableness of Marex's reliance, but I do not consider that it impacts, to any great extent, on the reasonableness of Clause 10.5.

530. It is also true (for the purpose of section 11.4(a) of UCTA) that Access World could be expected to have substantial resources available to it for meeting any liability as one of the world's largest warehouse and logistics companies, but Marex has not justified why Access World should be obliged to deploy such resources to recompense Marex for its commercial loss following a gratuitous authentication in circumstances where Marex, but not Access World, knew what the commercial risks of the transaction were, and Marex, but not Access World, was in a position to assess those risks.

531. The availability of insurance to entities in the position of Marex and Access World is also a relevant consideration. However, there was only limited evidence before me, and in the present case the evidence was not fully played out in circumstances where Marex settled with MCAP before MCAP's witnesses were called. From what evidence I have heard (including from Mr King) it is clear that underwriters were not keen to write business covering counterfeit warehouse receipts (as opposed to warrants), and it appears that insurers to some extent had had "jangly knees" following Qingdao (albeit that Mr King did consider, rightly or wrongly, that there was cover in place). The impression I formed was that cover might have been available in the market if properly broked (in contrast to the chronology of events in the present case) but the evidence before me does not suffice to allow me to make a finding in that regard or as to the premium payable for such an insurance. Equally I had only limited evidence in relation to the availability of insurance to warehouses. Access World did have an insurance policy (the terms of which it did not disclose). I was told in closing by Mr Thomas, on instructions, that Access World's insurance was limited in amount to a figure substantially less than Marex's claim. This was not formally in evidence before me, and in any event what is relevant is the availability of insurance rather than what insurance was actually in place. Overall I do not consider that the evidence before me was of sufficient quality to weigh for or against the reasonableness of Clause 10.5. I am satisfied, however, that in terms of the taking out of insurance it would have been a party in Marex's position who was best placed to take out insurance, as such party (unlike a warehouse) would be fully aware of the commercial aspects of the transaction (which by their very nature impact upon risk).

532. In all of the circumstances, and having regard to all the factors I have identified and addressed above and weighing them all together, I am satisfied that Access World has discharged the burden upon it of demonstrating the reasonableness of Clause 10.5, and I find

that the requirement of reasonableness is satisfied. In particular Clause 10.5 is neither an unusual or onerous clause, it accords with similar clauses in the industry and is reasonable in terms of the cap it imposes, and is entirely appropriate in relation to the provision of a gratuitous service, in the context of the respective knowledge of the parties as to the risks of the transactions, and in circumstances where limitations of liability in the Terms and Conditions are an integral part of the assumption of responsibility that I have found.

533. I also find that on its true interpretation (as Access World accepted in closing), the limit in Clause 10.5 of EURO 100,000 "per event, or series of events arising from one and the same cause" is a limit in respect of each warehouse receipt examined and authenticated.

534. The parties have focussed on Clause 10.5, but to the extent that any issue arises in relation to the reasonableness of any of the other provisions of Clause 10 I am satisfied that they satisfy the requirement of reasonableness in the circumstances I have identified, and having regard to the factors I have identified, in relation to Clause 10.5 which would also apply to such other clauses (including Clause 10.3 which contains language that is in common use).

K.4 The proper construction of Clause 10.3

535. It will be recalled that Clause 10.3 provides, "In no case shall the Company be liable, whether in contract or tort, for any lost profit, income or savings, wasted expenditure, or indirect or consequential loss, whether or not the Company knows or has previously been advised of the possibility of such loss or damage" (emphasis added).

536. Access World maintained in closing (it has to be said somewhat half-heartedly) that Marex's claim for damages arises out of the liability it has incurred to Natixis in respect of Marex's breaches of the purchase contracts with Natixis (that I have found), is "indirect or consequential loss" and excluded under Clause 10.3.

537. I am satisfied, however that the reference to "indirect or consequential loss", on well-established principles, is drawing a distinction between the first and second limbs of *Hadley v Baxendale*, and that it is only losses falling within the second limb of *Hadley v Baxendale* that are excluded and that losses that arise naturally, in the ordinary course of things, under the first limb of *Hadley v Baxendale* are recoverable (see the discussion in *Lewison* at para 12.14 and the well-known cases there cited). In this regard Marex is liable to Natixis in damages for its breaches of contract that I have found represented in large part by the price paid, and such damages comprising the price paid represents direct loss arising naturally in the ordinary course

of things, and is not indirect or consequential loss, and so is recoverable by Marex from Access World (subject, of course, to the cap under Clause 10.5). It is accepted by Marex (rightly in my view) that the hedging loss and loss of profit element would not be recoverable as these would be indirect or consequential losses and so excluded under Clause 10.3.

L. MITIGATION

538. Access World alleges that Marex has unreasonably failed to mitigate its losses by not suing CHH or Mr Wong in circumstances where Marex has the benefit of a settlement agreement with CHH together with a personal guarantee provided by Mr Wong.

539. In this regard Access World points out that Mr Wong and CHH have never challenged their obligations under these agreements and have never suggested that they do not owe Marex money under these agreements. The evidence is also that Mr Wong is keen not to be sued (Mr van den Born said in oral evidence, *"Yes, I believe Mr Wong told us that"*). When cross-examined each of Mr Nutt and Mr van den Born accepted that Mr Wong is believed to be asset rich, even if he may be cash poor, and that as well as property interests in China, he may also have property in the USA.

540. Access World points out that Marex has done nothing to enforce either agreement or pursue either CHH or Mr Wong. Nor is there any evidence that Marex has undertaken any independent investigation to ascertain what assets Mr Wong has in Hong Kong or outside China which Marex may be able to enforce against more easily. When cross-examined, Mr van den Born acknowledged that his *"softly, softly"* approach had not worked to date.

541. In this regard the following exchange also took place when he was cross-examined, which is characterised by Access World as an admission of a failure to mitigate on Marex's part (although ultimately it is a matter for the court to consider, and determine, whether there has been any failure to mitigate) :-

> "Q. In the absence of that working, the prudent course of action, the only course of action consistent with your duties to your own company, and consistent with your fiduciary duty to Natixis, would be to pursue him in court to get a judgment and then to seek to enforce it wherever you can find assets, wouldn't it?
> A. Yes, that's logical, albeit I'm not so sure the Chinese court system and the Western court systems are the same."

542. It transpired during the course of the present trial that others have taken steps to pursue CHH and Megawealth and both companies have instructed solicitors, leading and junior counsel and have submitted a Defence. It is said that this serves to confirm that Mr Wong remains concerned not to have judgments against him or his companies and that had Marex pursued CHH and Mr Wong in court this would in all likelihood have resulted in payment from CHH and/or Mr Wong. I consider, however, that the defence of such proceedings also shows that such claims are not accepted, and a willingness to incur substantial costs to resist claims.

543. The general principles in relation to mitigation are well known and well-established. As identified in *McGregor on Damages* at para 9-079:

> "In mitigating his loss the claimant victim of a wrong is only required to act reasonably and the standard of reasonableness is not high in view of the fact that the defendant is an admitted wrongdoer. Lord Macmillan put this point well for contract in *Banco de Portugal v Waterlow* [[1932] AC 452]; his remarks apply equally to tort. He said [at p. 506]:
>
> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

544. In the present case Marex takes a preliminary, but fundamental, objection to Access World's plea that Marex has failed to mitigate, namely that a claimant is not required as a matter of law to take any steps to sue parties who, in addition to the defendant, are liable to the claimant for the same loss. In this regard Marex relies upon what is said in *McGregor on Damages* para 9-094 and in *Haugesund Kommune v Depfra* [2010] 2 Lloyd's Rep. 323. Para 9-094 in *McGregor* provides, amongst other matters, as follows:-

> "**A claimant need not take steps to recover compensation for his loss from parties who, in addition to the defendant, are liable to him for the same loss**
>
> 9-094 This is an undoubted principle and it is a principle which, strictly speaking, stands on its own feet independently of mitigation. It is mentioned here largely because it quite often becomes associated with mitigation in the minds of both judges and commentators. On this matter T*he Liverpool (No.2)* is the central case. It was in this case that Harman LJ made the first clear statement of the principle, pointing out that otherwise it would have been unnecessary for the legislature to make provision for contribution and indemnity

between joint and several tortfeasors. Indeed *The Liverpool (No.2)* goes as far as to show that, even if the third party offers payment of the amount for which he is liable, the claimant is not required to accept it in mitigation. In that case the defendants' ship through negligence came into collision in port with another ship which sank. The claimant harbour board sued the defendants, whose liability was limited, for expense incurred and damage sustained in clearing the port of the wreck. However, the claimants had also taken steps to enforce their statutory right against the owners of the wreck to recover from them any expenses outstanding after raising and selling the wreck, and not only had this amount been established but the money had been tendered, refused by the claimants, and then put on deposit by the owners of the wreck. In such circumstances the Court of Appeal held that the claimants were under no duty to satisfy part of their damages by accepting the money already on deposit. Harman LJ, delivering the court's judgment, pointed to the analogy that

"it has never been the law that a creditor having a security against a third party for his debt must give credit for that when proving in the bankruptcy""

545. In this regard in H*augesund,* Tomlinson J (as he then was) endorsed the statement in *McGregor*, identifying that this principle was nothing to do with mitigation, at [20]-[21]:-

"20. Mr Railton submits that the authorities demonstrate a principled approach to the question what credit is to be deducted in assessing what loss is recoverable in situations such as the present. He referred me to a line of authorities including *Steamship Enterprises of Panama Inc*, *Liverpool v Ousel (The Liverpool) (No 2)* [1963] P 64, *International Factors Ltd v Rodriguez* [1979] 1 QB 351, *London and South of England Building Society v Stone* [1983] 1 WLR 1242, *Standard Chartered Bank v Pakistan National Shipping Corporation* [2001] CLC 825, *and Peters v East Midlands Strategic Health Authority* [2009] 3 WLR 737. Authorities such as these are summarised in the textbooks as giving rise to a principle. In *Halsbury's Laws of England*, 4th Edition, volume 12(1) at para 826 it is said:

In general, where a claimant has a right of action against two obligors in respect of a particular matter, but brings an action against only one, the defendant cannot generally avoid or reduce his liability on the ground that the claimant, having a potential action against the other obligor, has not suffered the loss claimed. The availability of any such alternative cause of action affords no defence to the particular obligor's liability to pay damages in full unless the failure to pursue that liability constitutes a failure to take reasonable steps to mitigate the claimant's loss. Where, however, a claimant who has concurrent claims against two obligors in respect of the same matter recovers the whole or part of his loss from one of those obligors, the amount which the claimant thus recovers is applied in diminution of the damages which are awarded to him against the other obligor. A claimant cannot recover more than the total sum due in respect of his loss, merely by reason of the fact that his claim may lie against more than one person. The rule reflects a general judicial dislike of overcompensation.
The principle is however put differently in McG*regor on Damages*, 18th Edition, para 7-085: …
[as quoted above]

21. The formulation in *McGregor* is in my view to be preferred, not least because the Court of Appeal has on two occasions emphasised that the
principle that a claimant is free to choose from whom to recover compensation has nothing to do with mitigation of loss — see The *Liverpool (No 2)* per Harman LJ at page 83 and P*eters* per Dyson LJ giving the judgment of the court at page 752, para 41."

546. Tomlinson J in *Haugesund* also referred, at [23] to the judgment of Sir David Cairns in *International Factors Ltd v Rodriguez* [1979] QB 351:-

"23. *The Liverpool (No 2)* was not referred to in *International Factors Ltd v Rodriguez* where a director of a company, being sued for conversion of cheques which he had paid into the company's account, but which should have been paid to the claimant factors, contended that the claimant factors had suffered no loss, because they had a right of action against the debtors, the drawers of the cheques. The debtors had been notified that the debts were assigned to the plaintiff debt factors but they mistakenly sent payment to the company. The argument was therefore that the claimant debt factors could have sued the debtors on the original obligation, making them pay twice over. That argument pursued by a tortfeasor guilty of conversion was perhaps unlikely to succeed. Sir David Cairns put it this way at page 359A to B:
A plaintiff who has two causes of action cannot be met when he makes a claim against one defendant by the answer: "Oh, no; you've suffered nothing by my tort because you have a cause of action against somebody else".
That clearly cannot be right. The principle, although unstated, is the same as that enunciated in *The Liverpool (No 2)…"* (emphasis added)

547. In the present case Marex has causes of action against Access World, and also against CHH and Mr Wong under the settlement agreement and personal guarantee. If they are all liable in respect of the same loss then I consider the principles identified above apply so that Marex is not obliged to take any steps to sue CHH and Mr Wong. On the facts of the present case I consider that they are liable in respect of the same loss in circumstances where the agreed debt under the settlement agreement (US$32,400,000) has within it the price of the metal which is the very subject matter of Natixis' damages claim against Marex, in respect of which Access World is liable in damages to Marex.

548. However, lest that not be the case, Marex also has additional strings to its bow in response to the plea that it has failed to mitigate its loss. The first is to submit that Access World has failed to demonstrate what Marex has failed to recover from its failure to sue CHH and Mr Wong. What evidence there is suggests that CHH is an assetless company, whilst it appears that Mr Wong's assets are in mainland China (and whilst there is some possibility of enforcement, cost and expense would no doubt be incurred, difficulties may arise and there is no certainty as to what (if any) sum would be recovered). There is also a suggestion (though

no actual proof before me) that Mr Wong may have an asset in California. On any view, there is uncertainty as to what sums (if any) would be recoverable from Mr Wong if proceedings were taken against him. I am not convinced that this point is necessarily a free-standing knock-out blow to the plea of failure to mitigate. However, it is linked to, and needs to be considered together with, the third point made by Marex to which I will now turn.

549. It is well established that, as a matter of law, a claimant is not required to embark on complicated, difficult and uncertain litigation against a third party. As is stated in *McGregor* at 9-090:-

> "A claimant need not take the risk of starting an uncertain litigation against a third party Thus in *Pilkington v Wood* [1953[Ch , the claimant bought freehold land from a seller who purported to convey the property as beneficial owner, the defendant acting as the claimant's solicitor in the transaction. When the claimant later tried to sell the property he found the title was defective, since the seller was a trustee of the property and had committed a breach of trust in buying it himself. In the claimant's action against the defendant solicitor for negligence, the latter contended that before suing him the claimant ought to have mitigated his damage by suing the seller on an implied covenant of title. This contention was rejected by Harman J because, even conceding that the defendant had offered an adequate indemnity against costs in an action against the seller and that the seller was solvent and therefore worth suing, it was not clear that the claimant had a good prima facie right of action against the seller. The judge stated that he was of the opinion that
>
> > "*the so-called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party.*""

550. This principle has been applied in many reported cases. However there have been cases where conduct is found to have been required of a claimant as part of the need to mitigate, particularly in claims by mortgage lenders against their professional advisers when borrower and security have proved inadequate, and there has been a failure to enforce the borrower's security. A case in point, relied upon by Access World, is *Western Trust & Savings Ltd v Travers & Co* [1997] P.N.L.R. 295.

551. In that case (a claim by mortgage lenders against their solicitors for a negligent report on title to the mortgaged property), the lenders' failure first to bring an action for possession of the property was held to be a failure to mitigate as this was the normal, and not difficult, method of enforcing the security. As a result the damages were reduced to a nominal amount. Access World submits that the present case is analogous as there is effectively a guarantee from Mr Wong.

552. In the Court of Appeal in *Western Trust,* the appellant lenders relied upon *Pilkington v Wood* to support their submission that there had been no failure to mitigate. Phillips LJ (as he then was) distinguished *Pilkington v Wood*, stating (at p. 303):-

> "The facts of that case were, in my judgment, very different from the facts in the present case. In the present case the litigation in question was no more than a possession action which is an ordinary feature of enforcing security, with which the plaintiffs in this case will be well familiar and which would have been a necessary step whether or not there were defects in the security. Such litigation is in no way analogous to the action that was proposed in Pilkington." (emphasis added)

553. Unlike the undertaking of a possession action, which is, as noted, an ordinary feature of enforcing security and which would have been necessary in any event, what is being contemplated here is litigation against a third party in Hong Kong under Hong Kong law under a guarantee given by a Hong Kong passport owner with assets in mainland China. The opportunities for technical defences to be taken in relation to guarantees under English law are well known (albeit they are often found to be unmeritorious when adjudicated upon, after considerable costs have been incurred). I do not consider that it can be assumed that Mr Wong would not take points (good or bad) against a claim under the guarantee, and costs would be incurred in any litigation in order to adjudicate upon the claim. I note in this regard that CHH is defending the proceedings involving other parties in this Court, no doubt at some considerable expense to all the parties involved.

554. However, even assuming that Mr Wong either did not take such points, or it was possible to obtain the equivalent of summary judgment in Hong Kong, I consider that that would just be the start, as enforcement proceedings would, I have no doubt, be complex, costly and with no certainty as to what sums (if any) would be successfully recovered. In this regard, and though Access World made mention of a reciprocal enforcement arrangement with China in opening, I do not have before me any, or any sufficient, evidence that would justify a conclusion that enforcement would be simple or successful, in whole or in part. I consider that Marex is right, in the circumstances pertaining, to characterise the prospect of actual recovery (which is what any proceedings are ultimately aimed at) as uncertain and speculative, and any proceedings would undoubtably involve the expenditure of significant costs. In such circumstances I do not consider that Marex is under any obligation to commence proceedings against Mr Wong or CHH (which would appear to have no assets in any event) and I am satisfied that the principle in *Pilkington v Wood* applies and there has been no failure to mitigate on Marex's part. I would only add that a mere threat to commence proceedings without an

intention to carry that through would be a toothless threat, and actual proceedings (by others against CHH in this Court) do not appear to have resulted in Mr Wong or his companies paying sums claimed.

555. Access World could, of course, itself commence proceedings against CHH (or potentially Mr Wong) whether in fraud (if it could plead and prove the same) or indeed for a contribution or indemnity, if it considered it reasonable and appropriate to do so.

556. In the above circumstances, and for the reasons I have given, there has been no failure to mitigate by Marex, and I so find.

M. Quantum

557. As appears from the Agreed Statement on the Quantum of Natixis' Claim lodged on the last day of the hearing, it is common ground between Natixis and Marex that, if (as I have now found) Natixis' claim against Marex under the Purchase Contracts succeeds, Natixis is entitled to recover:-

(1) US$30,428,374.40, i.e. the price Natixis paid to Marex under the Purchase Contracts.
(2) US$1,476,025.80, i.e. the loss Natixis incurred when it unwound the hedges of the Purchase Contracts.
(3) US$209,694.25, i.e. the sums which Natixis would have received on the Prompt Dates (17 May 2017 and 21 June 2017) if not for Marex's breaches of the Purchase Contracts.
(4) Statutory interest, at a rate and on a basis to be determined (if not agreed), from the Prompt Dates until the date of Judgment.

558. There is a dispute as to whether Natixis is entitled to recover from Marex under the Clause 7 indemnity in the Purchase Contracts the costs of Natixis' claim against, and any costs liability to, Access World. I consider that this issue, if not agreed, is best dealt with at the ancillaries hearing following hand down of my judgment together with questions of interest and costs (again if not agreed).

559. So far as Marex's claim against Access World in tort is concerned, I anticipate that the parties can agree the quantum figure by way of damages consequent upon my findings on

liability, contributory negligence and limitation of liability, but should any issue arise I will also deal with that at the ancillaries hearing, together with any issues as to interest and costs (if not agreed).