TRAVERS SMITH

1992 ISDA notice provisions clarified: pink paper and red faces

In the recent case of *Greenclose Ltd v National Westminster Bank Plc*, the court held that a contractual notice sent by email did not comply with the requirements of the 1992 ISDA Master Agreement and was therefore invalid.

Greenclose Ltd v National Westminster Bank Plc
[2014] EWHC 1156 (Ch)

Summary

Greenclose concerned an attempt by National Westminster Bank Plc ("NatWest") to exercise a contractual right to extend an interest rate collar documented under the 1992 version of the ISDA Master Agreement (the "1992 ISDA") and governed by English law. The court held that NatWest's notice of its election to extend the collar did not comply with the terms of the 1992 ISDA and was invalid, with the result that its election to extend the collar was ineffective.

Section 12(a) of the 1992 ISDA governs the service of contractual notices. It provides that *"[a]ny notice or other communication in respect of this Agreement may be given in any manner set forth ... to the address or number or in accordance with the electronic messaging system details provided (see the Schedule) and will be deemed effective as indicated"*. The clause then sets out five means by which notices may be served, namely by courier, telex, fax, certified or registered mail and electronic messaging system.

Two questions in relation to the construction of section 12(a) arose in *Greenclose*: (i) whether the clause was permissive, and set out a non-exhaustive list of methods of service of contractual notices, or whether the clause was mandatory, so that only notices served by one of the listed methods would be valid; and (ii) whether email was an *"electronic messaging system"* for the purposes of the clause.

Mrs Justice Andrews held that it was common ground that, if the methods of service set out in the clause were mandatory, a notice which was not served by one of those methods would be ineffective. She noted that there was significant support for this position, not least in Lord Hoffman's speech in *Mannai Investment Co Ltd v Eagle Star Life Assurance* [1997] AC 749 where he said, *"[i]f the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been"*.

Andrews J went on to find that the provisions of section 12(a) were mandatory. In so doing she considered, and disapproved, commentary in a number of textbooks which suggested that the clause should be construed in a permissive manner.

In relation to the second question, Andrews J found that the phrase *"electronic messaging system"* did not include email. This conclusion was supported by the fact that when the 1992 ISDA was introduced, email was not in common use, and also by the use of the word "system"; Andrews J considered that this referred to a system set up specifically for the transmission and receipt of messages (like SWIFT), as distinct from a message sent via a computer, as computers are used for a range of purposes in addition to email.

What does this mean in practice?

As NatWest found to its cost, the decision establishes that, unless the parties have specifically agreed to service by another method, contractual notices under the 1992 ISDA will only be valid if served via one of the methods set out in section 12(a). Parties who wish to be able to serve notices by email under the 1992 ISDA should expressly specify in the Schedule that this is the case, and provide an email address for such service.

The relevance of the case is not limited to the 1992 ISDA. For example, the notice provisions of the 2000 and 2009 versions of the Global Master Securities Lending Agreement contain broadly similar language and are therefore likely to be construed in the same way. Note, however, that the equivalent provision in the 2002 version of the ISDA Master Agreement, which is also likely to be construed as mandatory, expressly permits service by email.

The case provides a salutary lesson as to the importance of identifying the mandatory requirements which apply to a contractual notice, and the consequences of failing to comply with them.

"… by leaving it to the last minute to give notice, and failing to check the terms of the contract, the Bank took a calculated risk, and got it wrong"

per Mrs Justice Andrews

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