

Giving notices: High Court holds it's a must – *Greenclose Ltd v National Westminster Bank plc*

Notices given under the ISDA Master Agreement are ineffective unless given by one of the methods specified in Section 12(a) of the Master Agreement and in accordance with the details in the Schedule.

The notice provisions in a contract are often as prickly as they are potentially pernicious. Prickly because of the need to comply precisely with the small print – as one judge put it, if an agreement requires notice on blue paper, notice on pink paper will not suffice. Potentially pernicious because the penalty for a petty error can be huge. To make matters worse, there is often pressure because of the tendency to leave notices to the last minute. Disputes about the validity of notices abound.

Greenclose Ltd v National Westminster Bank plc [2014] EWHC 1156 (Comm) is one such dispute. The issue was whether an interest rate collar had been extended. Extension would have been lucrative for one party, but correspondingly expensive for the other. Notice was required by 11 am on 30 December, and it was only shortly before that time that the party sought to give notice. It tried fax, only to find the fax switched off for the holidays. It tried telephone, only to find that no one

answered. The question was whether its voicemails and emails were sufficient.

The starting point in any dispute about a notice is what the contract says. In *Greenclose*, the collar was subject to the 1992 ISDA Master Agreement (the 2002 Agreement is substantially the same). Section 12(a) provides that notice "may be given in any manner set forth below... to the address or number or in accordance with the electronic messaging system details provided (see the Schedule) and will be deemed effective when indicated". It then lists five means (six in the 2002 Master Agreement, adding email), such as delivery in person or by courier, and certified or registered mail.

Section 12(a) is mandatory, not permissive

The first issue in *Greenclose* was the interpretation of Section 12(a), which is headed "Effectiveness". Does it require notice to be given by one of the five means specified or are they

Key Points

- Parties must deliver notices via the methods specified in Section 12(a) to an address or number set out in the Schedule; no other will do.
- Parties should ensure such details are fully and accurately entered and kept up to date, including those of their counterparties, and if necessary update them in accordance with Section 12(b).
- Methods for delivery of notices not contemplated under Section 12(a) will not be valid, even where recipient details are provided for such method under Part 4 of the Schedule.
- 1992 ISDA Master Agreements do not provide for email delivery of notices unless amended.
- May apply equally to other industry standard documents containing similar provisions.

merely options, with the benefit of deemed effectiveness, but which do not exclude the use of other methods? Does "may" mean "must"?

The judge, Andrews J, decided that Section 12(a) is mandatory. Notices must be served by one of the means

"... if 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 that the tenant wanted to terminate the lease..."

set out in the section; nothing else will do. The wording might start with the generally permissive "may" but, in the judge's view, when this is followed by a list of options, it indicates that the only choice is between the options listed. In other words, in context "may" means "must". In reaching this result, the judge was also influenced by the statement in the same section that termination notices "may not" be served by fax, concluding that "may" must bear a consistent, and mandatory, meaning.

Part 4 of the Schedule is exhaustive too

Section 12(a) of the ISDA Master Agreement refers to the Schedule. In *Greenclose*, the judge decided that not only must a notice be served by one of the means listed in the section, but that a notice must also be sent to an address or number set out in the Schedule; no other will do.

In *Greenclose*, no fax number was listed in the Schedule. This meant that, even if the intended recipient's fax had not been switched off, a faxed notice would still have been ineffective. The absence of a fax number, or of other relevant details, in the Schedule means that the parties have excluded that method of service.

Notice by email

The 2002 ISDA Master Agreement

refers expressly to email, but the 1992 form of the Agreement only mentions "electronic messaging systems". In *Greenclose*, the judge decided that email is not an electronic messaging system, email being decidedly uncommon in 1992.

Out of date and missing details

The contact details in the Schedule to the ISDA Master Agreement and in other documents need to be completed fully and accurately in order to give flexibility and certainty when it is necessary to serve a notice. It is also important, to both the putative server and the potential recipient, that the details are kept up to date. For example, under the ISDA Master Agreement, a fax is only served when it is received; if the fax number given in the Schedule is no longer in use, the fax will never be received. In contrast, a notice delivered in person is effective when delivered to the address set out in the Schedule; if a party has moved from that address, the notice delivered will still be effective but the intended recipient may only find out about it when it is too late.

Conclusion

Contractual notices, and contractual notice provisions, are important. Certainty that a notice will be effective – whether under the ISDA Master

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Agreement or anything else – can only be achieved if parties ensure that the relevant details are fully and accurately entered when the agreement is concluded, and are also kept up to date subsequently. And, to state the obvious, a party needs to check the contract terms before serving a notice.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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