Neutral Citation Number: [2014] EWHC 1156 (Ch)

Case No: HC 12D02057

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/04/2014

Before :

Mrs Justice Andrews DBE

- -

Between :

GREENCLOSE LIMITED	**Claimant**
- and -	
NATIONAL WESTMINSTER BANK PLC	**Defendant**

- -
- -

Stephen Auld QC and Saul Lemer (instructed by **Bryan Cave LLP,** 88 Wood Street, London EC2V 7AJ) for the **Claimant**
Andrew Mitchell QC and James Cutress (instructed by **Dentons UKMEA LLP**, One Fleet Place, London EC4M 7WS) for the **Defendant**

Hearing dates: 25-27 March 2014

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Judgment

Mrs Justice Andrews:

1 The issue at the heart of this case is whether the Defendant ("the Bank") validly exercised its contractual right to extend the term of a 5 year interest rate collar transaction ("the Collar") for a further two years by giving notice to the Claimant ("Greenclose") before 11am on 30 December 2011. The Collar was an interest rate hedging transaction that was entered into as a prerequisite to the Bank affording Greenclose loan facilities of £15 million under a Loan Agreement dated 5 October 2006. Although the Loan Agreement pre-dates the Collar, drawdown was not permitted until the hedge was in place.

2 In simple terms, a Collar combines two products to generate a maximum (cap) and minimum (floor) level of interest payable. The party seeking to hedge his exposure to the risk of interest rate movement simultaneously buys a cap from, and sells a floor to, the trading counterparty. If the base rate remains at or between those two levels the hedging party (in this case, the borrower) pays nothing to, and receives nothing from, the counterparty, (in this case, the lender). Thus if the Collar is entered into in order to hedge the interest payable under a variable rate loan, as it was in this case, the borrower continues to pay the lender that variable rate for so long as the base rate remains between the floor and the cap. If the base rate rises above the cap, the lender

pays the borrower the difference. If the base rate falls below the floor, the borrower pays the lender the difference. The risk of the base rate dropping below the floor is the price the hedging party has to pay for the trade. It is an alternative to paying an upfront premium, which explains why these products are sometimes referred to as "zero coupon". Therefore, if the borrower is hedging at a time when interest rates are high, it is to his advantage to keep the floor level as low as possible.

3 In order to determine the notice issue, I must construe the provisions of Section 12 of the 1992 ISDA Master Agreement (Multi Currency-Cross Border Form) read in conjunction with the other contractual documents including the Schedule to the Master Agreement and the transaction Confirmation. ISDA (which stands for the International Swaps and Derivatives Association) is a not-for-profit corporation incorporated in the State of New York. In Lomas and others v JFB Firth Rixon Inc and others (ISDA intervening) [2010] EWHC 3372 (Ch), [2011] 2 BCLC 120 at [7] Briggs J. noted that:

> *"It has over 820 member institutions, including most of the world's major institutions that deal in OTC derivatives, as well as businesses, government entities and other end users that rely on derivatives to manage the risks inherent in their core economic activities. Its primary purpose is to encourage the prudent and efficient development of privately negotiated derivatives business. For that purpose it has developed standard contractual wording and transaction architecture for market participants. This first occurred, historically, in relation to swaps. Since 1992 its standard terms have been used for numerous other types of derivatives, including pure contracts for differences, caps and floors. Thus, interest rate swaps are a sub-class of an original and still very important class of derivatives for which ISDA's standard forms, and the master agreement in particular, are routinely used".*

4 As Briggs J. went on to explain, at [8]:

> "*The 1992 version of the Master Agreement was the first to be designed in a form applicable to derivatives other than just swaps, and to accommodate both financially and physically settled transactions. The 2002 version replicates many of the provisions of the 1992 version, but with adjustments based on lessons learnt since 1992, in particular from experience of periods of market turmoil in the late 1990s. Nevertheless the publication of the 2002 master agreement did not lead to its invariable use in preference to its predecessor."*

In this case, the parties chose the 1992 form to govern the transaction, despite the fact that the effective date of the Collar was 4 January 2007.

5 Given that this is a version of a standard form which is still in regular use as a template throughout the world, the way in which I determine the issues of construction is bound to have ramifications beyond this case. In particular, I have to decide whether the different means of giving notice set out in s.12 are mandatory or permissive, and whether the phrase "electronic messaging system" used in the 1992 form embraces emails. Unfortunately, unlike Briggs J. (and the Court of Appeal) in Lomas v JFB Firth Rixon, I do not have the assistance of submissions from ISDA itself, and there has been no expert evidence on market practice.

6 If I conclude that the Bank did give notice which was effective to extend the term of the Collar, I then have to decide whether, as Greenclose alleges, there were any terms to be implied in the Collar that precluded the Bank from exercising its option in the circumstances in which it sought to do so. Greenclose submits that there were terms that:

a) The Bank would not extend the Collar if extending was not reasonably necessary to protect Greenclose against interest rate fluctuations or rises so as to protect the Bank against the risk of Greenclose being unable to service its repayments under the Loan Agreement ("the Protection Condition");

b) The Bank would not extend the Collar if doing so would materially increase the risk of Greenclose being unable to service the loan and defaulting ("the Risk of Default Condition");

c) The Bank would act in good faith and/or in accordance with the principles of fair dealing ("the Good Faith condition").

In the light of the argument that there were implied terms, it is necessary to set out the factual background to the transaction in more detail than might otherwise have been sufficient.

7 Greenclose is a family business which owns and operates three luxury hotels, two in the New Forest and one in Wales. It opened a Spa in one of the hotels, Careys Manor, in around August 2004, having spent around £5 million on the project. In large part due to the success of that venture, Greenclose has managed to cope with the adverse impact of the recession on the leisure industry. It currently employs around 350 people and has a turnover of around £12 million per annum. The majority shareholder and managing director is Mr John Leach. In practice he is the man in overall charge of running the business with the assistance of, among others, the finance director Mr David Reynolds. Greenclose's office is at Mr Leach's home in Lymington, Hampshire, Pennington House. Mr Leach is an astute and sophisticated businessman who follows the market movement of base rates and LIBOR. He was rightly described in one of the Bank's internal emails as "*capable of making an educated and informed decision on hedging*".

8 In the late summer of 2005, Greenclose was looking to refinance its facilities with Allied Irish Bank. Mr Leach entered into discussions with the Bank, which seemed keen to solicit his custom. However, the Bank had concerns about Greenclose's ability to service the debt, and initially turned down Greenclose's application. Despite that initial setback, in January 2006 the Bank did agree to lend £1.5 million to Mr Leach personally, to be used to inject funds into Greenclose. It took a charge over Pennington House as security.

9 Negotiations for a 15-year term loan to Greenclose, coupled with an overdraft facility, continued through much of 2006. In order to allay the Bank's concerns about debt servicing, the Bank proposed that Greenclose should enter into some form of interest rate hedging product – a step referred to within the Bank as "Interest Rate Management" ("IRM" for short). Mr Leach was reluctant to commit Greenclose to an interest rate swap, which would fix the rate of interest, because he expected base rates

would peak and then fall. He did not want his business to be locked in to a high interest rate. The Bank made it clear at an early stage that some form of interest rate hedge was going to be a precondition of any agreement to provide the facilities to Greenclose. Nevertheless, the Bank was prepared to allow Greenclose some flexibility in the choice of products and time of the hedging.

10 On 24 May 2006, Mr Leach had a meeting with Mr Michael Harrison, then the designated senior commercial banking relationship manager, and Mr Matthew Jones, then an associate in the Bank's UK Treasury Solutions division of the RBS Global Banking & Markets department, ("GBM") based in their Bristol office. Mr Jones' role was to meet clients and discuss interest rate risk management with them. He was also the interface between the client and the Bank's trading desk, and the person to whom Mr Leach spoke on the telephone when he placed the order for the Collar and two subsequent IRM transactions.

11 Mr Jones (who now works for one of the Bank's competitors) gave evidence at the trial. He confirmed the favourable impression of him that I had formed on reading the documents, including the transcripts of tapes of his telephone discussions with Mr Leach. He is an intelligent, articulate, and highly conscientious young man.

12 In May 2006 the base rate was 4.5% and seemed likely to rise. Mr Leach thought it unlikely that rates would move much in the short-term, though possibly there would be one rise (to 4.75%). He said he felt that Greenclose could cope relatively comfortably even in what he considered to be the unlikely event that base rates went up by 1%. He was concerned to secure the ongoing operations of Greenclose, whilst at the same time limiting the downside risk if base rates rose for a sustained period of time, particularly if they went above 6%, which he described at the meeting on 24 May 2006 as an "Armageddon" scenario.

13 On 2 June 2006, Mr Jones sent Mr Leach by email the first version of a paper he had prepared for Greenclose entitled "Interest Rate Risk Management Solutions". It contained a summary of their discussions on 24 May and included full explanations of, and indicative quotes for, 10 year and 15 year base rate swaps, 10 year and 15 year base rate zero upfront premium Collars, and a real rate lock-in, incorporating a zero-upfront premium RPI Collar. Mr Jones stated in the paper that this list was by no means exhaustive, and further alternatives could be looked into if required. Mr Jones also very properly and fairly pointed out that any contract with RBS Global Markets would be completely separate to the underlying loan, that there would be breakage costs associated with early termination, and that the levels quoted in his paper did not include the banking margin.

14 Mr Jones assessed Mr Leach at the time as taking a responsible attitude to managing his IR risk, and thought that he demonstrated during the meeting a broad understanding of a number of economic issues. I agree with that assessment. I had the advantage of seeing and hearing Mr Leach giving evidence for many hours. Like Mr Jones, he was an impressive witness who gave his evidence in a frank and straightforward manner. It was plain that he had a good understanding of the various IRM products that he was offered by the Bank, (very fairly, he did not seek to suggest otherwise). Despite this, on every occasion when he was discussing them with Mr Leach, Mr Jones took considerable pains to spell out how those products worked.

15 On 5 June 2006 Mr Harrison sent Mr Leach a letter to say that the Bank's Credit Committee had given its approval for the proposed facilities, and enclosing a Schedule outlining the main terms and conditions on which the Bank was prepared to provide the funding, whilst stressing that these were subject to completion of the Bank's usual lending diligence procedures. The Schedule stated that "*Interest rate hedging, to the Bank's satisfaction, of minimum nominal amount of £10m for a minimum period of 10 years is a condition precedent of the facilities*."

16 Mr Leach tried to persuade the Bank to remove the condition precedent, but he was unsuccessful. As he explained in his evidence: "*I was not unhappy about the hedging, I was unhappy about the fact that hedging was a condition of the loan.*" The reason for this was that although he saw it as being in Greenclose's and the Bank's mutual interest that Greenclose should hedge, Mr Leach wanted some flexibility as to how and when Greenclose should do so. The Bank did its best to accommodate Mr Leach in this regard. On 8 September 2006 Mr Harrison sent him a letter which stated that the Bank understood his stance on wanting some flexibility on interest rate hedging in order to manage his responsibility of ensuring the best financial advantage for Greenclose. Mr Harrison said he was happy to confirm that the following arrangement was acceptable to the Bank:

" *You will have full discretion to choose swaps, caps collars or other derivatives traded by our Financial Markets dealers*

- *£5m of nominal debt hedging is entirely at your discretion*
- *£5m of nominal debt is to be dealt on the day of first loan drawdown for a minimum 5 year period at a swap or cap rate of 6% or less*
- *£5m is to be dealt at your discretion within three months from first drawdown or earlier if the 5 year LIBOR reaches 6%.*

….

We do need a signed ISDA in order to complete two or more interest hedging deals."

17 Although this was not expressed in the clearest of terms, Greenclose was still being required to hedge only £10 million of the £15 million nominal debt. The second of the bullet points was intended to signify that it was entirely up to Greenclose to decide whether it would also hedge the remaining £5 million. The Collar with which this case is concerned was entered into in order to satisfy the requirement in the third bullet point that £5 million of nominal debt be dealt on the first day of drawdown.

18 By the time that letter was sent, Virginia Lynn of the Bank's legal department had already sent a draft version of the 1992 ISDA Master Agreement by email to Mr Reynolds. She asked him to review the draft Schedule and let her know if he had any comments to make. Part 4 of the draft Schedule stated next to the heading "Addresses for notices or communications to Party B" in bold capital lettering and square brackets "PLEASE CONFIRM DETAILS". Underneath the heading appeared the following:

Address: [there then followed the address of Pennington House]

Attention: David Reynolds

Telephone: [Greenclose's office phone number]

Fax: [left blank]

It appears that this information was derived from an ISDA request document filled in by Mr Harrison. The one piece of contact information that Ms Lynn did not transpose from the request document to the draft Schedule was Mr Reynolds' email address. I do not consider this to have been an oversight, for reasons which will appear later in this judgment.

19 The Loan Agreement, which was signed by the Bank on 2 October 2006 and by Greenclose on 5 October 2006, provided, by Clause 7.2:

> "*The Bank shall furthermore not be obliged to make the Loan or any Tranche thereof available unless the following conditions are satisfied on the date on which the Loan is drawn:*
>
> …
>
> *(e) The Borrower has entered into an interest rate hedging instrument acceptable to the Bank at a level for a period and for a notional amount acceptable to the Bank"*.

20 After the Loan Agreement was signed, discussions continued between the parties as to the hedging instrument that Greenclose would enter into. On 25 October 2006, following a telephone conversation with Mr Leach, Mr Jones sent him an update of his paper on IRM solutions. This included indicative quotes for 5, 7 and 10 year base rate swaps and 5 and 10 year base rate collars. It also introduced a Bank extendable base rate collar, explaining that "*RBS holds the sole right to extend the collar on the 5th anniversary for a further 2 years at no cost. The collar then retains the same levels as for the first 5 years*." The indicative quotes made it clear that the floor of the extendable collar was a lower rate than the floor of the "vanilla" zero upfront premium collars. Mr Leach accepted in evidence that he understood at the time that the advantage of an extendable collar was that Greenclose got a lower floor than it would have done under a vanilla collar. He also understood that the *quid pro quo* for that lower floor was that the Bank would be given the power to extend the term of the transaction.

21 By this time, the upward trend in interest rates had gone further than Mr Leach anticipated in May 2006, and there was a consensus that base rates would rise to 5% in November (as indeed they did). Mr Leach was still optimistic that UK rates would not go beyond 5.25%. However, in that financial climate, it was not feasible for Greenclose simply to purchase a cap, because it would have been too expensive. Given Mr Leach's understandable antipathy towards fixed rate swaps, from his perspective the only realistic choice was between a vanilla collar and an extendable collar. This was not known to Mr Jones, who anticipated at the time that Mr Leach was most likely to choose a 5 year swap.

22 On 23 November 2006 Mr Leach told Mr Harrison that his lawyers had no issue with the ISDA form, and Mr Harrison gave Ms Lynn instructions to send Greenclose a formal copy for signature. Ms Lynn sent the execution copies to Greenclose under cover of a letter dated 29 November 2006 addressed to Mr Reynolds. The signed copy was returned by post to Ms Lynn under copy of a letter from Mr Leach's secretary. The ISDA Master Agreement and the Schedule to it are both dated "as of 29 November 2006". The relevant part of Part 4 of the executed Schedule dealing with notices and other communications from the Bank to Greenclose was in identical terms to the draft Schedule quoted in paragraph 18 above.

23 The scheduled date for drawdown under the Loan Agreement was Thursday 4 January 2007. At Mr Harrison's suggestion, Mr Jones emailed Mr Leach on 22 December 2006 giving him a quick market update, pointing out that the 5 year swap rate was moving upwards, and saying that he would pick up the phone to him in early January 2012. On the morning of 3 January 2007 at 9.52am Mr Jones emailed Mr Leach the third version of his paper on IRM solutions, with indicative quotes for 5 and 7 year base rate swaps, 5 and 7 year base rate collars and a 5 year + 2 year base rate Bank extendable collar, based on the market that morning. As before, all the quotes for collars were capped at 6%. The floors were 5.35% for a vanilla 5 year collar, 5.25% for a vanilla 7 year collar and 5.10% for an extendable 5 year collar. As he had done in his previous paper, Mr Jones spelled out that the cost of the cap was reduced by accepting the floor, and that Greenclose could not take advantage of base rates below the floor.

24 Mr Jones telephoned Mr Leach at 2.20pm the same day. Mr Leach said that he had seen Mr Jones' email and had arranged a meeting to discuss it with Mr Reynolds in around half an hour. He asked if he could ring him back. Mr Jones asked if there were any matters Mr Leach wanted to discuss with him before he spoke to Mr Reynolds. Mr Leach observed that none of the products seemed hugely appealing. He thought that the market was near the top, that base rates were likely to go to 5.25% but he would be surprised if they went up again, and that his feelings about the market movements thus far had proved reasonably accurate. There was also some discussion about the floor rates. Mr Leach expressed surprise that they were so high.

25 The transcript shows that the conversation then continued as follows:

> *MJ: Ok, if you think about it, if you do the swap you'd be at 5.48, if you did the 5 year collar you'd be at 5.35 on a 5 year basis, if you did a 7 year collar, you'd be at 5.25 with that floor, which means that if we did have a base rate increase to 5 and a quarter you wouldn't obviously pay an adjustment because you'd be at that 5 and a quarter, if you look at a hybrid between the two which was the extendable collar what that means is, um…*

> *JL it gives you an option to renew*

> *MJ it gives us a one off right to extend it at the same levels for a further 2 years. Now if you think about a 5 year collar with the floor at 5.35 and a 7 year at 5.25, if you have a 5 year, but potentially 7 years, we can get it down to 5.1, so that would mean obviously*

at the moment, if in that example you'd be paying 10 basis points with base rates, because you would not benefit clearly from a funding rate below or base rate funding rate below 5.10, now if we went to 5 and a quarter we'd pay you 0.15, sorry, you would, I do beg your pardon, you would be at the 5 and a quarter level.

JL …which is where I think rates are going to go anyway

MJ Yep, yep

JL You know, so, it's in a sense heads I lose and tails I lose

MJ I mean the market I guess is where it is, if you, if you're looking at the collars, if you're looking at the extendable collar, just bear in mind obviously where that floor is if you give the bank the, not yourself, but the bank, obviously, the one off right to extend for a further 2 years, you know you still get the cap protection at 6% and we keep that floor in place at 5.1, you know on the 5th anniversary for another 2 years, then obviously allows us to give you a better, you know, reflect that flexibility we have if you like, in giving you a better floor rate, so if you want to get that floor rate down, then obviously that's a way of doing that, but look at that in conjunction, you know, if you're comparing the vanilla collars you can see obviously 5 years you'd be at 5.35 on the floor, 7 years at 5.25.

JL No I do agree that the extendable one on the face of it, I mean it, you know, it um..

MJ I think the thing about that is you'd be then obviously in 5 years time, we come to the end of 5 years, one of two things can happen, we could say, we're not extending it

JL Base rates are 3% you say you're going to extend it [laughs]. Base rates are at 8% you say must be joking…

MJ Yeah exactly, kind of, but what that, then think about what it's giving you in the intervening 5 years, it means you've had you know a lower floor, like for like on that 5 year swap or even indeed on that 7 year swap.

JL No, no, I agree, I mean of the three on offer I think that's probably the best, the extendable, but um, it depends on where the cycle is doesn't it, you know, I mean if you and me and the City are right in saying that probably they won't go higher, I mean generally the market is seeing 5 and a quarter as top you know, it's not seeing any higher than that…"

26 It was clear that Mr Leach was still not keen on being forced to hedge to cover a scenario he did not expect to materialise, namely, base rates exceeding 6%, but he knew that he had no choice in the matter. It is equally clear that he understood that the

price of obtaining the lowest floor rate was granting the Bank the power to extend the collar. The conversation concluded with Mr Leach saying he thought he would be able to call Mr Jones back before 4 pm.

27 When Mr Leach reverted a little later in the afternoon, the first thing he did was to query the floor rates he had been given. He said that he had obtained a lower quote (for the 5 year vanilla collar) from an alternative contact, of 5.25% instead of 5.35%. Mr Jones promised that he would double check the current market rates with his trader. He said he would do that once Mr Leach had made a decision on what he wanted to do. Mr Leach said he thought they might go with the extendable collar, because no one knew what would happen in 5 years' time, but he wanted as good a deal as the Bank could get for Greenclose. Mr Jones then ran through the features of the extendable collar again. He said:

> "*And just to confirm as well obviously it's effectively could be a 7 year contract, so it runs for 5 years then on the 5th anniversary the Bank and not yourselves will look at it and decide whether or not we will extend it at exactly the same level so the same cap, same floor and same notional for a further 2 years that's how it works. Are you, are you comfortable with that?*"

Mr Leach responded "*yes*, *yes*".

28 Having spoken to the trader, Mr Jones rang back at 15.25pm and told Mr Leach that he was able to get the floor on the extendable collar down to 5.07%. Mr Leach said he would go with that. Mr Jones then ran through the trade yet again. He spelt out that on the fifth anniversary the Bank had the right but not the obligation to extend the trade on the same levels for a further two years. It was set against average quarterly base rates with a cap at 6% and a floor at 5.07%. This meant that Greenclose was giving up the right to benefit from any base rate below 5.07%. In response to that explanation, Mr Leach said "yes". Mr Jones then stressed that at all levels he was talking about base rates and not including the banking margin, and he reiterated the exposure to breakage costs on early termination. He asked Mr Leach if he was happy with that and Mr Leach said that he was.

29 Mr Jones then asked Mr Leach for his fax number so that he could fax him the post trade confirmation to sign and fax back to the Bank's London office. Mr Leach gave him the fax number and Mr Jones said that a final confirmation would follow in the post, which would also require Mr Leach's signature. After confirming again that the trade was on a notional amount of £5 million across the term, Mr Jones then went away to execute the order.

30 It is evident from these exchanges that Mr Leach knew exactly what sort of product he was buying into and what the advantages and disadvantages were. Although his comment "*Base rates are 3% you say you're going to extend it… Base rates are at 8% you say must be joking*" was of a jocular nature, the comment demonstrates an appreciation by Mr Leach that the Bank was likely to exercise its right to extend if the market conditions were in its favour in five years' time, i.e. if base rates had moved below the floor. Of course, at the time of the transaction, neither party could have foreseen that base rates would have dropped anywhere near as low as they did.

31 It was obvious from the terms in which he reported the transaction to the rest of his team within Global Markets that Mr Jones thought he had done a deal which was good for the client and good for the Bank, which was what he had hoped to achieve. I reject any suggestion that Mr Jones was trying to persuade Mr Leach to favour the extendable collar, let alone that he was doing so in order to increase the Bank's commission. Mr Jones set out the three types of product, gave a fair explanation of each of them, and in their discussions he did no more than point out what Mr Leach was perfectly capable of working out for himself, namely, that the deal with the lowest floor, and thus the cheapest for Greenclose, was the extendable collar. When base rates went up only a few days later, Mr Jones' view that the deal was a good one for Greenclose was shared by Mr Leach and Mr Reynolds. Thus, for example, when Mr Jones spoke to Mr Reynolds on 6 February 2007 to find out when Greenclose planned to execute the next IRM hedge, Mr Reynolds commented that it was "*a shame we didn't do more on the last one*."

32 The post-transaction acknowledgment arrived by fax at 16.34pm on 3 January 2007, and Mr Leach sent the signed copy back as directed at 17.12. The formal transaction Confirmation, which is dated 3 January 2007, was posted by the Bank to Greenclose's office on or after 8 January, at Mr Jones' direction, and marked for the attention of Mr Leach. He signed and returned the copy marked "File Copy" as requested.

33 The Confirmation, like the Schedule to the Master Agreement, expressly incorporated the definitions and provisions contained in the 2000 ISDA Definitions. It continued:

> "*This Confirmation supplements, forms part of, and is subject to, the 1992 ISDA Master Agreement dated as of 29 November 2006, as amended and supplemented from time to time ("the Agreement") between yourselves and [the Bank]. All provisions contained in the Agreement govern this Confirmation except as expressly modified below.*"

34 The Termination Date was defined as "*04 January 2012, subject to adjustment in accordance with the Modified Following Business Day Convention*". I need not consider the Modified Following Business Day Convention for the purposes of this judgment because, in the event, all relevant dates were business days. Under the heading "other provisions" the Confirmation stated, so far as is material:

> "*[The Bank] have the right but not the obligation to amend the Termination Date of this Transaction to 04 January 2014 (the "Extended Termination Date")…..by giving notice to [Greenclose] by 11.00am London time on 30 December 2011….*
>
> *If [the Bank] exercise such right, the Transaction shall be extended with effect from and including the Termination Date to and including the Extended Termination Date.*"

35 The Bank's ability to extend the term of the contract was described in the Confirmation as a "*right to amend the Termination Date of this Transaction*." There was some debate at the trial as to whether it was correct to characterise this right as a contractual option, or whether it was an irrevocable unilateral offer by Greenclose to vary the Termination Date which was capable of acceptance by giving notice to Greenclose, or neither of the above. However, I doubt if the correct jurisprudential characterisation makes any significant difference to the way in which I should

approach the notice issue. It is plain that, as a matter of contract, the Bank could only exercise its right to change the Termination Date to 4 January 2014 by giving notice to Greenclose by 11am on 30 December 2011.

36 It follows that if, on its true construction, the contract mandated the methods by which such a notice to extend was to be given, then the Bank would have to give notice by any prescribed method, and it would have to follow the contractual requirements strictly. Failure to do so would render the notice ineffective to extend the Collar. That appeared to be common ground, and there is ample authority to support that approach: see e.g. Lord Hoffmann's famous example in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 at 776:

> "*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.*"

37 On the other hand, if there was no contractual restriction on the methods of giving notice, Mr Mitchell QC submitted that it was unnecessary for the notice to have actually come to the attention of anyone at Greenclose, so long as it was available to be read before 11am. Mr Auld QC submitted that if the notice provisions in the agreement are permissive, and a method was used that was outside the specified categories which deem notice to be effective even if the recipient does not see it (or in some cases, does not even receive it) it was necessary for the notice to have been actually communicated to Greenclose by 11am. For reasons that will appear later in this judgment I prefer Mr Auld's analysis of what these contracting parties intended.

38 The Bank's primary case is that it gave notice by sending an email to Mr Leach at 9.45am on 30 December 2011. The email was followed by a voicemail message left on Mr Leach's mobile phone by Mr Russell Tew (who had sent the email) at 9.59am. The Bank's fallback position is that the voicemail message was itself a notice, though it is clear from his evidence that Mr Tew did not intend it to be anything other than a courtesy call to inform the customer that a notice had been sent.

39 Although the Bank contends that it is unnecessary to prove that the email was read or the message was listened to before 11am, Mr Mitchell has invited me to find that as a matter of fact, Mr Leach listened to the message and read the email before the deadline. Mr Leach denies this. His evidence is that he was unaware of the email and did not listen to the message until the following day. Much of Mr Mitchell's extensive cross-examination of Mr Leach was directed towards undermining his credibility on that issue. In the light of this factual dispute, I will set out the material facts surrounding the Bank's purported exercise of its right to amend the termination date, before construing the notice provisions in the Collar.

40 In November 2011 Greenclose was asking the Bank for a renewal of its existing facilities, an increase in its overdraft, and/or deferral of the capital element of its loan repayments to assist its cashflow and to enable it to carry out some refurbishment over the winter months. In support of that application, Mr Reynolds provided the Bank with a budget for 2012. By then, base rates had plummeted to 0.5%, well below the floor of the Collar. The Collar was not serving the purpose for which it had been put in place, namely, protecting Greenclose (and the Bank) against the risk that base rates would rise to 6% or above. It was costing Greenclose around £57,000 per quarter: that

is the figure which appears in the quarterly "reset confirmation" sent by the Bank to Greenclose by fax on 9 December 2011 to inform it of the amount due for payment under the Collar.

41 On 18 November 2011 Mr Alan Bufton, who had taken over from Mr Harrison as the relationship manager, warned Mr Reynolds in an email that he should budget for the Collar to be extended and amend his cashflow forecast accordingly. Thereafter, Mr Leach sought to persuade the Bank not to extend the Collar. He argued that an extension of the existing instrument offered Greenclose no protection and was extremely expensive, for no benefit. Within the Bank, the decision was one for GBM, and specifically the traders, to take. In December 2011 Mr Bufton forewarned GBM that the customer was going to ask the Bank to set aside the extension. The two people with whom he corresponded were Mr Tew and his colleague Mr Rishin Patel, both of whom occupied similar positions to that of Mr Jones, though they were based in the London office.

42 Prior to November 2011, Mr Tew had not been involved in matters pertaining to Greenclose. However, since Mr Patel was due to be away on holiday at the end of December 2011, it was Mr Tew's responsibility to give the notice of extension if the trader on the GBM trading desk, Mr Bob Goodfellow, decided to exercise the Bank's contractual right to extend the Collar. This seemed virtually inevitable, given that internal documents indicate that the Bank was "out of the money" on its own book of business despite being heavily "in the money" vis a vis Greenclose on this individual Collar.

43 On 9 December 2011 Mr Tew sent an email to Mr Bufton in these terms:

> "*Alan - on 30th December GBM will need to contact the customer to inform them of the intention to extend the collar. Under the terms of the agreement this will be done via fax. Can you please provide me with the clients:*
>
> *Name:*
> *Email address:*
> *Phone number:*
> *Fax number:*
> *so that we can get hold of the client in the Christmas week…*"

44 Despite the impression given in that email, Mr Tew had not checked the terms of the ISDA Master Agreement or the Schedule. Indeed, he never checked it. Mr Tew always intended to give notice by fax; he decided to do so for no other reason than that it was a standard method of communication with the Bank's customer base. He had no idea that there was no fax number in the Schedule or that the only contact for Greenclose named in the Schedule was Mr Reynolds.

45 It appears that, despite a reminder, Mr Bufton did not respond to Mr Tew's request for contact details for the client. On 13 December 2011 Mr Tew sent an email to Mr Bufton stating: "*With regards the extension of the Greenclose collar we will contact the client (Catherine and John Leach) at…*" [he then set out Greenclose's office fax number and telephone number]. He asked Mr Bufton to let him know if the numbers were incorrect, failing which he would assume they were correct. Mr Bufton confirmed that they appeared correct. Mr Patel obtained Mr Leach's email address

from someone in Mr Bufton's department on 23 December, and forwarded it to Mr Tew by email on 28 December.

46 Mr Leach's concerns about the renewal of the Collar were debated at the Bank's December Credit Forum, but the decision was left with GBM. On 20 December 2011, Mr Bufton wrote to Greenclose to communicate the decision of the Credit Forum to refuse both the request to increase the overdraft facility and the request for loan repayment relief, but to agree to the renewal of existing facilities. Mr Bufton said in the letter that Mr Leach's views on the extension had been shared with his colleagues in GBM who exercised the final decision but that he would "*strongly suggest that you work to the premise that the Collar in question will be extended and that you will be notified as such on 30th December. Whilst nothing is certain, the extension looks highly likely*".

47 That letter did not arrive until 28 December 2011, but its contents did not come as a surprise to Mr Leach, because in the intervening period Mr Leach had received, read and digested an email from Mr Patel which was sent to him at 12.38pm on 23 December. The material part of the email said:

> "*Next week, <u>we will be sending you written notice</u> for the extension of the termination date of the current hedge (IRG 14654731) you have with us. I have attached a copy of the original trade confirmation for your reference. The notice will be sent to you on the 30th December 2011 no later than 11.00 am London time and the extension of the termination date execution will take place on the 4th January 2012.*"

[emphasis added]

48 Greenclose's offices shut every year at around midday on the last working day before Christmas, and re-open on the first business day after New Year. The evidence of Mr Leach, supported by the evidence of Mr Reynolds, is that Mr Leach turned on his "out of office" automated response to emails on the morning of Friday 23 December 2011 just before midday, after which they had some pre-Christmas drinks and nibbles and the office then closed for the Christmas vacation at around 12.15pm. The "out of office" remained switched on throughout the vacation until the office opened again on 3 January 2012, although Mr Leach was in and out of the office in the intervening period. Thus when Mr Tew's email was sent to Mr Leach's email address on 30 December 2011 it would have generated an automatic "out of office" response.

49 The question whether the "out of office" message was switched on by Mr Leach on 23 December 2011 is of minor significance, given that Mr Leach accepts that he saw and read Mr Patel's email of 23 December 2011 shortly after it was received in his inbox. Indeed he forwarded it at 12.59 that day to two of his trusted advisors, Mr Haycocks and Mr Marrow, under cover of an email expressing his frustration and disappointment at the absence of any response from the Bank to his requests for extension of the overdraft facilities and postponement of capital repayments, and stating that he was not prepared to accept the hedging without a fight because he found the Bank's action "*totally exploitative and unacceptable*". However, the Bank contends that Mr Leach's evidence that the "out of office" response was operating on 30 December 2011 should not be accepted, and that it adversely affects the credibility

of his evidence as to when he first saw Mr Tew's email and heard the voicemail message sent and left respectively on that date.

50 Mr Leach plainly had no independent recollection of switching the "out of office" message on. He candidly admitted that he did not habitually turn on his "out of office" whenever he was away from the office. The impression that I formed from his 3rd Witness Statement and his evidence in cross-examination was that Mr Leach was certain that his "out of office" message was turned on when the Bank purported to give notice by email on 30 December 2011, but his belief that he switched it on on 23 December 2011 was heavily reliant upon Mr Reynolds' recollection of events.

51 Mr Reynolds' evidence was that in the late morning of 23 December 2011, Mr Leach (who admitted he is not as computer literate as Mr Reynolds) contacted Mr Reynolds to ask him to check that his "out of office" message was working, and Mr Reynolds sent him a test email which generated the "out of office" response. Mr Reynolds thought it was most likely that this contact was by telephone from Mr Leach's office to Mr Reynolds in the downstairs office. The response read as follows: "*The office is closed untill [sic] Tuesday 3rd January 2012. I will not be picking up emails during this holiday.*" Mr Reynolds noted that, unlike his own standard "out of office" message, Mr Leach's automated response said that the office was closed. He decided that he would alter his own "out of office" message to mirror the wording of Mr Leach's message, and did so. Unlike Mr Leach, Mr Reynolds generally switched on his "out of office" message whenever he was going to be away. After the Christmas drinks, Mr Reynolds went off to meet his wife for further pre-Christmas celebrations at around 12.15. Thereafter they went off on holiday, as it happened, to one of Greenclose's hotels. Mr Reynolds returned to supervise the accounting staff dealing with the payroll on the morning of 28 December 2011, but that was a quick visit, and he was not officially back from holiday until Tuesday 3 January 2012.

52 Mr Reynolds explained in cross-examination that this was his actual recollection of what happened when he was first asked about the matter two or three months after the event. He added that "*as of today, yes, it might be different.*" Neither the test message nor the "out of office" response to it has been disclosed by Greenclose. Mr Leach and Mr Reynolds both gave evidence that they assumed that they had been permanently deleted; Mr Reynolds gave evidence about the efforts made by Greenclose's IT advisers to find the messages without success.

53 Mr Leach forwarded Mr Patel's email of 23 December 2011 to Mr Reynolds on 28 December by email timed at 9.00am. That email was received by Mr Leach after Mr Reynolds had departed for his Christmas holiday, which explains why Mr Leach did not forward it to Mr Reynolds' email address immediately on 23 December. Mr Reynolds' mobile was not set up to receive such data, so there was no point in his doing so. Unless Mr Reynolds had already got in to the office, and switched his own automated "out of office" off before Mr Leach's message was sent to him on the morning of 28 December 2011, there should have been an automated response from him to Mr Leach's email if his recollection is correct. Again, no such response been disclosed by Greenclose.

54 The Bank's case is that Mr Leach's "out of office" auto response cannot have been switched on from 23 December 2011 until 3 January 2012 because if it had been, both Mr Patel and Mr Tew would have received "out of office" responses to their emails

sent to Mr Leach's email address on 23 December 2011 and 30 December 2011, and these responses would have been captured and retained on the Bank's then recently-introduced journaling system even if they had been "double deleted", i.e. deleted from the recipient's inbox and then from the "deleted items" folder. Mr Patel was not called to give evidence that he received no "out of office" response. Mr Tew's evidence was that he did not recall receiving an out of office response to his email of 30 December 2011 and did not believe that he got one.

55 Mr Hood, a Messaging Services Manager within the Bank, gave evidence of searches carried out by two named employees of the technology services division that retrieved all the entries on the journaling system that captured and retained the emails sent to and received by Mr Patel on 23 December 2011 and the emails sent to and received by Mr Tew on 30 December 2011, which were then forwarded to the Bank's solicitors. Mr Hood said he was informed by the solicitors that they had been unable to find the "out of office" emails from Mr Leach on either date. However, the journaling system retrieved automated "out of office" responses that <u>were</u> received in Mr Patel's and Mr Tew's inboxes on 23 and 30 December 2011 respectively from the computer of Mr Bufton, to whom their emails to Mr Leach on those dates had been copied. It apparently failed to pick up any external "out of office" responses received in Mr Patel's inbox on 23 December 2011.

56 It is important to note that the Bank chose to call no expert evidence, and that Mr Hood was tendered as a witness of fact. Given that his evidence about the searches and their results was at best second-hand, it was of very limited assistance, and any opinions he expressed are inadmissible. The problem with Mr Hood's evidence is that the Court has no means of knowing how thorough the searches were, or how effective the journaling system was in capturing data. I find it significant that no "out of office" was disclosed by the Bank from Mr Patel, to whom Mr Tew's email of 30 December 2011 to Mr Leach was also copied, and whose absence from the office on 30 December 2011 had led to Mr Tew being responsible for giving the notice. It is inherently unlikely that a bank employee would go away on holiday without switching on his "out of office" message, and such a message should have appeared in Mr Tew's inbox along with Mr Bufton's. Yet the Bank produced no such message from the journaling system, and no evidence from Mr Patel. On the evidence before me, the only "out of office" response captured in Mr Tew's inbox on 30 December 2011 was Mr Bufton's.

57 If the automated responses had been sent from Mr Leach's computer to Mr Patel's and Mr Tew's computers, Mr Hood said he doubted that they would have been filtered out as "spam" because other emails from Greenclose had got through without difficulty, but he accepted that they might have been held up in transmission for some reason. Another possible explanation for the alleged non-receipt of the "out of office" message, accepted by Mr Hood (though it was not explored in evidence with Mr Leach) is that in error his "out of office" email was set up to respond to internal emails only; but like Mr Hood's evidence about the "spam" filter, that is pure speculation. I mention it only by way of demonstrating that even if the "auto response" was not captured by the journaling system, or did not reach Mr Patel's or Mr Tew's inboxes, it does not necessarily follow that one can conclude on the balance of probabilities that it was not set up or sent. It would be dangerous to draw the conclusion merely from the failure of the Bank's searches to turn up the "out of

office" responses from Mr Leach, coupled with their success in finding internal "out of office" responses from Mr Bufton, that Mr Leach's evidence is unreliable, particularly since the searches appear to have failed to turn up Mr Patel's "out of office" response. Moreover, it is odd that no external "out of office" emails were picked up in Mr Patel's inbox for the whole of 23 December 2011, which was the Friday before Christmas.

58 Whenever the Court has to resolve a conflict of this nature it is important to evaluate it against the inherent probabilities and the contemporaneous evidence (or lack of it). So far as the inherent probabilities are concerned, if an "out of office" response was turned on at any point during the Christmas holidays, it is far more likely to have been turned on before Christmas, or at least before New Year, than on 2 January, the day before the office was officially due to re-open. If 23 December was the last working day, that is the most likely date on which it would have been turned on.

59 Moreover, Mr Leach had become seriously ill with Norovirus at the beginning of December 2011; so ill that his planned open heart surgery had to be postponed from 9 December to late January 2012. Although the Greenclose offices are physically located within Mr Leach's home, his illness made it less likely that he would be doing much work or dropping in to the office on a regular basis during the vacation period. Thus there was a good reason for him to set up an "out of office" message warning people seeking to get in touch with him over the vacation period that the office was shut for the duration and he would not be picking up emails; all the more so if Mr Reynolds was going to be physically absent for almost the whole of that time. That was one of the reasons given by Mr Reynolds for recalling that the "out of office" was set up on 23 December 2011 when he was first asked about it.

60 It is also inherently likely that documents of this nature, particularly test messages, would be permanently deleted from the computer system of the sender or recipient if there was no particular reason to keep them, so the absence of documents from Greenclose's computer records is not a particularly strong point in itself. There has been no expert evidence about Greenclose's or the Bank's computer systems and the ability or otherwise to retrieve such information from the metadata. Mr Reynolds was far from sure that the Greenclose backup system would have captured these emails, and in any event he said it was overwritten on a cyclical basis. On the other hand, it is less likely that the automated responses were sent if they do not appear on the Bank's journaling system – provided that it was working correctly. This particular Bank has had notorious problems with its IT in the past, though there was no evidence one way or the other about the operational effectiveness of the journaling system. One message may have got lost or delayed in transmission, but it seems improbable that both would have done, as they were supposedly sent a week apart, and to different recipients.

61 So far as the contemporaneous documents are concerned, two are of particular significance. One is the only automated "out of office" reply produced by Greenclose in disclosure from the whole of the Christmas and New Year period. It is a response to an untitled email sent to Mr Leach by his secretary, Sarah Boullier, on the morning of the extra New Year Bank Holiday, Monday 2 January 2012. The automated reply was sent at 11.35 am, in the terms I have already quoted (including the typographical error). It was found by Mrs Boullier in her "deleted items" folder and forwarded by her to Mr Leach on 8 March 2012. The email of 2 January 2012 from Mrs Boullier to

Mr Leach to which it responded has not been found. The subject matter was left blank.

62 If that document is genuine (and Mr Mitchell very properly did not contend otherwise) the latest that Mr Leach could have set up the "out of office" automatic reply was on the morning of 2 January 2012. On the Bank's case it would have had to have been set up on that date, because it says there was no automated response to Mr Tew's email of 30 December 2011, and the period in between was the New Year weekend. Moreover, Mrs Boullier had sent Mr Leach at least two emails on 28 December 2011. If the "out of office" response had been switched on by then, her first email to Mr Leach should have generated the auto response, but the Bank's contention (again unsupported by expert evidence) is that subsequent emails from her to Mr Leach (including the 2 January 2012 email) would not have done, because the system assumes that the sender of the email will not need telling twice that the recipient is not there.

63 If that hypothesis is correct (though in the absence of expert evidence I cannot safely assume that it is), then if the auto response had been switched on before 28 December 2011, either (a) the auto response was switched off and on again in the intervening period, (which does not accord with Mr Leach's recollection, and seems inherently unlikely) or (b) the message from Mrs Boullier on 2 January 2012 that generated the response was sent from a different email address, (which does not appear to have been the case, even though she sent it from out of the office). Yet, if the 2 January 2012 "auto response" email is genuine, Mr Mitchell was unable to afford me any plausible explanation for why Mr Leach would have turned on his "out of office" response for the first time on the morning of 2 January. Even if Mrs Boullier was sending Mr Leach a test message, there was no reason for him to have wanted his secretary to send him a test message that morning to check that the "out of office" was working, unless he believed it was already switched on. Moreover, he is unlikely to have asked Mrs Boullier to check that it was working if, as Mr Reynolds attested, he had already checked that with him.

64 If the Bank's assertion about how "auto response" messages work is correct, the communications between Mrs Boullier and Mr Leach by email on the morning of 28 December 2011 would appear to demonstrate that Mr Leach cannot have set up his automated response on 23 December and kept it on throughout the holidays. However, that does not mean that his evidence about it being set up before 30 December 2011 and operative on that date is mistaken. The conversation between Mr Leach and Mr Reynolds leading to the setting up and checking of the auto response could have taken place on the morning of 28 December 2011, when they were both in the office, and not on 23 December, as they now believe it did. Although Greenclose was officially closed for business, 28 December 2011 was the next business day after 23 December because 27 December was an extra bank holiday.

65 Mrs Boullier's time sheet indicates that she worked until 11.40am on 28 December 2011. Her last email sent to Mr Leach that morning is timed at 11.34. It is plausible that Mr Leach would want to set up an "auto response" before the New Year break, especially if he had overlooked it on the previous Friday; and it seems likely that Mr Leach would have asked Mr Reynolds, who was in the office, to check that he had set the message up correctly on his computer, especially if Mr Leach's PA had gone

home. Mr Reynolds' recollection that this conversation occurred in the late morning also fits that scenario.

66 At the time that the "out of office" response of 2 January 2012 was sent to Mrs Boullier, no issue had yet been raised about the validity of the 30 December 2011 email notice of extension which, by this time, Mr Leach had read. It was not until after Mr Leach had complained to the Bank (in an email sent to a senior official, Mr Armbrister, on 3 January 2012) that he forwarded Mr Tew's email of 30 December 2011 to Mr Haycocks for his comments, on 4 January 2012. Mr Haycocks' first comment was "*interesting to know if legally they notified us on time*". The response is the second of the significant documents. At 15.47pm the same day, Mr Leach emailed the relevant provisions of the ISDA Master Agreement (which had been forwarded to him by Mr Reynolds) to Mr Haycocks. He stated in that email "*My email was in "out of office" mode and it stated that the office was closed and I would not be picking up emails over the period. Interesting!*"

67 Mr Haycocks responded: "*Very interesting! Need a lawyer's interpretation!*" to which Mr Leach responded "*A bit "last resort*"!" – indicating that Mr Leach was privately far from convinced that the "out of office" message would assist Greenclose. Thus, within a week of the date on which the notice of 30 December 2011 was sent, (but some weeks before Mrs Boullier retrieved the 2 January 2012 email from her "deleted" folder), Mr Leach was telling Mr Haycocks that his email was in "out of office" mode on 30 December 2011 – though unsurprisingly he did not tell him the date on which he switched it on. He had no reason to say that to Mr Haycocks if it was untrue; and if he had not switched the "out of office" response on until 2 January 2012, he could hardly have forgotten about that or got muddled about the dates only two days afterwards.

68 As Mr Mitchell went to great lengths to demonstrate with Mr Leach, it was not until much later, in a letter dated 29 March 2012, that Greenclose's solicitors formally raised any point on the validity of the notice. The fact that the validity of the notice was not yet in issue in January 2012 undermines any suggestion that Mr Leach made up a story about the "out of office" message being switched on prior to 30 December 2011, because he had no reason to make it up at a point when it was of no apparent significance to his dispute with the Bank. So the 4 January email to Mr Haycocks is powerful near-contemporaneous evidence that the "out of office" auto response was indeed switched on by Mr Leach some time before 30 December 2011.

69 Therefore, both the inherent probabilities and the contemporaneous documents emanating from Greenclose are consistent with the evidence of Mr Leach that on 30 December 2011, the "out of office" automated message was switched on and would have been sent out in response to emails received in Mr Leach's inbox, including Mr Tew's email, and I find as a fact that it was. The fact that for reasons unknown the Bank's journaling system appears to have failed to capture the message in Mr Tew's inbox is insufficient to rebut that evidence.

70 My impression of Mr Leach and Mr Reynolds in the witness box played no part in my conclusion, but it reinforces it. I have no doubt that both of them were doing their honest best to assist the Court. Neither was evasive in cross-examination, and Mr Leach readily conceded that he had no explanation for how it was that the automated responses apparently did not reach the Bank or for the fact that an automated response

was sent to his secretary on 2 January 2012 when she had already emailed him on 28 December 2011. Although witnesses can be mistaken, especially with the passage of time, Mr Reynolds' account of checking Mr Leach's auto response and then altering his own "out of office" message to include information about the office being shut was plainly a truthful account of something that had actually happened. As he first gave that account within around 3 months of the events in question he cannot have been mistaken about the year.

71 The only question that remains is <u>when</u> the automated message was switched on. In this regard, for the reasons I have stated, the evidence seems to point towards the conversation between Mr Leach and Mr Reynolds taking place on the morning of 28 December 2011, rather than on the morning of 23 December as they both now believe it did – but if, and only if, the Bank's assertion about the way in which "auto responses" work is correct. If the Bank is wrong about that, 23 December 2011 is inherently more likely, and it accords with the recollection of both the relevant witnesses in 2012. Fortunately, it is unnecessary for the purposes of this judgment for me to resolve that point.

72 On 23 December 2011, when he read Mr Patel's email, Mr Leach knew that the Bank intended to give notice <u>in writing</u> to extend the Collar the following week. He had no reason to suppose that notice would be given by email. Historically, important communications from the Bank were sent by letter and arrived in the post. The only communications of any significance relating to the Collar that were sent by fax after the post-transaction acknowledgment were the quarterly reset confirmations. Email was not a means of notice or communication set out in the Schedule to the Master Agreement. Nor, incidentally, was it a prescribed means of giving notice under the Loan Agreement. Mr Leach did not need to physically go into Greenclose's office to check the mail, as it would be delivered to his home in the normal way, and it appears from the events of 28 December 2011 (referred to below) that the post arrived before 10am.

73 Mr Leach's email sent to Mr Haycocks and Mr Marrow shortly after he read Mr Patel's email of 23 December 2011 demonstrates that he was very angry about the Bank's decision. On the morning of 28 December 2011, (which was the next day that Mr Leach went into the office) and shortly after he had forwarded Mr Patel's email to Mr Reynolds, Mr Leach sent a further email to Mr Haycocks and Mr Marrow at 9.24 am. Mr Leach's email indicates that he had calmed down, but he was still very upset about the Bank's behaviour, and that he wanted to discuss what to do next with Mr Haycocks and Mr Marrow. He planned to call each of them for a separate discussion and then possibly to set up a tripartite conference call. At that time he had not received the Bank's letter of 20 December 2011. That letter arrived in the post around 20 minutes later. It was scanned by Mrs Boullier and sent to Mr Leach by email, and forwarded by him later that morning to Mr Haycocks and Mr Marrow. The letter was consistent with Mr Patel's indication that the notice would be given on 30 December 2011. Therefore, Mr Leach would have expected the notice from the Bank to have arrived in that morning's post, if not before.

74 On 29 December 2011, the trader, Mr Goodfellow, sent an email to GBM addressed, among others, to Mr Jones, confirming that the Bank would be exercising its right to extend the Collar. He said that "*the option expiry date is the 30th but this option is deep deep in the money so there is no chance of us not exercising. We may as well*

inform the client today". One of Mr Jones' colleagues forwarded the message to Mr Tew, who responded "*Bob – we have already given the client a heads up and I will fax/email him tomorrow morning as per the confo. Cheers.*"

75 Thus it was Mr Tew who took the decision to wait until the morning of 30 December 2011 to give the contractual notice, despite the fact that the senior trader who had decided to extend the Collar was content that Greenclose be given notice of extension on 29 December. Mr Mitchell submitted that it was possible to construe the Confirmation as requiring that notice be served on 30 December 2011, so that service on 29 December would not suffice. I disagree. The words "by 11am on 30 December 2011" set a deadline of 11am on 30 December 2011: they do not mean "on 30 December 2011 but before 11am." Of course, the Bank was entitled to wait until just before the deadline to give the notice; but by doing so it took the risk that if it made an error or if there was some other problem, there would be insufficient time to redress the situation.

76 On the morning of 30 December 2011 Mr Tew attempted to fax notice of the Bank's exercise of its right to extend the Collar to Greenclose's fax number, at 9.35am. The fax said:

> "*Dear John,*
>
> *As per the Rishin Patel's email sent Friday 23 December 2011 please take this as written notice that the Bank is exercising its right to extend the termination date of the hedging contract IRG14654371 for a further two years. The contract extension will apply from 4 January 2012 and the new termination date will be 4 January 2014."*

77 The attempt at transmission failed. The delivery report stated "NOAN" under "status" indicating to Mr Tew that there was no answer from the recipient's fax machine. The reason why there was no answer has not been established. I accept Mr Leach's evidence that he never turned the office fax machine on or off. Even if the fax machine had been switched off by someone, rather than (for example) running out of paper, or suffering a fault on the line, there was nothing sinister about that: it was holiday time and the office was unmanned, although Mr Leach was dropping in from time to time. There was no deliberate attempt by Greenclose to prevent the receipt of the notice. Mr Leach was expecting that notice to arrive in a letter, not by fax or email, and although he was unhappy about the Bank's decision, he was resigned to receiving it; his focus was on seeing if there was anything he could do to persuade the Bank to change its mind.

78 In any event, Mr Leach is plainly not someone who would resort to such underhand behaviour. In the course of the trial it was suggested to Mr Leach not only that he caused the fax machine to be switched off, but that his first witness statement created a deliberately misleading impression of his movements in and out of the office over the Christmas and New Year holidays and that there was deliberate prevarication by his solicitors in answering questions or disclosing material that might be regarded as unhelpful to him. I unhesitatingly reject all those criticisms, although in fairness to the Bank, it is easy to see why it was suspicious. Mr Leach had ill-advisedly sent an email to Mr Armbrister on 3 January 2012, suggesting that he was unaware of the Bank's right to extend the Collar at the time when the transaction was entered into. It said "*At*

no time was this option discussed and if I had been made aware verbally of the bank's option, I would not have agreed to it".

79 It is to his credit that when he was faced with that document, Mr Leach did not seek to justify his behaviour. Although what he said was untrue, when the email is read in its entirety it is plain that Mr Leach was not seeking to argue that Greenclose was not bound by the terms of the Collar, but rather to persuade the Bank that it was unfair for it to act in a manner which was, as Mr Leach saw it, totally contrary to its customer's best interests. I cannot conclude from that lie, told in that context, that Mr Leach was prepared to perjure himself or that he was involved in any attempt to mislead the Court. When he made his first witness statement, Mr Leach did not have the benefit of all the disclosure, and as often happens when a person is trying to recollect what happened some years previously, some mistakes were made. There has been no attempt to suppress disclosable documentation; the stance taken by Greenclose's solicitors in the correspondence to which Mr Mitchell referred was a perfectly proper one.

80 At 9.45am Mr Tew sent an email to Mr Leach's email address which he ccd to Mr Bufton and Mr Patel. The subject matter was "*Notice to extend existing Base Rate Collar IRG14654371*" It said:

> *"Dear John*
>
> *Below is a copy of a fax we tried to send to you this morning. We are informing you that the Bank is exercising its right to extend the hedging contract IRG 14654731".*

It did not occur to Mr Tew to tick the box requiring a "read receipt" so that he would find out when Mr Leach had opened the email. I find on the balance of probabilities that Mr Tew did receive the "out of office" auto response to that email. It explains why he then tried to get hold of Mr Leach by phone, using the office number, to draw his attention to the email. Of course Mr Tew would have been aware that the fact that an "out of office" response is generated does not necessarily mean that the person you are trying to contact is not physically in the office. Pennington House was Mr Leach's home.

81 At 9.58am Mr Tew rang the Greenclose office telephone number but got no response. As there is no answering machine, he was unable to leave a message. A transcript of that call recorded Mr Tew's background conversation with a lady in his office. As the phone rang, Mr Tew said "*perfect, he's not answering. But it's not I don't think it's going to go to voicemail either*" to which the lady said "*ah it's not your fault*". That suggests that Mr Tew was becoming frustrated because his attempts to make contact with Greenclose thus far had failed, which is also consistent with his having received an "out of office" response to the email. He was obviously concerned that something may have gone wrong with the notice, and his colleague was trying to console him. Mr Tew then rang Mr Leach's mobile number. The call went straight through to the Vodafone voicemail service. He left a message as follows:

> "*Hello there. This is a message for John Leach. It's Russell Tew calling at the Royal Bank of Scotland. I'm just calling to say that I sent you an email this morning and a fax although we couldn't get through on the fax number. Uh,*

giving the bank's intention to extend your existing base rate collar. The bank will exercise that right to extend it. The details are in the email. Any questions please give me a call." He then left his telephone number.

82 That message was not, nor did it purport to be, a notice exercising the Bank's contractual right to extend. It was drawing attention to the email and the fax purportedly containing the written notice that the Bank had told Mr Leach it was going to serve. Although Mr Leach's telephone records show that he accessed his voicemail account for 20 seconds at 10.32am on 30 December 2011, and twice on the following day, he cannot recall what calls he received or from whom, but he believes that he did not hear Mr Tew's message until 31 December. Even if he were mistaken about that, the objective evidence establishes that he did not listen to his messages for long enough on 30 December to have heard anything more than Mr Tew telling him that he had sent him an email that morning. He would not have heard what the email related to.

83 Vodafone coverage, and thus the mobile reception at Pennington House is very bad. Mr Leach has to go outside into the grounds in order to try and find somewhere where he can make calls and listen to voicemail, and even then he said he often finds it difficult to make out what is being said because of interference on the line. The only logged access to voicemail that was long enough for Mr Leach to have heard all Mr Tew's message was on the following day, and that accords with his evidence that he did not listen to that message until after he had read the email. I accept that evidence.

84 Mr Mitchell pointed out that the email would also have been received on Mr Leach's mobile phone, to which it would have been sent automatically. There was no evidence of any difficulties in receiving emails at Pennington House. He submitted that when Mr Leach accessed his voicemail at 10.32am he was likely to have had some notification of the missed call from Mr Tew and of any new emails. However, Mr Leach was not expecting an email from the Bank. Mr Tew was unknown to Mr Leach, as they had had no previous dealings, and his telephone number, if it came up, would have meant nothing to him. Mr Leach said, and I accept, that he did not use his mobile (a Nokia) to access emails because the keyboard and screen were too small. Even if the email had been downloaded onto his mobile by the time he accessed his voicemail, I find it inherently improbable in the light of those facts that Mr Leach would have checked his mobile for emails on 30 December 2011, let alone opened and read, Mr Tew's email on his mobile.

85 Mr Leach's evidence is that he did not read the email before 11am on 30 December 2011. The first time he saw Mr Tew's email was when he next went into the office. I accept that evidence. At the time when he made his 3rd witness statement Mr Leach believed that next visit to the office to have been on 31 December. As it happens, he was mistaken, because he did go in to the office on 30 December and made some phone calls from the office number, albeit after 11am. Looking at the inherent probabilities, and bearing in mind Mr Leach's evidence that he checked in the office on 28 and again on 29 December 2011 to see if the letter containing the notice had arrived from the Bank, it is likely that he would have done the same on 30 December, but he would not have found the notice in the post.

86 If he had switched on his computer, however, he would have seen the email from Mr Tew, and given that he was expecting to hear something from the Bank by 30

December 2011, it is probable that he would have opened and read it. Another indication that Mr Leach saw the notice on 30 December 2011 is the fact that when he told Mr Haycocks in the email of 4 January 2012 that the "out of office" had been switched on, he did not add "*and I did not see the notice myself until the following day*", as one might have expected had that been the case. On the other hand, there was little or no point in Mr Leach telling Mr Haycocks about the "out of office" message, (and by implication, what it should have conveyed to the Bank) if, despite that message, he had actually been in the office and seen the message before 11am. The terms of the email to Mr Haycocks are consistent with Mr Leach's evidence that he did not see the email from Mr Tew until after the deadline expired.

87 Therefore I find Mr Leach did not see the email or hear the voicemail message left by Mr Tew until after 11am on 30 December 2011. This was not a case of deliberate evasion; Mr Leach had no knowledge that the Bank was attempting to serve notice by email until he subsequently saw and opened Mr Tew's email on his computer.

NOTICE

88 The 1992 ISDA Master Agreement provides, so far as is relevant:

12. Notices

(a) ***Effectiveness****. Any notice or other communication in respect of this Agreement may be given in any manner set forth (except that a notice or other communication under Section 5 or 6 may not be given by facsimile transmission or electronic messaging system) 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:-*

(i) if in writing and delivered in person or by courier, on the date it is delivered;

(ii) if sent by telex, on the date the recipient's answerback is received;

(iii) if sent by facsimile transmission, on the date that transmission is received by a responsible employee of the recipient in legible form (it being agreed that the burden of proving receipt will be on the sender and will not be met by a transmission report generated by the sender's facsimile machine);

(iv) if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested) on the date that mail is delivered or its delivery is attempted; or

(v) if sent by electronic messaging system, on the date that electronic message is received….

(b) ***Change of Addresses****. Either party may by notice to the other change the address, telex or facsimile number or electronic messaging system details at which notices or other communications are to be given to it."*

89 Part 4 of the Schedule contains no fax number for Greenclose and no email address for Mr Reynolds (the named contact) or anyone else. Therefore, unless a notice of change was given under s.12(b), if s.12(a) of the Master Agreement (read together

with the Schedule) is mandatory, the ways in which an effective notice could be given to Greenclose would be in writing (delivered in person or by courier) or by registered or certified mail. None of these methods was used by the Bank. Although some argument was addressed to me about whether the fax number provided by Mr Leach at Mr Jones' request for the purposes of transmitting the post-transaction acknowledgement, (and used thereafter for transmitting the quarterly position statements) was implicitly incorporated into the Schedule, I do not need to decide that point, since the attempt to send the notice by fax to Greenclose failed.

90 The notice clause was not a "tailor made" piece of drafting. It is part of a standard form which was described by Briggs J in Lomas v Firth Rixon at [53] as "*probably the most important standard market agreement used in the financial world*." He continued: "*it is axiomatic that it should as far as possible be interpreted in a way that serves the objectives of clarity, certainty and predictability, so that the very large number of parties using it should know where they stand.*" Although that judgment was appealed, the Court of Appeal said nothing to disapprove those observations, and I agree with them.

91 It is also important to bear in mind that, whilst the Master Agreement sets out standard provisions that should be interpreted uniformly, it is just a template which the parties are free to adopt in whole or in part or to change as they see fit. The Schedule to the Master Agreement is where the parties will usually adapt its terms to suit their own requirements. Thus, even if s.12(a) is mandatory, it would still be possible for additional or alternative means of notice or communication to be included in the Schedule (or, indeed, in the Confirmation) if the parties so wished.

92 The Bank's case is that s.12(a) deals purely with the deemed effectiveness of any notices given by the methods therein set out, and that it does not necessarily follow that no other types of notice can be effective. It just means that if some other method of notice is adopted, the party giving the notice must prove that it was given to and received by the other contracting party. Mr Mitchell placed strong emphasis on the use of the word "may", which, by contrast with "shall" or "must", will normally be construed as permissive. He pointed to the fact that language used elsewhere in the Master Agreement is more obviously mandatory in character, for example Section 9(b), which provides that "*no amendment, modification or waiver in respect of this Agreement will be effective unless in writing… and executed by each of the parties…*" He submitted that s.12(a) could have been couched in similar terms so as to make it clear that no notice would be effective unless given in writing and by one of the prescribed methods, to the address or fax number or electronic messaging system details provided in the Schedule.

93 However, in a context where the word "may" is followed by a list of various methods of serving notice, the word can connote that the person serving the notice has a choice between those prescribed methods. In my judgment that is plainly the sense in which the word "may" is used in Section 12(a), and the natural meaning to be given to the phrase "*may be given in <u>any manner set forth</u>*" is that notice can be given in any manner that is listed, but in no other way. This construction is supported by the words in parenthesis which follow, stipulating that notices under Sections 5 and 6 "may not" be given by fax or electronic messaging system. "May not" in this context has to be understood as a prohibition. One would expect the draftsman to use "may" and "may not" in the same sense in the same sentence.

94 Therefore, the natural interpretation of s.12(a) is that there are a limited number of permitted means of giving notice, and that the party giving notice has a free choice between them, save insofar as notices under s.5 and s.6 are concerned, when the choice of methods becomes more restricted. The words "*to the address or number or in accordance with the electronic messaging system details provided (see the Schedule)"* also support a mandatory construction. Without them, the details appearing in Part 4 of the Schedule would have no greater significance than any contact details supplied outside the contract, and there would be little purpose in specifically providing that those details can only be altered by notice under s.12(b) .

95 S.12(a) must not be construed in isolation, and the other terms of the Master Agreement support that interpretation. S.12(b) deals with how alterations are to be made to the address, telex or facsimile number or electronic messaging system details at which notices or other communications "*are to be given*" to each party. The phrase "*are to be given*" is used, instead of "*may be given*". That phrase plainly indicates that the details provided by each party in the Schedule mandate the means of notification (unless and until changed by further notice pursuant to s.12(b)). As one might expect, those details mirror the methods of notification listed in s. 12(a), which specifically tells the reader to see the Schedule (in order to find out the address, etc. provided by each party for delivery or service of such notices). I accept Mr Auld's submission that the purpose of Part 4 of the Schedule, read in conjunction with s.12(a), was to set out a clear procedure under which notices could be unequivocally served by one party on the other. No useful purpose is served by s.12(b) unless that is the case.

96 Section 13(c) includes the phrase that "*the parties irrevocably consent to service of process given in the manner provided for notices in Section 12*". It goes on to state that nothing in the Agreement will affect the right of either party to serve process in any other manner permitted by law. That gives a degree of support for the mandatory construction, because the reference is to "*the manner provided for notices*" rather than "*the manner permitted for notices*." It suggests that section 12 provides, i.e. sets out, the manner in which all notices are to be served.

97 It is significant that all the methods listed in s.12(a) envisage the notice being given in writing or some other permanent form. This is understandable in a context where contractual notices have such important ramifications for the contracting parties (and potentially impact upon positions they may have taken to hedge against their exposure under that contract), for example, by bringing the term of the contract to an end prematurely. Section 5, for example, enables one party to give notice to the other of a breach of the agreement which, if it is not remedied on or before the thirtieth day after notice of such failure is given, will constitute an Event of Default. An Event of Default enables the non-defaulting party to designate an Early Termination Date. It is just as important that the notice under s.5 spells out exactly what the other contracting party has allegedly done or failed to do, as it is that both parties know when the thirty days start to run, otherwise the recipient of the notice does not know what he needs to do to stop time running against him. Oral notice of alleged breaches would give rise to uncertainty, and would be a recipe for argument, which is precisely what the ISDA Master Agreement is designed to avoid. Certainty is of paramount importance.

98 The same considerations apply to Section 6, under which in certain specified circumstances, including an Event of Default, an Early Termination Date can be designated by giving at least 20 days' notice to the other contracting party. The Early

Termination Date cannot be "*earlier than the day such notice is effective*". Both parties need to know for certain when the Early Termination Date will be, because that is the date on which their positions will close out. Notices under ss.5 and 6 are generally regarded as the most important types of notice that can be given under the Master Agreement. If fax notices do not suffice for ss. 5 and 6, it would make little or no commercial sense to construe the Agreement as permitting oral notices to be given for those sections.

99 There is no inconsistency with Section 9(e)(ii), which specifically enables Transactions to be entered into "orally or otherwise". That reflects the common trade practice of orders being placed with traders over the telephone, but the way in which an agreement can be made on ISDA terms is something quite different from the way in which the parties to that agreement have agreed that notice under it is to be given. By their nature Transactions are often entered into at speed, and orally, but they are invariably confirmed in a document.

100 The Bank relied upon the decision of the Court of Appeal in <u>Ener-G Holdings Plc v Hormell</u> [2012] EWCA Civ 1059. That was a very different case, which concerned a tailor-made contractual notice clause which had three sub-sections. Subsection (i) provided that "*any notice …. under this Agreement <u>shall</u> be in writing and signed by or on behalf of the party giving it*". Subsection (ii) stated that "*any such notice <u>may</u> be served by delivering it personally or by sending it by pre-paid recorded delivery post…*" Subsection (iii) stated when notices served in the ways referred to in subsection (ii) "*<u>shall</u> be deemed to be received*." [Emphasis added]. The majority of the Court of Appeal agreed with the trial judge that the word "may" in this context was permissive, although they admitted they did not find the point an easy one, and Longmore LJ delivered a powerful dissenting judgment.

101 I consider that case gives rise to no general rules, and turned on the language of the contract in question, which concerned the sale and purchase of a business. Quite apart from the fact that the draftsman had used "shall" and "may" in different sub-paragraphs of the very same clause (a point which clearly influenced the decision of the Master of the Rolls) it is understandable why the court felt reluctant to construe subsection (ii) narrowly. That construction would have meant that a claim for breach of a contractual warranty could be subject to a contractual time-bar even if the other contracting party had actual notice of it – something which, objectively, the parties were unlikely to have intended. The notice in question did not have an impact on the contract itself, either by bringing it to a premature end or by extending it, let alone a potential impact on the positions of the contracting parties under other contracts with third parties. When one is dealing with the exercise of a contractual right to extend the contract for another two years, there is less justification for adopting a permissive construction, because the circumstances are akin to the exercise of an option.

102 Moreover, the "deemed receipt" sub-clause in the contract in <u>Ener-G Holdings v Hormell</u> had the effect of treating the notice as being received at a particular time, regardless of when (or even if) it was actually received or seen. Thus adoption of either of the two permitted contractual methods of notice had the perceived advantage for the party giving notice of shifting the risk (of non-receipt or delayed receipt) to the recipient. The court held that if some other method of notice was adopted, the party giving the notice would have to prove that the recipient had received the notice (and when). In the case of personal delivery, it was held that the function of the clause was

to obviate the necessity of proving that the notice was given to a director, rather than to an authorised employee, of a corporate recipient. Thus the function of sub-clause (ii) was one of risk allocation in terms of proof.

103 In my judgment, the arguments in favour of a mandatory construction in this case are far more compelling than they were in Ener-G Holdings v Hormell. By contrast with the sub-clause in that case, s.12(a) of the Master Agreement is not about risk allocation, it is about validity. It is not concerned with deemed *receipt*, but with deemed *effectiveness*, (a concept which has particular significance for notices served under s.6). S.12(a) only obviates the necessity for proof of actual delivery or receipt in a minority of cases. Although a notice sent by certified or registered mail is deemed to be effective on the date when delivery is attempted, a notice given by fax is only deemed to be effective if and when it is "*received by a responsible employee of the recipient in legible form*." Proof of transmission by the sender will not suffice. In most cases s.12(a) requires delivery or receipt to be proved by the person who seeks to rely upon the notice; in the case of a fax there are additional evidential requirements. Thus the function of s.12(a) cannot be to shift the risk of non-delivery or non-receipt to the intended recipient if any of the stipulated forms of notice are adopted.

104 In any event, s.12(a) does not say that "notice given by any of the following methods shall be deemed effective as indicated". It says that "*notice may be given in any manner set forth*" (it then refers to the Schedule) "*and will be deemed effective as indicated*". The "*and*" is important. It signifies that the section is not exclusively about when a notice is deemed effective; the first part of the section deals with the permitted means of giving notice, and the second deals with the date on which any notice given by each of those permitted methods will be deemed to be effective. All the indications are that it is intended to be comprehensive.

105 S.12(a) does not specifically address the hour of service but simply the date. Mr Mitchell submitted that this point favoured the Bank's construction, but it seems to me to be, at best for the Bank, neutral, and at worst, a further point favouring the view that this provision is not an evidential risk-shifting mechanism. Plainly, if the contracting parties stipulate that a certain type of notice has to be served by a specified time of day on a particular date, service before that deadline must be proved in the normal way.

106 I do not accept the Bank's submission that the words in parenthesis are mandatory, but the rest of the wording in Section 12(a) is not. If Section 12(a) performed a similar function to the clause in Ener-G Holdings Plc v Hormell it would simply be setting out the agreed consequences of service by one of the permitted methods, i.e. doing no more than signifying when such a notice would be deemed to be effective. There would be no place within a clause whose sole function is risk allocation, for an absolute prohibition on the service of certain types of notice by one of the permitted methods. Consistency would require any prohibition on service of notices under s.5 or s.6 by fax or electronic messaging system to be couched in terms precluding such notices from being "*deemed effective*". Instead, there is an absolute prohibition which appears in a sentence said to set out some, but not all, of the permitted means of giving notice. At the very least one might have expected the draftsman to have dealt with that prohibition by means of a separate sub-section in order to avoid confusion. Moreover, that absolute prohibition arises in the part of section 12(a) that deals with

the means of giving notice, and not in the part dealing with the effectiveness of notices served by those various means. In my judgment there is no justification for reading the rest of the part of the section in which it appears as permissive, rather than mandatory, and to do so makes no sense.

107 I am fortified in my interpretation by strong indications that ISDA itself regards s.12(a) as mandatory. As this is a standard form, it is permissible to take into account published explanatory notes such as the User's Guide to the Master Agreement, as for example Aikens J did in Australia & New Zealand Banking Group Ltd v Societé Générale [2000] CLC 161; and see Lewison, The Interpretation of Contracts, 5th Ed, at 3.08. Section M (Section 12 – Notices) of the User's Guide to the ISDA 1992 Master Agreement (1993 ed.) states that section 12 "*sets forth the means by which any notice or other communication in connection with a 1992 Agreement may be given… this Section has been modified from the 1987 Master Agreement so as to contemplate notices or other communications by facsimile transmission or electronic messaging system for certain purposes*". The notes then refer to "*permitted*" notices given by fax and "*permitted*" electronic messages and conclude "*Relevant addresses, numbers or electronic messaging details must be specified in Part 4(a) of the Schedule to the Multicurrency Master…*" The language of the guide is consistent with the provisions being mandatory. It refers to "*the means by which notices may be given*" not *"examples of ways in which notices may be given."* It does not describe this section as an evidential or risk-distributing section. It also describes the information in Part 4(a) of the Schedule in mandatory terms.

108 The same section of the User's Guide to the ISDA 2002 Master Agreement states that "*Section 12(a) provides that notices or communications in respect of the 2002 agreement may be given in six different forms,"* which it then sets out. There are six different forms rather than five, because email was added in the new Section 12(a)(vi). The reference to the six different forms is couched in terms that suggest that they are the only methods by which notice can be given. Weight is added to that interpretation of the Guide by the next paragraph which begins "*Section 12(a) has been modified from the 1992 Agreement to permit email delivery*". The use of the word "*permit*" indicates that this method of giving notice was not permitted under the 1992 form. As well as shedding some light on the interpretation of "*electronic messaging system*", which I address below, this later guide lends further support to the view that the specified methods of giving notice under s.12(a) are (and always have been) mandatory and regarded as such by ISDA itself. There would be no need to modify them to add another method if they were merely permissive, since that method would always have been available.

109 The explanation given in the Guide is inconsistent with the notion that the section does no more than stipulate when a notice given by each of the identified methods is deemed to be effective. If that had been its purpose, the explanation would have said something to the effect that "*the new section 12(a)(vi) clarifies the position where a notice is served by email, by stipulating that such a notice is deemed effective on delivery, rather than at some other time, such as receipt*".

110 Mr Mitchell submitted that it was impermissible for the Court to have regard to the modifications to the Master Agreement suggested by ISDA in 2001 and implemented in the 2002 ISDA Master Agreement, even though those modifications were made long before the Collar was entered into. He submitted that they were not part of the

factual matrix, because Greenclose was not a market trader, and there was no evidence that it was aware of those changes, even though the Bank was. However, the way in which the ISDA Master Agreement is to be construed cannot differ depending upon the identity of the parties to a specific contract made using those terms as a template. In my judgment, it would be wrong in principle for the Court to ignore any evidence that sheds light upon how ISDA (or the market) interpreted the 1992 Master Agreement at or before the time when the Collar was entered into, and the evidence about changes that were suggested by ISDA and eventually made to S.12(a) of the 1992 Agreement and the reasons for those changes is plainly helpful in that regard.

111 In Seadrill Management Services Ltd v OAO Gazprom [2004] 1 AC 715, Moore-Bick LJ expressed doubts about the legitimacy of comparing earlier and later versions of a standard form contract on the assumption that the parties consciously intended to achieve a particular result by adopting the later version; but he contrasted that exercise with cases in which "*it is possible to identify with a degree of confidence the reason for a particular amendment to a standard form*" when he accepted that a comparison between them may be appropriate. Here, of course, the reasons for the amendments were publicised by ISDA at the time; and the purpose of the comparison is not to assume a conscious intention that the parties intended to achieve a particular result by adopting the later (or indeed the earlier) version; it is to ascertain whether anything said by the authors of the standard form at the time of the amendments sheds light on the correct interpretation of the earlier version. The Bank, of course, was the party which chose the 1992 version of the ISDA Master Agreement to govern these transactions, and put it before Greenclose for its agreement; it cannot claim to have been ignorant of the differences between that and the 2002 version.

112 In October 2001 ISDA published a document entitled "the Amendments to the ISDA Master" which, as its name suggests, contained a series of suggested amendments designed to address perceived areas of difficulty or deficiency in the 1992 Master Agreement. Among these was Attachment 6, which repeats the language of s.12(a) of the 1992 ISDA Master Agreement verbatim, save for removing the words in parenthesis and adding 12a (vi) which reads "*if sent by email, on the date that email is delivered*". The Commentary on the Amendments explains that this suggested amendment:

> "*amends Section 12 (a) (Notices-Effectiveness) of the Master Agreement in two main respects. First, the parenthetical in the second and third lines of Section 12(a) is deleted in Attachment 6 so that notices under Section 5 or 6 of the Master Agreement may be given by any of the specified methods. The inability to give notices under Sections 5 or 6 via facsimile or electronic messaging systems proved to be unduly restrictive during the market turbulence experienced in 1998. Second, Attachment 6 adds a new clause (a)(vi) to permit giving notice via e-mail, the effectiveness of which is upon delivery of the email.*"

113 Thus in 2001 ISDA was saying that the effect of removing the prohibition on service of notices under ss 5 or 6 by fax or electronic messaging system was to enable such notices to be given "*by any of the specified methods*". There was no suggestion that such notices could be given (or continue to be given) by unspecified methods. Moreover, the use of the word "permit" is significant; it suggests that notice by email was not previously allowed, and that the methods set out in section 12 are mandatory.

114 S.12(a) of the 2002 ISDA Master Agreement incorporates those two changes. S.12(a)(vi) states that a notice will be effective "*if sent by email, on the date it is delivered*". A notice sent by electronic messaging system, however, is still deemed effective on the date on which it is "received", just as it is in the 1992 ISDA Master Agreement. Part 4 of the Schedule to the 2002 ISDA Master Agreement specifically refers to email in addition to all the other methods of communication specified in the Schedule to the 1992 Master Agreement (but the words "Electronic Messaging System Details" remain in the Schedule).

115 My view that the specified methods of giving notice are mandatory is consistent with that of Justice Duffy of the US District Court in New York in a very similar case, albeit that the form under consideration was a 1987 ISDA Master Agreement (which did not make provision for notices to be served by fax.) New York law and English law are the two systems that are usually chosen by the parties to ISDA Master Agreements to govern their transactions. The case was First National Bank of Chicago v Ackerley Communications Inc (2001) WL 15693 (SDNY). As in the present case, the bank, First Chicago, had a two year option to extend a derivative – in that case, an interest rate swap. It claimed to have given effective notice by fax of its election to extend the agreement. The Judge referred to the fact that the relevant 1987 ISDA Master Agreement did not provide for facsimile transmission as an acceptable means of notification between the parties. He quoted the notice clause, which is in similar, but slightly different terms to Section 12(a) of the 1992 Master Agreement:

> "*Any notice or communication in respect of this Agreement will be sufficiently given to a party if in writing and delivered in person, sent by certified or registered mail (airmail, if overseas) or the equivalent (with return receipt requested) or by overnight courier or given by telex (with answerback received) at the address or telex number specified…*"

He said there was no proof that First Chicago attempted notification of Ackerley by any of the means listed in the contract. Failure to give the required notice defeated First Chicago's entire claim. He added:

> "*It is hornbook law that when the terms of a written contract are clear and unambiguous and those terms require written notification in a particular manner then such notification can be given only in that manner…*"

116 Both parties have also referred me to the views of commentators. An article on the ISDA strategic documentation review and the forthcoming 2002 ISDA Master Agreement entitled "A New Master Agreement for the New Millenium: The Development of the 2002 ISDA Master Agreement" by Richard Tredgett and John Berry of Allen & Overy [2005] 5 JIBFL 197, 1 May 2002, says this about the notice provisions:

> *"Under the 1992 Agreements, notices may generally be given in various ways, including by a facsimile or electronic messaging system. However, notices under ss 5 and 6 of the 1992 Agreements (which include default notices and notices designating Early Termination Dates) may not be given by a facsimile or electronic messaging system. Further, the 1992 Agreements do not provide for delivery of any notices, including notices under ss 5 and 6, by email. The prevailing view has been that e-mail is not an "electronic messaging system".*

Experience in 1998 showed that giving notice to a counterparty (particularly one that is in financial difficulty) is not always easy or even possible. Stories circulated of ailing counterparties switching off fax machines, bolting doors or taking other evasive measures designed to prevent others from delivering notice to them. In the light of these experiences, it was felt that consideration should be given to ways of trying to improve the notice provisions in the 1992 Agreements, perhaps by expanding the permitted ways of giving effective notice.”

117 By contrast, Simon James of Clifford Chance, in his book on the Law of Derivatives (1999) refers to the fact that notice provisions in agreements generally are of two types, those which require that notice must be given in accordance with the requirements set out in the agreement or provide that notice may be given in a particular way but it does not prevent notice being given in other ways. He takes the view that s.12(a) opts for the latter approach, but does prevent certain notices being given in one particular way. Mr James does not explain why he reaches that view, and makes no reference to the Guide. Moreover, he was writing before the changes to the standard form in 2001 and 2002 and therefore did not have the advantage of ISDA’s own explanation of why it felt it desirable to alter the notice provisions.

118 Simon Firth, of Linklaters, in his more recent book, Derivatives Law and Practice (2013) takes a rather more considered view and explains his reasons for it. At paragraph 11.177 after quoting s.12(a) of the 1992 ISDA Master Agreement, he states that such provisions help to promote certainty by making it clear when a notice will be treated as having been duly given. He goes on to add “*what is less clear, however, is whether a notice will be valid if it is given in any other way (for example by being sent to an address that is not specified in the Schedule or, unless it is given under s.5 or 6 of the 1992 Agreement, to a different fax number.)”* He then argues for a permissive construction, so as to permit service by ordinary post if the letter is received by someone with actual authority to act on behalf of the recipient, and cites <u>Ener-G Holdings v Hormell</u> as an example of a case in which “*the same conclusion was reached on the basis of a slightly differently worded provision*”. Mr Firth does not explain how the approach he advocates is consistent with the promotion of certainty, which he appears to regard as a laudable objective. Ordinary post can go astray; the whole purpose of identifying registered or certified post is that receipt can be proved. Moreover, he appears not to have considered the ISDA materials, since he makes no reference to them.

119 Mr Firth contends that if the notice is sent to a different address or fax number from the one referred to in the Schedule, but is received by someone with authority, it should be valid. The first point to make about that argument is that it presupposes that s.12(a) is mandatory. If it is not, then notice can be given in any way that the person giving it wishes, provided it comes to the attention of the recipient. Mr Firth describes the words “*see the Schedule*” as a “simple injunction” and states that it does not *necessarily* mean that the only information that is relevant is that provided in the Schedule. However he fails to explain what else it is supposed to mean, or what function the Schedule is supposed to serve if <u>not</u> to mandate the address, fax number or electronic messaging system details at or to which notice is to be given.

120 The reason that Mr Firth gives for his view that the information in the Schedule should not be regarded as exclusive is that “*the opposite conclusion would mean that, if the recipient had moved offices or changed its fax number without notifying the*

sender, it would be impossible for a notice to be served." In those circumstances, however, the sender would be unlikely to have a different address or fax number to send the notice to, unless it made its own inquiries. Moreover, if the notice was sent to the specified address by certified or registered mail then it would be deemed served even if delivery was attempted and the recipient had moved out of that address. In any event, the article by Messrs Tredgett and Berry indicates that practical problems were indeed experienced in giving notice under the 1992 Master Agreement during the financial turmoil of the late 1990s because it was relatively easy for the receiving party to avoid delivery. The introduction of email as a specified method of giving notice was in part intended to overcome those problems.

121 Having had the advantage of seeing the materials to which I have referred and hearing full argument by leading counsel on the rival constructions, I disagree with the view of Mr James and reject Mr Firth's contentions as to how these provisions should be construed. Section 12(a) is mandatory and notice has to be given by the means it prescribes, by reference to and in accordance with the information provided in Part 4 of the Schedule, unless there has been an amendment of that information by a notice given by the party to whom that information relates to the other contracting party under Section 12(b). If the Schedule does not provide certain information necessary for service by a prescribed method, then the contract must be construed as limiting the prescribed methods to those expressly permitted by the Schedule unless and until the missing information is notified under Section 12(b) or the contract is formally amended.

122 The question whether the notice given under s.12(a) can be addressed to someone other than a person who is named in the Schedule is more difficult. Mr Auld submitted that s.12 should be construed as mandating that the notice be served on the person or persons named in the Schedule, as that would create greater certainty. He pointed out that in the Schedule to the ISDA Master Agreement in this case, the Bank had specified that s.5 or s.6 notices should be addressed to "Head of Legal, Global Banking and Markets", and all other notices should be marked for the attention of "Swaps Administration". If delivery to the named addressee is not mandatory, there would be no point in drawing that distinction and even s.5 or s.6 notices could be served on anyone at the Bank with authority to receive them. I see the force of that argument; however, they would still have to be served at the address specified in the Schedule for service of such notices, which lessens the chances of their going astray.

123 The provisions relating to fax messages specifically refer to receipt by "*a responsible employee of the recipient*". Thus if a fax number had been provided by Greenclose in or for the purposes of the Schedule, and a fax had been received in the office at the designated number by Mr Leach, it would be impossible to argue that the notice was ineffective even if it was not addressed to Mr Reynolds. If that is so for faxes, then as a matter of consistency the same logic should apply to the other specified methods of notice. Moreover, s.12(a) refers to giving notice to the address, number or electronic messaging system details provided in the Schedule, and not to the persons or addressees specified in the Schedule. In my judgment, if the notice is addressed to the receiving party or to someone with authority to receive it on behalf of that party, and served on such a person, that will suffice, even if it is not addressed to or received by a person named in the Schedule.

124 I do not regard the fact that the office telephone number was set out in the Schedule as a reason for construing s.12(a) as permissive, or construing this contract as permitting oral notices to be given. The telephone number, like Mr Reynolds' name, was an additional piece of information not required by s.12(a). The fact that it appeared in the Schedule did no more than signify that this was the number to be used for telephonic communication with Greenclose. One cannot properly infer an intention to vary the methods by which notice can be given simply from the presence of that telephone number. Matters would have been different if the Schedule or the Confirmation had said, in terms, that "*notices may also be given by telephone*".

125 Given that the methods stipulated in s.12(a) are mandatory, the next issue is whether giving notice by email was permitted. The short answer to that is no, because regardless of whether the phrase "*electronic messaging system*" includes email, no email address was ever specified in the Schedule for the purposes of giving notice under this agreement. Thus the contracting parties did not intend notices to be served by email. After the signature of the Master Agreement and the Schedule, no notice was ever given by Greenclose to the Bank under s.12(b) changing the details in the Schedule.

126 Mr Mitchell sought to argue that Mr Leach's email address was "provided" by his signing the post-transaction acknowledgement combined with a course of dealing between the parties by which they communicated using Mr Leach's email address. That argument has no merit; the post-transaction acknowledgment was not a notice under s.12(b) and it did not emanate from Greenclose. It was the Bank that inserted Mr Leach's email address in that document in the first place. Mr Jones had asked Mr Leach for his fax number specifically for the purpose of sending him the post-transaction acknowledgment; he made no request of any kind in respect of an email address. Mr Leach accepted in evidence that he confirmed its accuracy by signing and returning the fax, but he was never asked to agree to service of notices by email either then or subsequently, and I cannot construe his actions as amounting to an objective agreement by Greenclose to the addition of email to the Schedule as a permitted method of serving notice or to the addition of an email address. The Bank obviously did not consider that to have been the case, since no file note or other document has been produced to indicate that anyone on the Bank's side annotated or amended the Schedule following receipt of the Post-Transaction acknowledgement. Moreover, nothing is said about it in the Confirmation, which would have been the obvious place for the matter to have been recorded as part of the agreed terms of this transaction.

127 It is nothing to the point that there have been a large number of email communications between the Bank and Mr Leach over the years. That does not signify that there was ever any agreement by Greenclose that formal notices or communications under the Collar could be given to it by email. With the exception of the post-transaction acknowledgment and the quarterly reset confirmations, all important communications were sent to Greenclose by post.

128 The fact that the original transaction was carried out over the telephone and the post-transaction acknowledgment appeared in a fax exchange does not affect the agreed position under s.12 or the Schedule. The post-transaction acknowledgment was interim confirmation of the trade before the final transaction Confirmation was sent (by post). The definition of "*Confirmation*" in the ISDA Definitions is: "*one or more documents or other confirming evidence exchanged between the parties (including by*

means of an electronic messaging system or email) which, taken together, confirm all of the terms of that Swap transaction." That makes it clear that the mandatory provisions of s12(a) do not extend to confirmations, any more than they do to transactions. The way in which a transaction is made or a confirmation is recorded has no bearing on the question of how a notice can be validly given.

129 In any event, the phrase "*Electronic Messaging System*" in the 1992 ISDA Master Agreement does not include email. In 1992, email was not in common use and thus the reference to "electronic messaging system" is unlikely to have been intended to include it. Nor is it possible to conclude that over time, with the developments in computer technology, the meaning of that expression altered or that the expression must necessarily be construed as including any types of electronic messaging system that became more prevalent or were developed after the form was originally drafted. The distinction expressly drawn in the ISDA definition of "*Confirmation*" (referred to above) between electronic messaging systems and email, the suggested amendment to section 12(a) in 2001, the changes to that section in the 2002 Master Agreement to include email for the first time, and the reasons given for this by ISDA itself, make it plain that the expression was never intended to embrace email, and that specific provision had to be made to include email after it became a common form of communication. That view is supported by commentators. I have already referred to the article by Messrs Tredgett and Berry. As a further example, in his book "Mastering the ISDA Masters Agreements (1992 and 2002): A Practical guide for negotiation", Paul Harding states:

> *"Section 12 states the means by which any notice or communication in connection with an Agreement may be made, including by fax or electronic messaging systems which does not include email."*

130 Mr Mitchell was unable to point to any commentary expressing a different view. He referred instead to dictionary definitions of email. The Oxford English Dictionary defines email as "*messages distributed by electronic means from one computer user to another via a network"* and "*the system of sending messages by such electronic means*" and the definition in Chambers English Dictionary is to like effect. Whilst it is true that the expression "email" may be understood as a reference to the system of sending the messages, in the sense of the OED example: "*a contract communicated by email*", that is not the sense in which "system" is being used in the Master Agreement.

131 The language of the Master Agreement also gives clear indications that email was not intended to be included in the expression "*electronic messaging system*". The focus is on the "system", which in that context suggests a recognized system that was expressly set up for the purpose of transmitting electronic messages, which a computer is not. S.12(a) refers to the "*electronic messaging system details provided*" in the Schedule. It therefore envisages that what will be provided in the Schedule is not (or not just) an address but details of the particular messaging <u>system</u> that is going to be used to transmit the electronic messages. That is more consistent with the interpretation advocated by Greenclose; a banking counterparty could give its SWIFT details and number, for example.

132 A further clue to the meaning of the expression appears from the fact that notice given by electronic messaging system is deemed to have been given on "receipt". The time at which an email is received is difficult to ascertain and is a recipe for argument –

does one count receipt on the server, or receipt in the inbox? What if the recipient has a desktop computer and a handheld device such as a mobile phone to which emails are routed? Is the email received when it is loaded onto the first device or the second? What happens if the message is filtered out and never arrives but does not "bounce back"? The time when it is delivered is straightforward, which explains why ISDA adopted that as the point of effectiveness. By contrast, it is easy to ascertain when a SWIFT message is received because the time will be recorded on the message at the recipient's end of the system.

133 Mr Mitchell submitted that the distinction between email and electronic messaging system drawn in the 2002 ISDA Master Agreement lends support to the view that prior to that time the phrase "electronic messaging system" must have been taken to include email, and that the definition of "electronic messaging system" as excluding email suggests that it would otherwise be included. I cannot accept that submission. The definition is an express reflection of the situation as it was (and as it was understood) prior to the 2002 ISDA Master Agreement. The evidence before me shows that the distinction drawn by ISDA between "electronic messaging system" and "email" was designed to make it plain that email was <u>not</u> encompassed within the expression "electronic messaging system"; that its intention in 2001 and 2002 was to introduce email as a permitted method of serving notice, because it was not permitted under the 1992 Master Agreement; and the commentators suggest that the prevailing view in the market at all material times was that the 1992 Master Agreement does not permit notice to be given by email, whereas the 2002 Master Agreement does. That view of the 1992 Master Agreement is something of which the Bank and its legal department must have been aware; it explains why Mr Reynolds' email address was omitted from the Schedule both in the draft version sent by Ms Lynn to Greenclose and in the final version signed by the parties, despite being stated in the ISDA request document.

134 Thus the purported notice sent by email was not a valid and effective notice and it did not operate to extend the term of the Collar.

135 I should add that I would have reached the same conclusion even if I had accepted Mr Mitchell's submission that s.12(a) is permissive, because the email was not opened or seen by Mr Leach until after the deadline had passed. It is insufficient for the Bank to establish that it would have arrived in his inbox before 11am. The Confirmation makes it clear that the right is to be exercised by "*giving notice <u>to</u> Greenclose*", not by serving a notice <u>on</u> Greenclose. "Giving notice to" can mean different things in different contexts, but as a matter of plain English it involves actual communication of the subject-matter of the notice to the person who receives it. It is important to bear in mind the specific function that this contractual notice was intended to serve. A valid notice would extend the duration of the contract by two years. Neither party expressly contemplated that notice would be given by email – so if that method is permitted, when are those parties to be taken as having implicitly agreed that notice would be "given" to Greenclose by using it?

136 In the context of determining when an offer has been accepted, Lord Wilberforce said in <u>Brinkibon v Stahag Stahl GmbH</u> [1983] 2 AC 34, at 42D:

> "*No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie.*"

In this particular case the task of the court is to ascertain the intention of the contracting parties by construing the notice provisions. Since this notice concerned the exercise of a contractual option or right of extension, or the acceptance by the Bank of a unilateral and irrevocable offer to extend the contract, it seems to me to be wholly uncommercial to suggest that on an objective construction of the Collar the parties can be taken to have agreed that notice would be given to Greenclose by a method neither party had specified, if it was not actually communicated to someone in authority at Greenclose.

137 Cases such as The Brimnes [1975] QB 929 are concerned with a very different type of scenario. They have nothing to do with the interpretation of a specific contractual term. If the parties are in an ongoing trading relationship where notices are routinely served by a particular method, such as a telex or fax, it makes sense to conclude that such a notice will be served when it is available to be read or seen during normal office hours. There may be many contexts in which a court would have no hesitation in deciding that an email was "received" when it was received on the other party's computer within ordinary business hours, or "delivered" when it is transmitted and no "message undeliverable" bounce-back arrives in the sender's inbox. This is not one of them. These parties could have contracted on the terms of the 2002 ISDA Master Agreement, which would have had the effect for which the Bank contends if notice was given by email - but they chose not to. They cannot be treated as having made exactly the same bargain by choosing the 1992 form and not specifying email as a method of giving notice.

138 An email is not subject to the postal acceptance rule. It is a form of near-instantaneous communication. I do not accept that, on an objective analysis, the parties to this contract can be taken to have agreed at the time of entry into the Collar, that in five years' time, sending an email to the computer of someone who is not a named contact in the Schedule to the Master Agreement, and who would not be expecting notice to be given in that way, would suffice in and of itself to bring to Greenclose's attention the exercise of the Bank's unilateral right to extend the term by a further two years. If, as Mr Mitchell contended, notice could have been given orally, then leaving a voicemail message would not be good enough either. There would have to be actual communication (save, perhaps, were there was deliberate evasion by the recipient, which is not the case here). It is irrelevant that advance warning may have been given to the recipient to expect some form of written notice that morning.

139 If Mr Mitchell's analysis had been correct, and the function of s.12(a) was one of risk allocation, so that it would not be incumbent on the server to prove that the notice had actually come to the attention of the recipient if one of the prescribed methods (other than fax) was used, one would expect the corollary to be that such proof *would* be needed if another permitted method was used instead (and *a fortiori* if the parties expressly agreed, as they did, that the sender had to prove that a fax was received by a responsible employee). If the sender had to prove the actual receipt of a fax by someone with authority to act on behalf of the recipient, that suggests that the parties were concerned that there should be proof that the notice actually came to the

attention of Greenclose. If that is true for a fax message, the same reasoning should apply to an email.

140 The burden on the sender is not particularly onerous. Modern technology easily enables the sender to find out when the email has been opened by setting up the computer to generate the appropriate message. However, as I have said, Mr Tew did not ask for a "read receipt". The reason that he was so keen to get a message to Mr Leach to draw his attention to the email was that he had received the "out of office" auto reply and became worried that he had not seen it. Mr Tew's behaviour is consistent with the natural interpretation of the notice clause (although he was unaware of what it said) because if one party is extending the term of the contract it would expect to have to ensure that the other party knew about it.

141 There was nothing unbusiness-like about an "out of office" auto reply being set up on Mr Leach's computer in these circumstances; quite the reverse. The Bank knew full well that it was the Christmas holiday period and having dealt with Greenclose for five years, it would have been aware that it closed the office between Christmas and New Year. The very reason why Mr Tew had been so anxious to collate the various contact details for Greenclose on 9 December 2011 and thereafter was that he anticipated that there might be some problem in communication given that notice had to be given during the week after Christmas.

142 The Bank's unattractive contention that it was all the fault of Greenclose that it failed to deliver the notice by 11am and that this somehow creates an estoppel precluding Greenclose from raising any objection to it, was rightly not at the forefront of Mr Mitchell's submissions. The Bank took the risk of waiting to serve until the last minute and it made the mistake of assuming (a) that service by fax was permitted and (b) there would be no problems with the fax transmission. That is not to be laid at the door of Greenclose. Mr Leach was not expecting any communication from Mr Tew, with whom he had had no prior dealings; he was not expecting any emails from the Bank and as he had been told that notice was going to be given in writing, he was not expecting a telephone call either. In my judgment Mr Leach is not to be criticised for the fact that he did not see the email until after 11am on 30 December 2011.

143 Accordingly, for all the above reasons, the Bank failed to give a valid notice of the exercise of its right to extend the termination date of the Collar and the contract came to an end on 4 January 2012. It follows that the Bank is liable to repay to Greenclose all the sums that Greenclose has paid it under the terms of the Collar since that date, with interest.

IMPLIED TERMS

144 In the light of my conclusions on the notice point, it is unnecessary for me to address Greenclose's alternative case. However in deference to the detailed submissions from both parties, and in case this matter goes further, I will deal with the case on implied terms as succinctly as possible. In my judgment none of the suggested terms meets the test for an implied term set out by Lord Hoffmann (delivering the judgment of the Privy Council) in Attorney General of Belize v Belize Telecom [2009] 1 WLER 1988 at [16]-[27] as endorsed and clarified by the Court of Appeal in The Reborn [2009] 2 Lloyd's Rep 639. None of the suggested terms is necessary to give effect to the reasonable expectations of the parties to the Collar.

145 The Confirmation gives the Bank an unqualified right to extend the term of the Collar for a further two years. The Confirmation states that the Bank has a right, but not an obligation to extend. When a contract gives one of the parties an absolute right, a court will not usually imply any restrictions on it, even restrictions preventing the right from being exercised in an arbitrary, capricious or irrational manner: see e.g. the Court of Appeal decision in Lomas v JFB Firth Rixon [2012] EWCA Civ 419 at [46]; Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd [2013] EWCA Civ 200 at [77]-[95]. The restrictions suggested by Greenclose would prevent the Bank from extending the Collar in the very circumstances in which it would be in its economic interests to do so, namely, when at the time of the fifth anniversary, base rates had dropped below the floor. They would also require the Bank to subordinate its own commercial and economic interests to those of its customer, even to the extent of potentially bearing a loss on its trader's book of business.

146 Although the original purpose of the Collar was to provide protection (for both parties) against the possibility of a rise in base rates above 6%, which would have made it more difficult for Greenclose to service the loan, no derivative product would have provided Greenclose with the envisaged protection unless interest rates remained high. The only way in which that protection could have been achieved without there being a potential downside for Greenclose if the market moved in the opposite direction would have been to purchase a cap, and that was prohibitively expensive and would have required a substantial up-front premium. The Collar was the cheapest and the "least worst" of the remaining three possibilities. If Mr Leach had chosen a fixed rate swap or a vanilla collar, Greenclose would have had to pay more money to the Bank than it did during the initial five year term of the Collar.

147 Mr Leach plainly understood the differences between those three products. He knew that the right to extend was the price Greenclose was paying for a low floor, and he expected that the Bank would extend the term of the Collar if the market moved in its favour. He never sought to bargain for any limitation on the exercise of the Bank's right. Implying a term like the "Protection Condition" is not only unnecessary to make the contract workable, it would fly in the face of the expectations of the contracting parties. An agreement that the Bank would not extend the term of the Collar if to do so was not reasonably necessary to afford Greenclose interest rate protection, is tantamount to an agreement that the Bank would (or would only) extend the term of the Collar in circumstances in which it *was* reasonably necessary to afford such protection to Greenclose. Once it is translated into those positive terms it becomes plain that the alleged implied term is unreasonable and that these contracting parties would not have agreed to it.

148 If the Collar could only be extended if, after five years, base rates were at or around the levels that they were in January 2007, the suggested implied term comes perilously close to requiring the Bank to extend the Collar in such circumstances, even though the parties have expressly agreed that it is under no obligation to extend, but has an unfettered right to choose. If it does not mean that, then how could one evaluate whether the alleged implied term has been breached? To what point would the market have to have moved before it was said that it was no longer "reasonably necessary" for Greenclose to hedge? Over what period of time is the existence of a sufficient risk of an increase in rates over the cap to be evaluated? Moreover, the

Bank would be getting nothing in return for its agreement to a lower floor if it were deprived of the right to exercise the option in circumstances in which it was "in the money". In essence it would be taken to having agreed to act against its own commercial and economic interests.

149 The Risk of Default condition is even more uncertain and again, it is unnecessary to imply it to make the contract effective. There is no objective yardstick by which the Bank can evaluate whether the exercise of its right is going to "materially increase" Greenclose's risk of default in repayment of the loan. Mr Leach was unable to say what criteria the Bank would be required to take into account in making that evaluation.

150 So far as the "Good Faith" condition is concerned, there is no general doctrine of good faith in English contract law and such a term is unlikely to arise by way of necessary implication in a contract between two sophisticated commercial parties negotiating at arms' length. Leggatt J's judgment in Yam Seng Pte Ltd International Trade Corporation Ltd [2011] EWHC 111, on which Greenclose heavily relies, is not to be regarded as laying down any general principle applicable to all commercial contracts. As Leggatt J expressly recognized at [147] of that judgment, the implication of an obligation of good faith is heavily dependent on the context. Thus in some situations where a contracting party is given a discretion, the Court will more readily imply an obligation that the discretion should not be exercised in bad faith or in an arbitrary or capricious manner, but the context is vital. A discretion given to the board of directors of a company to award bonuses to its employees may be more readily susceptible to such implied restrictions on its exercise than a discretion given to a commercial party to act in its own commercial interests.

151 In TSG Building Services v South Anglia Housing Limited [2013] EWHC 1151 Akenhead J refused to imply a term that an unqualified right to serve notice to terminate the contract should be exercised in good faith, even though in that case there was an express clause in that contract requiring the parties to work together in a spirit of trust, fairness and mutual co-operation. He said, at [51]

> "*Even if there was some implied term of good faith, it would not and could not circumscribe or restrict what the parties had expressly agreed in Clause 12.3, which was in effect that either of them for no, good or bad reason could terminate at any time before the term of four years was completed. That is the risk that each voluntarily undertook when it entered into the Contract…*"

In my judgment precisely the same reasoning applies in the context of an unqualified option or right given to one party to extend the contract at the end of its initial five-year term. Greenclose took the risk that the Bank would extend the term, and in return for taking that risk, it received the lower floor.

152 In any event, exercising the option did not give rise to a material risk of default and the Bank did not act in bad faith in exercising it. If the person exercising the option were to take the pessimistic view that interest rates would remain at 0.5%, Greenclose's net payments under the Collar would be in the order of £230,000 per annum. It is clear from its financial statements that Greenclose's cashflow (and thus the question whether Greenclose was able to service the debt to the Bank) depended to a large extent on how much money was paid out in dividends and put back by way

of directors' loans. Mr Leach was very supportive of his company and as and when he needed to, he injected money into it or reduced the dividends. Greenclose's management accounts to October 2011 showed a group trading profit of £400,000 in the year to date, even taking into account the costs of the Collar, and as Mr Leach accepted, it remained profitable throughout the recession.

153 The Bank took the view at the time, in the absence of a forecast balance sheet, that a covenant breach was a possibility but most likely to be avoided by Greenclose, even if the risk of such a breach was potentially increased by extending the Collar. Further, and significantly, although Mr Leach tried very hard to persuade the Bank not to exercise the option once he was alerted to its intention to do so, neither he nor Mr Reynolds once sought to suggest that if the option were exercised it would put Greenclose at risk of defaulting. Their arguments were exclusively focused upon the fact that the purpose for which the Bank had required the hedge would no longer be served, and that Greenclose would get no benefit from the extension.

154 It is understandable why Mr Leach felt aggrieved about the decision to extend; from his perspective the Bank was taking unfair advantage of the unprecedented economic situation to make money for itself when the circumstances were the polar opposite of those in which the Bank had insisted that Greenclose enter into a hedge. However, in deciding to exercise the right to extend the Collar Mr Goodfellow was entitled to have regard to the Bank's own economic interests and to the exposure on his overall book. This was not a case of naked greed or exploitation of a vulnerable customer, even though from the customer's perspective it might have had that appearance. The decision was taken honestly and Mr Goodfellow was under no obligation to put the interests of the customer above those of the Bank.

CONCLUSION

155 As a result of unprecedented market movements following the financial crisis, Greenclose made what, in hindsight, turned out to be a bad bargain, though at the time it looked like a good one. The Bank had an absolute and unqualified right to extend the Collar, and it was free to choose to exercise that right in the circumstances in which it made that choice. However, the express terms of the 1992 ISDA Master Agreement and Part 4 of the Schedule mandated the ways in which the Bank could give notice to Greenclose. 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 it got it wrong. The notice it sent by email was ineffective; it was sent by a method that was not permitted, to an address that was not specified, and it was not seen by Mr Leach prior to 11am on 30 December 2011 2011. The voicemail message left on Mr Leach's phone does not improve the Bank's position, since it was not a notice and did not even purport to be.

156 It follows that Greenclose is entitled to judgment. I shall make the declarations that it seeks in paragraph 16 (1)(1A) and (2) of the Amended Particulars of Claim and order repayment of the sums it paid to the Bank under the Collar over the period of the extension, together with interest. The Bank's Counterclaim is dismissed in its entirety. There is no useful purpose to be served in making the declarations sought in paragraphs 4-7 of the Counterclaim, which have no bearing on any of the issues that I have had to decide.