THE HIGH COURT

[2011 No. 639 COS]

IN THE MATTER OF CITI HEDGE FUND SERVICES (IRELAND) LIMITED

AND

IN THE MATTER OF SECTION 201 OF THE COMPANIES ACT 1963

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 to 2012

Judgment of Ms. Justice Laffoy delivered on 21st day of June, 2013.

Introduction

1. The application to which this judgment relates is very unusual, not only because it raises an issue which has not previously been addressed by a court in this jurisdiction, but also because it is brought in these proceedings which, in my view, were finally determined by an order of the Court made on 5th December, 2011, so that this Court is effectively "*functus officio*".

2. The proceedings were initiated by a petition which issued on 4th November, 2011. The petitioner was Citi Hedge Fund Services (Ireland) Limited (Citi Hedge). In broad terms, the purpose of the petition was to procure the sanction of the Court to a scheme of arrangement (the Scheme) for the partial transfer of the business and undertaking of Citi Hedge to a connected company, Citibank Europe plc (CEP). Both Citi Hedge and CEP were companies incorporated in the State and the ultimate parent company of each was Citigroup Inc (Delaware), a company incorporated in the United States of America. There were two limbs to the reliefs sought in the petition under two distinct, although connected, provisions of the Companies Act 1963 (the Act of 1963), in that –

> (a) an order was sought pursuant to s. 201(3) of the Act of 1963 sanctioning the Scheme so as to be binding on Citi Hedge, CEP and the creditors of Citi Hedge; and
>
> (b) an order was sought pursuant to s. 203 of the Act of 1963 providing for the transfer of the Transferring Business (as defined in the Scheme) to CEP.

The orders sought in the petition were made by the Court on 5th December, 2011. The Scheme became effective on 1st January, 2012.

3. The application to which this judgment relates was initiated by a notice of motion which issued on 22nd January, 2013. The motion was brought by both Citi Hedge and CEP, collectively referred to as the Applicants. The only respondent on the motion was John Sisk & Son Ltd. (Sisk). Sisk was a creditor of Citi Hedge in 2011. Its relationship with Citi Hedge was a landlord and tenant relationship arising out of two leases which, at the time, Citi Hedge held, as tenant, from Sisk. The interest of Sisk in the Scheme was twofold, in that it arose from its position as a creditor of Citi Hedge, and also from its position as landlord of Citi Hedge under the two leases which were to be transferred pursuant to s. 203. On this application the Applicants have sought directions, which counsel for Sisk contended were more in the nature of declarations, as to the effect of the coming into operation of the Scheme on a particular aspect of the landlord and tenant relationship created by the leases.

4. As I have stated at the outset, the application is procedurally unusual. While on the face of it, what the Applicants are seeking are directions as to the "effect" of the order of 5th December, 2011, in reality the application has raised a substantive issue as to the current status of the landlord and tenant relationship of Sisk and CEP, which it seems to me would more properly be addressed in separate proceedings, because it turns, primarily, on the proper construction of the relevant leases. In any event, both sides participated fully in the application and the only purpose of mentioning my concern is to make it clear that this judgment is not to be taken as an indication that I consider it appropriate to bring an application of the type before the Court in proceedings under s. 201 more than a year after the final order approving the Scheme has been made in the s. 201 proceedings.

5. As will be clear later, there is a very net question involved on the application. However, in order to understand the current position of CEP, as tenant, and Sisk, as landlord, in the context of the reliefs sought on the application, I consider that it is necessary to consider:

> (a) the relevant terms of the leases governing the landlord and tenant relationship; and
>
> (b) the corporate and statutory processes by which the interest of Citi Hedge became vested in CEP, which despite the alternative relief sought on the application, which will be outlined later, I am absolutely satisfied occurred on 1st January, 2012.

The leases

6. The earliest lease was dated 1st March, 2006 (the 2006 Lease) and the later was dated 21st September, 2007 (the 2007 Lease). While the leases differed in that they obviously demised different premises and the commencement date of each term was different, so that the operative dates of options to terminate in each were different, as regards the issues the Court has to determine they were materially the same. Therefore, it is convenient to consider the issue before the Court by reference to the relevant provisions of the 2006 Lease.

7. The 2006 Lease was in favour of Citi Hedge by its former name, BISYS Hedge Fund Services (Ireland) Limited. It created a demise of the first floor of an office block in IDA Waterford Business & Technology Park in Waterford. It created a term of twenty years and one day from 17th November, 2005.

8. In the interpretation clause in the 2006 Lease the word "Tenant" was defined as meaning Citi Hedge by its former name and as

including "the successors in title of the Tenant to the Term and its permitted assigns". The Tenant's covenants were set out in Clause 4 and included in Clause 4.1(u), a fairly typical covenant which contained restrictions on assignment and parting with possession. That covenant was a covenant not to assign, transfer, underlet, etc. the demised premises but it was subject to a proviso that the landlord would (subject to compliance with the provisions of Clause 4(u)(ii)) not unreasonably withhold or delay its consent to an assignment or transfer of the entire of the demised premises. As counsel for Sisk pointed out in their written submissions, by virtue of the application of s. 66 of the Landlord and Tenant (Amendment) Act 1980, even if that proviso had not been contained in the 2006 Lease, the restriction on assignment would have had the same effect.

9. The clause in the 2006 Lease which has given rise to the issue on this application is Clause 5, which contains an option in favour of the Tenant to terminate the Lease, in other words, what is colloquially known as a "break clause". Clause 5 provides as follows:

> "The Tenant shall have the right to terminate this Lease on the expiration of the third year of the Term and again on the expiration on the eighth year and the thirteenth year of the Term (any of these dates being the 'Relevant Date') subject strictly to the following terms and conditions: –
>
> (i) The Tenant shall serve on the Landlord a Notice in writing exercising the said right . . . six months before the Relevant Date (and in this regard time shall be of the essence)."

There followed nine further terms and conditions regulating the exercise of the options, the most significant of which for present purposes is in paragraph (x) which provides as follows:

> "The provisions of this clause dealing with the Tenant's right to exercise the option to terminate at year three and eight of the Term are strictly personal to BISYS Hedge Fund Services (Ireland) Limited and may not be assigned or benefit any successor in title. The benefit and liabilities of the option to terminate at year thirteen of the Term may be assigned to a permitted assignee (in accordance with the terms of Clause 4.1(u) hereunder)."

10. The expiration of the eighth year of the Term of the 2006 Sub-Lease will occur on 16th November, 2013. The net issue which the Court has to determine is whether CEP is entitled to exercise the right to terminate the 2006 Lease on 16th November, 2013. CEP contends that it is, whereas Sisk contends that it is not, because such right was strictly personal to Citi Hedge which did not have any right to assign it or confer the benefit of it on CEP as its successor in title and, accordingly, it did not pass to CEP by virtue of the order of 5th December, 2011.

Reliefs claimed on application

11. On the application the primary relief sought by the Applicants is a direction that the effect of the order of 5th December, 2011 has been to transfer from Citi Hedge to CEP and to vest in CEP as from 1st January, 2012 the benefit of and all rights and entitlements of Citi Hedge arising in respect of the break options exercisable in 2013 and 2018 as contained in Clause 5 of the 2006 Lease and corresponding provision of the 2007 Lease.

12. In the alternative, the Applicants seek a direction that the order of 5th December, 2011 did not transfer from Citi Hedge to CEP and vest in CEP, whether as and from 1st January, 2012 or otherwise, the 2006 Lease and the 2007 Lease.

The corporate and statutory processes in relation to the Scheme

13. In outlining the corporate and statutory processes involved in the Scheme, insofar as they are relevant for present purposes, I propose drawing on what is outlined in the petition, although it is appropriate to record that all of the facts set out in the petition were verified by the verifying affidavit of Marion Mulvey, a director of Citi Hedge, sworn by her on 4th November, 2011.

14. As set out in the petition, the reason for the Scheme, which involved the partial transfer of the business and undertaking of Citi Hedge to CEP, was to re-organise certain business operations within the Irish group of companies which were subsidiaries of Citigroup Inc. The objective was that the business of Citi Hedge would be transferred to CEP by way of a partial merger by amalgamation to be implemented pursuant to the Scheme. It was made clear that CEP, as a highly capitalised entity, would be in a better position to satisfy the regulatory capital requirements of the business. The Scheme process was considered to be the most appropriate method by which the partial transfer of the business could be affected, primarily because of the logistical difficulties associated with individually assigning or novating the large number of underlying customer contracts involved.

15. Before the matter first came before the Court, Citi Hedge and CEP had entered into a Business Transfer Agreement on 10th October, 2011 in relation to the assets and liabilities of Citi Hedge which were to be transferred to CEP pursuant to the Scheme (the Transferring Assets and Liabilities). Under the Scheme Citi Hedge was retaining certain assets (the Residual Business), which comprised certain fund service contracts held by clients which were specifically identified in the Scheme and cash reserves of US$17m. What is clear is that the Residual Business was intended to be wound down. No consideration was to be paid by CEP to Citi Hedge for the Transferring Assets and Liabilities, because the aggregate value of the assets was considered to be equal to the amount of the liabilities but there was a mechanism for making an adjustment by the payment of an appropriate cash amount by the relevant party to the other party, if the position had changed on the date the Scheme was to become effective, 1st January, 2012. The sole shareholder of Citi Hedge passed a written resolution on 11th October, 2011 approving the implementation of the Scheme, subject to Court approval.

16. As stated succinctly in the petition, the Scheme, if approved, would involve the transfer of the Transferring Assets and Liabilities to CEP and would apply to the creditors of the company. As regards the creditors, the position was stated as follows in the petition, and verified in similar terms in the verifying affidavit:

> "As regards the effect of the proposed Scheme on the Creditors, the Scheme involves the transfer to CEP of [Citi Hedge's] liabilities and obligations to such Creditors. There shall be no change in the rights and obligations of Creditors as a result of the implementation of the Scheme save that such rights and obligations would be enforceable against and owed to CEP and not [Citi Hedge]. CEP is more highly capitalised than [Citi Hedge]."

Accordingly, what was involved in the Scheme was a partial merger between two solvent companies which, as regards the transfer of the rights and obligations of creditors, it was convenient to implement by way of the Scheme, which was to be sanctioned by the Court under s. 201.

17. The matter was first before the Court on 17th October, 2011 (under Record No. 2011 No. 594 COS). An order was made by the Court on that day under s. 201(1) of the Act of 1963, wherein the Court ordered that a meeting of the creditors be held on 1st November, 2011 and gave directions as to the conduct of the meeting.

18. The evidence on the petition established that prior to the creditors' court meeting Citi Hedge gave notice of the creditors' court meeting to the creditors and the notice contained an explanatory statement concerning the Scheme, which had been prepared in compliance with the requirements of s. 202(1)(a) of the Act of 1963. There was some engagement between the solicitors for Sisk, obviously following receipt of the notice, and the solicitors for Citi Hedge prior to the creditors' court meeting, to which I will return later.

19. The outcome of the creditors' court meeting was set out in the petition and verified in the verifying affidavit. The requirement of s. 201(3) that "a majority in number representing three-fourths in value of the creditors . . . present and voting either in person or by proxy at the meeting, vote in favour of the resolution agreeing to any . . . arrangement" was met. In fact, the percentage vote cast for the Scheme was one hundred per cent. Sisk was not represented at the meeting, either in person or by proxy. However, there is an interesting forensic analysis of the voting in the written submissions furnished to the Court on behalf of Sisk. In fact, there were only two votes cast in person and by proxy and the amount owing to the two creditors in question aggregated €51,231.52. Counsel for Sisk detected, presumably, from the list of creditors, that the two creditors whose debts aggregated €51,231.52 were the professional advisers of Citi Hedge, its accountants, PricewaterhouseCoopers, and its solicitors, Matheson Ormsby Prentice. The purpose of that analysis was to suggest what might have happened if Sisk, which was owed €157,413.28 by Citi Hedge, had considered it necessary to attend the meeting and vote against the resolution. In any event, that is entirely academic because the resolution was passed.

20. The only other matter adverted to in the petition to which I consider it prudent to refer is a statement that Citi Hedge then employed three hundred and twenty five people. It was stated that the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 would apply to the Scheme and that the employees would become the employees of CEP on 1st January, 2012. The significance of that is that the problem which emerged from the decision of the House of Lords in *Nokes v. Doncaster Amalgamated Colliers Ltd.* [1940] 3 All ER 549, which was the subject of much discussion at the hearing, on the application of the provision in the UK Companies Act 1929 to which s. 203 of the Act of 1963 corresponds, namely, that the Court order sanctioning a scheme of arrangement did not affect the transfer of a contract of employment which by law at the time was incapable of assignment, could not arise now either in this jurisdiction or in the United Kingdom. That is not to say that the decision of the House of Lords in the *Nokes* case is not still of significance in the United Kingdom.

21. Prior to the creditors' court meeting, the solicitors for Sisk, by letter dated 26th October, 2011, wrote to the solicitors then acting for Citi Hedge raising certain queries in relation to the Scheme. The solicitors acting for Citi Hedge responded by e-mail dated 28th October, 2011. The queries which it has been contended are of some relevance for present purposes and the responses thereto were as follows:

> (a) It was queried whether Citi Hedge proposed to request written consent from Sisk to the assignment/transfer of the 2006 Lease and the 2007 Lease. The response was that as the transfer was to be effected by court order, it was not an "assignment" and, therefore, it was not proposed to seek written consent.
>
> (b) Sisk queried whether it was proposed that deeds of assignment/transfer would be executed or whether it was intended that a court order pursuant to s. 203 would be sought pursuant to the terms of which the transfers/assignments would be effected and, if a court order was to be sought, whether it was intended to seek the written consent of Sisk prior to seeking such a court order. The response was that it was proposed that the transfers would be effected solely pursuant to the court order and Citi Hedge was not seeking the written consent of Sisk. However, it was pointed out that Sisk was entitled to vote to approve or reject the Scheme at the meeting of creditors convened for 1st November following.
>
> (c) It was queried whether Citi Hedge intended to remain in occupation of the demised premises if the Scheme was approved and, if so, for how long. The response was that CEP would take over occupation of the demised premises pursuant to the Scheme on the same terms as the demised premises were then currently occupied by Citi Hedge, but Citi Hedge would no longer be in occupation of the premises.
>
> (d) It was queried whether Sisk was being treated as a separate class of creditors (i.e. landlords) or whether it was being included in a class with general creditors. The response was that Sisk was included with the general class of creditors, as all creditors were treated in the same manner under the terms of the Scheme. There would be no changes whatsoever to the position of Sisk as creditor of Citi Hedge except that the tenant of the demised premises would be CEP and CEP would assume the rights and obligations of Citi Hedge pursuant to all of the documents relevant to the demised premises. As CEP was an Irish holding company of the Citigroup, it was in a stronger financial position than Citi Hedge and would accordingly be in a better position to satisfy any liabilities to Sisk.

The order of 5th December, 2011

22. The order of 5th December, 2011 reflected the reliefs sought in the petition, in that there were two limbs in the order. The first was an order pursuant to s. 201(3) of the Act of 1963. It stated that the Court sanctioned the Scheme for the partial transfer of the business and undertaking of Citi Hedge to CEP between Citi Hedge and its creditors as approved of by the creditors' court meeting. The Scheme was annexed to the order. Clause 11.1 of the Scheme provided as follows;

> "The Scheme will become effective on the Effective Date, being 1st January, 2012. If the Scheme becomes effective, it will be binding on Creditors irrespective of whether or not they attended or voted in favour of the Scheme at the Court Meeting."

Accordingly, in its capacity as creditor, Sisk was bound by the Scheme from 1st January, 2012. However, that, presumably, was of no concern to Sisk because it was now dealing with a "more highly capitalised" debtor than previously.

23. In the second limb of the order of 5th December, 2011, it was ordered:

> "pursuant to section 203 . . ., that the Transferring Business (as such term is defined in the Scheme . . .and subject to any adjustment payments to be made in accordance with Clause 5.2 of the Scheme) be transferred to [CEP] (including the rights and obligations of [Citi Hedge] under each and every contract to which [Citi Hedge] is a party but excluding the Residual Business, as such term is defined in the Scheme)."

In the annexed Scheme the expression "Transferring Business" was defined as follows:

> "All assets and liabilities of [Citi Hedge] with the exception of the Residual Business, that are to be transferred to CEP pursuant to the Scheme."

As I have already indicated the "Residual Business" was identified with precision in the Scheme and it did not include the leasehold interests created by the 2006 Lease or by the 2007 Lease.

24. Accordingly, on the wording of the order, when read in conjunction with the Scheme, there was transferred to CEP, *inter alia*, the leasehold interests created by the 2006 Lease and the 2007 Lease, including the rights and obligations of Citi Hedge under each.

Section 203 of the Act of 1963
25. In the Act of 1963, the heading on s. 203 – "Provisions to facilitate reconstruction and amalgamation of companies" – indicates precisely what the section is intended to do. Consequential on sanctioning a scheme under s. 201, where under the scheme the whole or part of the undertaking and property of any company concerned in the scheme is to be transferred to another company, by virtue of subs. (1) of s. 203 the Court is empowered, either by the order sanctioning the compromise or arrangement or by any subsequent order, to make provision for various matters, the first of which is –

> "the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company."

Sub-section (4) provides that, in s. 203, "property" includes property, rights and powers of every description, and "liabilities" includes duties.

Inter partes correspondence post-5th December, 2011
26. Subsequent to the making of the order of 5th December, 2011, the solicitors then acting for the Applicants sent an e-mail to the solicitors acting for Sisk on 19th December, 2011 in which the "tenant break options" in "the Lease between our respective clients" were addressed. The lease referred to was obviously the 2007 Lease, rather than the 2006 Lease, and to avoid confusion, I do not propose to quote what was stated. However, the e-mail clearly addressed the fact that, while one break option in the 2007 Lease "benefits assignees", others "are personal to Citi Hedge . . .". It was indicated that, given the intra-group nature of the assignment as part of an overall group restructuring, Citi Hedge "would be obliged for the landlord's agreement to the [personal] break options passing to [CEP]". It was suggested that a "simple deed of variation of the lease could record the necessary change".

27. Agreement to the suggestion not being forthcoming from Sisk's solicitors, the matter was further pursued by the then solicitors for the Applicants by letter dated 27th March, 2012, to which a draft deed of variation was attached. The draft deed of variation envisaged Sisk and CEP agreeing and confirming that, *inter alia*, the 2006 Lease was amended with effect from 1st January, 2012 by substituting the name of CEP for the name of BISYS Hedge Fund Services (Ireland) Limited in Clause 5(x). Sisk did not agree to execute the deed of variation.

28. CEP adopted a different position in October 2012 when it wrote directly to Sisk by letter dated 26th October, 2012 contending that "the contractual break option rights" in the 2006 Lease and the 2007 Lease were transferred to CEP pursuant to the order of 5th December, 2011 and sought confirmation from Sisk of that, failing which these proceedings would be instituted. Sisk's response directly to CEP by letter of 26th October, 2012 was that certain break options were strictly personal to Citi Hedge and it did not agree that they had passed to CEP.

Net issue
29. In essence, the net issue for determination by the Court is whether, in transferring the leasehold interests created by the 2006 Lease and the 2007 Lease, collectively referred to as "the Leases", which unquestionably came within the "Transferring Business" as defined in the Scheme, to CEP, the effect of the order of the Court of 5th December, 2011 was to substitute the name of CEP for the name of Citi Hedge (whether by its former or then current corporate name) in Clause 5(x) of the Leases.

30. The Court has had the benefit of very comprehensive written and oral submissions from each side on that issue. No less than seventy legislative provisions, judicial authorities from various jurisdictions and academic commentaries have been put before the Court. While I have had regard to them, I find it unnecessary to outline or discuss them in this judgment.

31. In summarising their submissions, counsel for the Applicants made the following points:

> (a) Having noted that there is no recorded decision in this jurisdiction dealing with the scope of the property, rights and powers capable of being transferred under s. 203 of the Act of 1963, nor is there any recorded decision with regard to the extent to which obligations, conditional or otherwise, are transferred and vested under s. 203, it was submitted that the break options, including those expressed to be personal to Citi Hedge, in both Leases were transferred by Citi Hedge to CEP and are available to be exercised by CEP and, in particular, it was submitted that –
>
> > (i) the "property" transferred by the order of 5th December, 2011, pursuant to s. 203, included the break options in the Leases;
> >
> > (ii) the break options are limitations on the obligations and duties of the Leases thus transferred and cannot be split or decoupled therefrom; and
> >
> > (iii) in any event, Sisk had waived its entitlement to object to the transfer as a result of its actions or omissions prior to the Court sanction of the Scheme.
>
> (b) An alternative position adopted, which reflects the second relief sought on the notice of motion, is that, in fact, the leasehold interests remain vested in Citi Hedge and that Citi Hedge is entitled to exercise the break options.
>
> (c) The final submission, as I understand it, relates to what might be called the "non-personal" break options, which it was submitted were exercisable by CEP because of the definition of "Tenant" in the Leases, the leasehold interests under which are now vested in CEP. My understanding is that there was no real disputation of that proposition on behalf of Sisk.

Conclusion on net issue: general observations

32. In addressing the net issue, in my view, the first point which is of significance is that the powers conferred on the Court by s. 203 are facilitatory where a scheme of arrangement, such as the Scheme, which involves the merger or amalgamation of the business of two companies has been sanctioned by the Court under s. 201. In other words, the powers conferred on the Court obviate what were referred to in the petition as the "logistical difficulties associated with individually assigning or novating" a large number of contracts. In the case of estates or interests in landed property, it also obviates the necessity to procure deeds of conveyance or assignment from the transferor company to the transferee company.

33. Secondly, the power conferred by s. 203, which the Court exercised in the order of 5th December, 2011, was the power to transfer the assets and liabilities of Citi Hedge to CEP. It cannot be doubted that the effect of the order was to transfer the leasehold interests created by the 2006 Lease and the 2007 Lease from Citi Hedge to CEP. The effect, as regards those elements of the assets of Citi Hedge, of the order was, in essence, the same as the effect of assignments by deed of the leasehold interests by Citi Hedge to CEP would have had, because Citi Hedge availed of the statutory process to achieve that end. It is unquestionably the case that the rights and obligations, using the terminology in the order, of Citi Hedge created by the Leases, which were capable of being transferred, did transfer to CEP.

34. This brings me to the third point of significance and that is consideration of the nature of the Leases. Since the enactment of s. 3 of the Landlord and Tenant Law Amendment Act Ireland 1860 (Deasy's Act), the relation of landlord and tenant in this jurisdiction is deemed to be founded on the express or implied contract of the parties. In this case, the relationship of Sisk and Citi Hedge was founded on the express terms of the Leases in issue. However, it is also the case that by virtue of each of the Leases there was vested in Citi Hedge a leasehold estate in the premises demised by each. The effect of the transfer by the order of 5th December, 2011 was to vest the leasehold estates in CEP and also to create a contractual relationship based on each of the Leases between Sisk and CEP and founded on the express terms of the Leases.

Net issue: conclusion in relation to the 2006 Lease

35. I now propose to look more closely at the transfer effected by the order of 5th December, 2011 of the leasehold interest created by the 2006 Lease to CEP, in the light of the conclusion I have reached, as set out above, that it had the same effect as an assignment by deed by Citi Hedge to CEP would have had. I consider that it is immaterial that the consent in writing of Sisk was not obtained to the transfer in accordance with Clause 4(u) of the 2006 Lease. The power of the Court to effect the transfer under s. 203 overrode that particular requirement of the Lease in the events which happened, namely, that Sisk did not object to or vote against the Scheme. In any event, the consent could not have been withheld by Sisk if it had been sought, because it would have been unreasonable to do so, a fact which was unequivocally recognised by counsel for Sisk in their written submission, as was the fact that Sisk did not refuse consent. The leasehold interest created by the 2006 Lease vested in CEP on 1st January, 2012 subject to the rent reserved by and the covenants and conditions contained in the 2006 Lease. In other words, CEP assumed the obligations to Sisk for which the Tenant is liable in the Lease. On the other hand, CEP acquired the benefit of the obligations due by Sisk to it as Tenant under the Lease. Identifying the obligations on either side is a matter of construction of the 2006 Lease.

36. In relation to the proper construction and application of Clause 5 of the 2006 Lease after 1st January, 2012, the manner in which the leasehold interest was transferred to, and became vested in, CEP did not vary the terms of the Lease, no more than the terms would have been varied if there had been an ordinary assignment by deed by Citi Hedge to CEP. After 1st January, 2012, Clause 5(x) must be read in exactly the same way as it would be read if there had been a straightforward assignment by deed from Citi Hedge to CEP. In other words, the right to exercise the option to terminate at the end of year eight, that is to say, on 16th November, 2013, ceased to exist on 1st January, 2012 because, by the express terms of Clause 5(x) it was "strictly personal" to Citi Hedge and Citi Hedge, having been divested of the leasehold interest, was no longer in a position to exercise it. Further, in my view, it is clear beyond doubt that, as a matter of construction of Clause 5(x), that right was not capable of being assigned to or for the benefit of CEP, as successor in title of Citi Hedge. Therefore, CEP is not entitled to exercise the power to terminate the 2006 Lease on 16th November, 2013. Any other construction would involve the Court rewriting Clause 5(x) on the lines suggested in the draft deed of variation furnished to Sisk with the letter of 27th March, 2012 referred to earlier. As CEP's former solicitors considered at the time, correctly in my view, that clause could only be varied with the consent of Sisk.

37. If the 2006 Lease is still in existence in 2018, in my view, the person then entitled to the leasehold interest under the 2006 Lease, that is to say, the then Tenant, will have the right to exercise the option to break at year thirteen, assuming it is a "permitted assignee". If CEP still retains the leasehold interest under the 2006 Lease in 2018, in my view, it will be entitled to exercise the option to terminate, because it would not be open to Sisk, or a successor in title of Sisk, to contend that CEP is not a permitted assignee. That right was an assignable right and it automatically passed to CEP under, or by analogy to, the implied all estate clause, which is now to be found in s. 76 of the Land and Conveyancing Law Reform Act 2009.

38. All of the foregoing conclusions are equally applicable to the 2007 Lease.

Other issues

39. As regards the alternative relief sought by the Applicants, it is absurd for those parties to contend that the leasehold interests created by the 2006 Lease and the 2007 Lease did not transfer from Citi Hedge and vest in CEP on 1st January, 2012. At the behest of Citi Hedge, the Court made the order of 5th December, 2011 which had the effect of transferring the leasehold interests. If Citi Hedge did not appreciate the implications of the transfer on the options to terminate, that is its problem. However, there is absolutely no basis on which either Citi Hedge or CEP can now seek to undo the effect of the order of 5th December, 2011 in relation to the leasehold interests. As I have recorded, Sisk has unequivocally acknowledged that the order of 5th December, 2011 effectively transferred the leasehold interests created by the 2006 Lease and the 2007 Lease to CEP. It has at all times acted properly and consistently in accordance with its status as landlord and in relation to its obligations and rights under those Leases. The approach adopted by the Applicants on this application is wholly misconceived and is based on a misunderstanding of the effect of the transfer of the leasehold interests.

40. Finally, I am satisfied that there was no acquiescence by Sisk in the state of affairs which the Applicants wrongfully contended existed after 1st January, 2012 and Sisk did not in any way waive the entitlement it had to adopt the approach it adopted on this application by its conduct either before or after 5th December, 2011.

Order

41. There will be an order refusing both reliefs sought by the Applicants.