Chancery Division

27 February 1979

B e f o r e :

Mr Justice OLIVER

Between:

TAYLOR FASHIONS LTD

v

LIVERPOOL VICTORIA FRIENDLY SOCIETY

- and -

OLD & CAMPBELL LTD

v

THE SAME

R R F Scott QC and J S Trenhaile (instructed by Philip G Jacobs, of Bournemouth) appeared on behalf of the plaintiffs, Taylor Fashions Ltd; Michael Essayan QC and J R Reid (instructed by Allin & Watts, of Bournemouth) appeared on behalf of the plaintiffs, Old & Campbell Ltd: P J Millett QC and G W Jaques (instructed by J Tickle & Co) represented the defendants in each case.

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1. Giving judgment, OLIVER J said that he had before him two summonses, both claiming new leases under the Landlord and Tenant Act 1954, but these summonses had not yet been adjourned into court because it was necessary first to determine claims made by the plaintiffs for specific performance and other relief. The background was as follows. The summonses under the 1954 Act related to claims for new leases of business premises in Bournemouth known as 20, 21 and 22 Westover Road. The plaintiffs in the first summons were Taylor Fashions Ltd ('Taylors'), the tenants of no 22. The plaintiffs in the second summons were Old & Campbell Ltd ('Oids'), the tenants of nos 20 and 21. The defendants to both summonses were the Liverpool Victoria Friendly Society, the freeholders and the landlords of the plaintiffs.

2. The present judgment was concerned with the plaintiffs' primary claims, not with the 1954 Act summonses. It would be seen that a question at the root of the matters with which he (his Lordship) had to deal was the exercisability of an option contained in the demise of no 22 to renew the term for a further 14 years after the expiry of the original term in 1976. This question was common to the cases of both plaintiffs. The defendants claimed that the option was void against them for want of registration under the Land Charges Act 1925, although apart from this all the relevant conditions for the exercise of the option had been fulfilled. The defendants had accordingly declined to renew the leases of nos 20 and 22 and had purported to exercise a right to break the lease of no 21, a right which only arose upon the non-exercise by Taylors of the option of renewal in respect of no 22. The defendants had served notices on the plaintiffs in respect of all three leases, to which the plaintiffs had replied by the claims for new leases under the 1954 Act already mentioned. The defendants' case did not impress one as overburdened with merit, but if they were right in law, and if there was no equity which assisted the plaintiffs, it was no part of a judge's function to impose his own idiosyncratic code of commercial morality. He was not criticising those who had the conduct of the defendants' affairs. They had a fiduciary responsibility for the management of the affairs of others.

3. It was necessary to give more detailed consideration to the factual background. Nos 21 and 22 Westover Road, Bournemouth, consisted of a building of four storeys and a basement in a favoured part of Bournemouth's shopping area, both premises being used as retail clothing stores, no 21 for gentlemen's tailoring and outfitting, no 22 as a ladies' fashion store. Prior to 1949 the building was owned by Olds, but in 1948 they decided to raise finance by making certain dispositions. The upshot was that the freehold of nos 21 and 22 became vested in the defendants, the Liverpool Victoria Friendly Society, subject to a lease of no 21 back to Olds for 42 years from December 25 1948 and subject to a lease of no 22 to Taylors (who had acquired the ladies' fashion business) for 28 years from December 25 1948. The lease of no 22 contained the critical provision that if the tenants should install a lift in accordance with permission given in the lease they should, subject to certain conditions as to the timing of the request and compliance with covenants, have an option for the renewal of their lease for a further term of 14 years from December 25 1976, the original date of expiry. The lease of no 21 to Olds for a term of 42 years from December 25 1948 contained a provision that if the tenants of no 22 should not exercise their option of renewal for a further 14 years, then the landlords should have the option of terminating the lease of no 21 at the end of 28 years. In that event both leases would terminate on December 25 1976.

4. Almost at once Taylors set about carrying out extensive improvements to no 22 for which they applied and received the landlords' consent. They also prepared plans and obtained estimates for the installation of the lift, involving substantial expenditure. This was done in the belief that there was in existence a valid and enforceable option which would provide Taylors with a total term of 32 years. There was no doubt that the defendants knew that the lift was going to be installed before the work was done and must have been aware that the existence of the option would be at least a relevant consideration in Taylors' undertaking the work and expenditure. The carrying out of the work was known to and acquiesced in by the defendants. At the time of the discussions on the siting and construction of the lift and while the work was being done the defendants did not suspect, and had no reason to suspect, that there might be a question as to the validity of the option for renewal. If Taylors had known that there were grounds for contesting such validity they *might* (but it was not possible to find as a fact that they *would*) have decided not to carry out the work on the lift.

5. It was relevant to mention at this point an event which had nothing to do with any of the parties but which had an important bearing on this litigation. This was the decision of Buckley J (as he then was) in the case of *Beesly* v *Hallwood Estates* [1960] 1 WLR 549 to the effect that an option to renew contained in a lease was registrable as a land charge under the Land Charges Act 1925 and was void against a purchaser of the reversion if not registered. It had to be recalled that before this decision the view of the legal profession, based no doubt on the notes in the then current edition of *Wolstenholme & Cherry*, was that an option to renew, being a covenant which touched and concerned the land and therefore ran with the reversion, did not require to be registered in order to bind a purchaser of the reversion. It is common ground that, so far as the parties to the present transactions were concerned, the significance of the decision was not appreciated by anybody. In fact this unconsciousness endured for a number of years.

6. The next transaction which needed to be mentioned was the taking of a lease by Olds of the adjoining property at no 20 in furtherance of a plan of expansion by Olds. The lease of no 20 to Olds was tied in with the other leases. It was executed on March 22 1963 and provided for a term of 14 years with an option to renew for a further 14 years, with the usual conditions as to prior notice and compliance with covenants, provided that the option to renew in respect of no 22 had been exercised. If the tenants of no 22 did not exercise their option then the option to renew the lease of no 20 was not exercisable by Olds. In committing themselves to the lease of no 20, and incurring the expenditure which this involved, Olds were relying on the continued exercisability of the option to Taylors under the lease of no 22 and they would not have proceeded if they had been aware that this underlying assumption was invalid. It was also clear that, at this time, that assumption was shared by the defendants themselves. It was not until 1975 that they became aware that the option might be void against them for want of registration.

7. On June 7 1976 Taylors served notice on the defendants exercising or purporting to exercise their option to renew in the lease of no 22 and they now claimed specific performance of that option. Olds now also claimed specific performance of the option contained in the 1963 lease relating to no 20 and an appropriate declaration as regards the clause in the lease of 1949 (which provided that if the option in respect of no 22 was not exercised the landlords could terminate the lease of no 21 at the end of the original 28 years' term).

8. The points which arose for decision in the light of the record of events were the following:

> (1) Was Taylors' option, as the defendants now claimed and the plaintiffs contest, void against the defendants for want of registration?
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> (2) If so, were the defendants estopped as against Taylors from relying on this ground of invalidity having regard to the expenditure incurred by Taylors with the defendants' concurrence?
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> (3) If the option was unenforceable against the defendants, had it nevertheless been 'exercised' for the purpose of the break and renewal clauses in the lease of 1949 to Olds?
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> (4) If it had not, were the defendants estopped as against Olds from relying on the invalidity of an option which in their own grants they had asserted to be subsisting?

9. It had been submitted by Mr Scott, for Taylors, that the Land Charges Act 1925 did not affect contractual obligations which, ever since the Grantees of Reversions Act 1540, had run with the land and remained binding at law quite regardless of any question of notice. This view, however, was not tenable so far as options for renewal were concerned since the decision in *Beesly* v *Hallwood Estates Ltd* above mentioned, a decision which had been accepted as correct in two Court of Appeal decisions, *Greene* v *Church Commissioners for England* [1974] Ch 467 and *Kitney* v *MEPC Ltd* [1977] 1 WLR 981.

10. It was, therefore, necessary to approach the case on the footing that, whatever the parties may have thought, the option to renew was in fact void against the defendants. That raised the issue of estoppel mentioned in the second and fourth questions set out above. The relevant principle of estoppel had been formulated by Mr Essayan as follows: 'If A, under an expectation created or encouraged by B that A shall have a certain interest in land, thereafter on the faith of such expectation and with the knowledge of B and without objection by him, acts to his detriment in connection with such land, a court of equity will compel B to give effect to such expectation.' From here, however, there was a critical division of opinion. The plaintiffs contended that the court had to look at the conduct of the party sought to be estopped and ask whether what he was now seeking to do was unconscionable. The defendants contended that it was an essential feature of this particular equitable doctrine that the party alleged to be estopped must, before the assertion that his strict rights could be considered unconscionable, be aware both of what his strict rights were and of the fact that the other party is acting in the belief that they will not be enforced against him. The defendants cited in support of their contention a number of authorities including the often-cited judgment of Fry J (as he then was) in *Willmott* v *Barber* (1880) 15 Ch D 96 in which he set out what are described as the five 'probanda' for establishing the equitable doctrine which would make it 'fraudulent' for a person to insist on his strict legal rights. The authorities, particularly more recent ones, however, appeared to support a much wider equitable jurisdiction to interfere in cases where the assertion of strict legal rights would be regarded by the court as unconscionable.

11. After an exhaustive review of the authorities, his Lordship concluded that it was not an essential element of this category of estoppel that the party estopped, although he must have known of the other party's belief, must have known that that belief was mistaken. In the recent case of *Shaw* v *Applegate* [1977] 1 WLR 970 Buckley LJ at p 978, referring to Fry J's 'probanda' in *Willmott* v *Barber*, said: 'So I do not, as at present advised, think it is clear that it is essential to find all the five tests set out by Fry J literally applicable and satisfied in any particular case. The real test, I think, must be whether, upon the facts of the particular case, the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it.'

12. The question therefore was whether, in all the circumstances, it was unconscionable for the defendants to seek to take advantage of the mistake which, at the material time, everybody shared. The cases of the two plaintiffs had to be considered separately.

13. In the case of Taylors there were two difficulties. The first was the difficulty of imputing to the defendants either encouragement or acquiescence in regard to Taylors' belief in the validity of the

option. The defendants came into the picture as purchasers of the reversion on an existing lease and subject to all its expressed obligations so far as enforceable against them. In installing the lift Taylors were simply doing what was contemplated by the lease and the defendants could not lawfully object to the work and could not be under any duty to communicate to Taylors what the defendants did not know themselves, namely, that the option was unenforceable because of non-registration. The second difficulty was that, although Taylors believed that the option was valid, it was not possible to say that they would have decided not to do the work if they had thought otherwise. It was even less possible to say that the defendants were, or must have been, aware that Taylors would not have done it. It was therefore necessary, although with some regret, to dismiss Taylors' claim for specific performance.

14. The case of Olds was very different. First of all, the defendants obtained the freehold from them at a price which was calculated, so far as Olds were concerned, on the footing that the break clause in the 1949 lease was to operate, and the term of the leaseback was to be reduced from 42 to 28 years, only in the event of the non-exercise of an option assumed to be subsisting when the lease was granted. Secondly, in the 1963 transaction Olds were encouraged by the defendants to expend a very large sum on no 21, and to take a lease of the adjoining premises (no 20), upon the faith of the expectation, encouraged by the defendants, that they would be entitled to renew in a particular event which Olds were invited to believe was at least possible. It would be most inequitable if the defendants, having put forward Taylors' option as a valid option in two documents, under each of which they were the grantors, and having encouraged Olds to incur expenditure and alter their position irrevocably by taking additional premises on the faith of that supposition, were now to be permitted to resile and to assert, as they wished to do, that they were, and had been all along, entitled to frustrate the expectation which they themselves created and that the right which they themselves stated to exist did not, at any material time, have any existence in fact. It followed that Olds' claim to specific performance succeeded.

15. Two further points should perhaps be mentioned. It might be that, apart from the kind of estoppel which had been discussed, the defendants were also estopped, as regards Olds, by their own deeds. Although estoppel by deed normally arose from recitals, it could be created by a clear and distinct averment in the operative part. It was a necessary inference from the wording of the 1963 deed that the tenants of no 22 had an option. The second point was Mr Essayan's contention that in construing the two leases to Olds the references to the tenants of no 22 'exercising' their option could be taken as references to their taking the necessary steps to give them a contractual right to a new lease, even though it could not result in a new lease effective against the defendants; the option could still produce contractual obligations between the original parties. However, the correct construction appeared to be that 'exercise' meant an effective exercise entitling the tenants of no 22 to a new term.

16. The result was, therefore, that (1) the claim of Taylors for specific performance of the option in the lease of no 22 must be dismissed; (2) there would be a declaration in favour of Olds that the break clause in the 1949 lease of no 21 was non-operative; and (3) a decree for specific performance of the option for renewal in the 1963 lease of no 20 to Olds would be granted.

17. The judge accordingly ordered that the claim by Taylors for specific performance of the option to renew in respect of no 22 be dismissed with costs, leaving the issue under the Landlord and Tenant Act 1954 outstanding. He made a declaration in favour of Olds that the two notices purporting to be notices under section 25 of the 1954 Act affecting their premises were null and void on the grounds (a) in respect of no 20, that the plaintiffs had validly exercised their option to renew the lease, and (b) in respect of no 21, that the defendants' right to terminate the tenancy had not arisen; the defendants to pay the costs.