RECEIPT OF RENT AND WAIVER OF LEASEHOLD COVENANTS: AN EQUITABLE APPROACH?

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INTRODUCTION

The decision of the High Court of the Republic of Ireland in *Crofter Properties Ltd* v *Genport Ltd*[1] has raised, once again, an issue concerning the requirements for an effective waiver of a leasehold covenant in Northern Ireland. Section 43 of the Landlord and Tenant Law (Amendment) Act 1860,[2] provides that:

> "Where any lease made after the commencement of this Act shall contain or imply any condition, covenant, or agreement, to be observed or performed on the part of the tenant, no act hereafter done or suffered by the landlord shall be deemed to be a dispensation with such condition, covenant, or agreement, or a waiver of the benefit of the same in respect of any breach thereof, unless such dispensation or waiver shall be signified by the landlord, or his authorised agent in writing under his hand."[3]

Section 43 appears clearly to require that where a landlord waives his tenant's breach of covenant, that waiver will only be effective if signified in writing.

The requirement of writing in section 43 appears to reverse the antecedent common law principle, whereby receipt of rent amounts to an implied waiver of breach of a covenant.[4] The provision of section 43 appears to enable a landlord to continue receiving rent from his tenant, with knowledge of the tenant's breach, and yet to claim that the breach has not been waived. The operation and effect of section 43 has been questioned, however, largely on the basis of an *obiter* statement by Palles CB in *Foott* v *Benn*.[5] The court's reference to section 43 was made in an intervention, in the course of counsel's argument, wherein Palles CB observed that he had:

> "frequently considered.. whether [section 43] does not apply merely to a waiver of the covenant generally, and that a receipt of rent after the breach, with knowledge of it, would still waive all rights of the landlord arising from that particular breach, although it would not amount to a dispensation of the covenant."[6]

• I am indebted to Dr Alan Dowling, who commented on this article in draft

1 Unreported (HC, RI), 15 March 1996 (1988/222 Sp).

2 Hereafter 'Deasy's Act'.

3 *Deasy's Act*, section 43.

4 See *Pennant's Case*, (1596) 3 Co Rep 64a; *Clifford* v *Reilly* (1869)IR 4 CL 218.

5 (1884) 18 ILTR 90

6 *Ibid*, at 91. It may be noted that the headnote reported a much stronger finding, to the effect that: "Section 43 of the Landlord and Tenant Act 1860, applies merely to a waiver of covenant generally. And a receipt of rent after breach of covenant, with the knowledge of it, still amounts to a waiver of all rights of the landlord arising from that particular breach.", *ibid*, at 90.

Although Palles CB expressed his opinion in qualified terms, it was reported as an *obiter dictum*, and has given rise to some uncertainty concerning the scope of section 43.

The distinction drawn by Palles CB, between waiver of a covenant generally, and waiver of a particular breach, is not made in section 43, but is drawn from the previous common law position.[7] At common law, a waiver can be either general or particular: a general waiver amounts to an undertaking by the landlord to waive all rights arising under a covenant, for all time, whereas a particular waiver excuses the tenant from liability only in relation to a specified breach, of which the landlord has knowledge. The common law distinction between general and particular waivers was preserved by the Law of Property (Amendment) Act 1860, section 6 of which provides that where a landlord waives his tenant's breach of covenant, this is to be taken as a waiver of the particular breach only, unless there appears an intention to the contrary.[8]

The comments of Palles CB in *Foott* v *Benn*, which suggested that conduct, such as receipt of rent, would continue to act as implied waiver of particular breaches, implies a distinction in section 43 between general and particular waiver, which appears to be unjustified considering the clear language with which the provision requires that waiver be in writing. The comments suggest that waiver could be effected without writing, so long as such waiver was confined a particular breach of a covenant.[9]

The decision in *Crofter Properties Ltd* v *Genport Ltd* rejects this approach. The court there held that the meaning of section 43 is clear: any waiver of a covenant, whether general or particular, must be effected in writing. The proposition that a landlord could waive his rights on the tenant's breach, notwithstanding the absence of writing, was dismissed by McCracken J, who stated that:

> "The wording of the section is quite clear, and relates to 'any breach thereof', which I think can only be reasonably interpreted as meaning that there cannot be a waiver of any specific breach unless that waiver is in writing."[10]

This decision has, in the Republic of Ireland at least, displaced the strained analysis of section 43 suggested by Foott v Benn, and interprets the provision in a manner which reflects the clear language in which it is framed.

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[7] The distinction was however clear to the draftsman, as section 22 of Deasy's Act indicates. Under that section consent to subletting is not deemed a general waiver of a comment against subletting.

[8] "Where any actual waiver of the benefit of any covenant or condition in any lease on the part of the lessor.. shall be proved to have taken place after the passing of this Act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear"; Law of Property (Amendment) Act 1860, section 6.

[9] The suggestion that section 43 applies to general waivers only is not universally accepted: see Dowling, "Waiver of Leasehold Covenants" (1987) 38 NILQ 265.

[10] *Ibid.*

RECEIPT OF RENT: THE NORTHERN IRELAND APPROACH

An important practical ramification of the waiver issue is the effect of a landlord's receipt of rent with knowledge of the tenant's breach. At common law the acceptance of rent by a landlord, following a tenant's breach of covenant entitled the tenant to consider the breach to have been waived, and deprived the landlord any further right of action on the foot of the breach. This common law principle[11] was based on the fact that:

> "..acceptance of any rent accrued due after the landlord's knowledge of the tenant's breach was regarded necessarily as inconsistent with an election to avoid the lease and consistent only with its affirmance. The acceptance of rent being, in the circumstances, an unequivocal act, waiver of the breach followed"[12]

Allowing the landlord to accept rent, without relinquishing his right of action on a breach of covenant has raised concern regarding the potential for a landlord to 'have his cake and eat it';[13] or to: 'approbat[e] and reprobat[e] the tenancy at the same time..'[14] A literal application of section 43 enables landlords to behave inconsistently: ostensibly to affirm the tenancy following breach, by accepting rent, and then subsequently to deny that the tenant's breach has been waived, because there has been no waiver in writing. It is clear, however, that the decision *in Crofter Properties* represents an inclination towards a strict application of section 43.

The literal construction to section 43, adopted in *Crofter Properties* does not, however, coincide with Northern Ireland authority on this point. The Northern Ireland High Court in *Duncan* v *Mackin*[15] allowed a landlord's receipt of rent to act as a waiver of his tenant's forfeiture. Lowry LCJ clearly asserted that:

> "Receipt of rent with knowledge of the breach of a covenant against alienation amounts to a waiver of the forfeiture."[16]

The court clearly sympathised with the plaintiff,[17] yet it is significant that its conclusions were based on English authorities, and without reference to the relevant statutory provision, section 43 of Deasy's Act.[18] Although there was no discussion of section 43, this decision indicates that in Northern Ireland, receipt of rent can presently operate as a waiver of a leasehold covenant. The decision in *Duncan* v *Mackin* is clearly at odds with the current Republic of Ireland authority of *Crofter Properties*. The Northern Ireland courts are therefore faced with a number of options for the future. These include following *Duncan* v *Mackin*, which did not

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[11] Which continues to govern this issue in England.

[12] *Oak Property Co Ltd* v *Chapman* [1947]1 KB 886 (CA) at 898, *per* Evershed LJ.

[13] Dowling, *op cit*, at 271.

[14] Final Report of the Land Law Working Group, (1990), para 4.4.15. As Bramwell B stated pre-1860: "..I take it to be clear that the lessor could not do an act affirming the tenancy, and yet say he did not elect to treat the breach as a forfeiture"; *Croft* v *Lumley* [1857-58]6 HLC 672 at 705.

[15] [1985]2 NIJB.

[16] *Ibid*, at 8.

[17] "Relief can and should be granted to the plaintiff..", *ibid*, at 7.

[18] See Dowling 'Anglo but perhaps not Irish', (1987)38 NILQ 58.

consider section 43, or to adopting the Republic of Ireland's strict approach to the provision.

The Land Law Working Group, in its 1990 report, recognised the existence of two principles relating to waiver of leasehold covenants in Northern Ireland. These were, firstly, that:

> "..waiver of a particular breach of obligation is to be strictly construed as relating to that breach alone (and, in particular, does not operate as a licence dispensing from that obligation for the future...)";

and also that: "..a general waiver of all past breaches of an obligation is effective only if given in writing executed by the landlord or his agent."[19] The Working Group proposed that section 43 should be replaced with a new provision, which would recognise the distinction between general and particular waiver. It also recommended that receipt of rent should continue to operate as waiver,[20] on the basis that:

> "..the landlord could not be permitted the illogicality of both approbating and reprobating the tenancy at the same time, and the acceptance of rent was taken as an election by him to continue the tenancy rather than forfeit it."[21]

While the statutory repeal and re-enactment of a modified section 43 would appear to present a solution to the current problems, until these proposals are in force, the Northern Ireland courts remain faced with the problems associated with interpreting section 43. In the meantime, if the decision in *Crofter Properties* v *Genport* is followed in Northern Ireland, its more literal interpretation of section 43 may leave unresolved the underlying problems concerning receipt of rent.

'WRITING REQUIRED' PROVISIONS AND RECEIPT OF RENT: THE COMMONWEALTH APPROACH

Although Deasy's Act applies only in Ireland, a similar question to that posed by section 43 has arisen in the Commonwealth, where the courts have been called on to consider provisions in a lease that nothing shall operate as a waiver by the landlord in the absence of writing. The judicial approach to such clauses provides an interesting perspective on the approach of Irish courts to section 43. In both cases, the issue under consideration is whether a common law rule, which considers a landlord's acceptance of rent with knowledge of the tenant's breach to amount to a

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[19] *Final Report of the Land Law Working Group*, (1990). para 4.4.10.

[20] The Land Law Working Group recommendation was that: "..the law of waiver serves a useful purpose in periodically drawing a line under past breaches of obligation and wiping the slate clean... [and] for this reason we think it should be adhered to and should continue to be activated by payments of rent."; Final Report, Land Law Working Group, (1990) para 4.4.12. This approach accords with the English common law position, whereby receipt of rent is treated as a 'special category', on the basis that: "..its legal consequences are well known and established."; Wilkinson, 'Acceptance of rent as a waiver', (1988)138 NLJ 95, 96.

[21] Land Law Working Group, *op cit*, para 4.4.15. Although the report also proposed the removal of the landlord's power to forfeit a lease, the rule regarding receipt of rent was considered equally applicable under the new procedure for termination of tenancies.

waiver of that breach, is ousted by provisions requiring that waiver be in writing.[22]

The Commonwealth courts have been reluctant to allow a landlord to accept rent from his tenant, and at the same time be able to take action for a breach of covenant, even where the lease contains a provision stating that breach of covenant can only be effectively waived in writing.[23] In *R* v *Paulson*,[24] the Privy Council held that the landlord had waived his tenant's particular breach of the covenant by accepting rent with knowledge of the breach, notwithstanding the inclusion of a provision in their lease which required writing for a valid waiver. The common law rule, which recognised receipt of rent as evidence of waiver, prevailed despite the parties agreement to the contrary, saying:

> "The principle of law that a lessor who accepts rent knowing that there has been a breach of covenant in the lease thereby irrevocably elects to treat the lease as subsisting, and is precluded from claiming a forfeiture, is applicable although the lease provides that no waiver shall take effect unless it is in writing."[25]

The reasoning in *R* v *Paulson* indicated judicial concern, also reflected in Northern Ireland, with the potential inequity of allowing a landlord to continue accepting rent, thereby giving the tenant the impression that the lease would continue notwithstanding a breach of covenant, and yet subsequently to take action on the foot of the breach. The court emphasised the implications of an acceptance of rent following breach, particularly that:

> "..the landlord, by the receipt of rent under such circumstances, shows a definite intention to treat the lease or contract as subsisting, has made an irrevocable election so to do, and can no longer avoid the lease or contract on account of the breach of which he had knowledge."[26]

The inclusion of a provision in the lease, which required that any waiver had to be in writing did not render the common law principle inapplicable, since to do so would enable the landlord: ".. at the same time to blow hot and cold, to approbate and reprobate the same transaction."[27] The inequity

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[22] Whether these cases are analogous to the position under section 43 is considered below.

[23] It has been accepted as a matter of principle that: "..there are occasions when, notwithstanding the presence of a provision to the effect that a waiver must be in writing, the courts have found that waiver has occured despite the absence of writing."; *Re Canberra Advance Bank Ltd and Barry Anthony Taylor*, (1992)115 ALR 207.

[24] [1921]1 AC 271; on appeal from the Supreme Court of Canada. This decision was relied upon by the High Court of Australia in *Mulcahy* v *Hoyne*, (1925) 36 CLR 41, where Starke J held that: "..[acceptance of rent] .. unequivocally recognised the tenancy as still subsisting, and operated as a waiver of the forfeiture down to that time."

[25] "The principle of law that a lessor who accepts rent knowing that there has been a breach of covenant in the lease thereby irrevocably elects to treat the lease as subsisting, and is precluded from claiming a forfeiture, is applicable although the lease provides that no waiver shall take effect unless it is in writing"; *R* v *Paulson*, *op cit*, at 271.

[26] *Paulson*, *op cit*, at 283.

[27] *Ibid*.

of allowing the landlord to accept rent, and yet reject the tenancy was foremost in the considerations of the court: "[i]t would be wrong and unjust on the part of the landlord so to treat the tenant".[28] Acceptance of rent was therefore deemed to be a waiver of the breach notwithstanding that the lease provided that it would not be. Lord Atkinson considered that the crucial factor was not the clause in the lease, but the landlord's intention. Although the court allowed that the clause could be effective in some circumstances,[29] if by receiving rent, the landlord showed an intention to treat the lease as subsisting, the Privy Council considered it to be 'wrong and unjust' for the tenant to be subsequently evicted.[30]

The principle espoused in *R* v *Paulson* was applied by the High Court of Australia in *Owendale Pty Ltd* v *Anthony*.[31] Again, the terms of the lease included an agreement between landlord and tenant that any waiver of the tenant's breach of covenant would not be effective unless made in writing. At first instance, Windeyer J noted that at common law, when a landlord, with knowledge of his tenant's breach of covenant, unequivocally acts in a manner: "..inconsistent with his avoiding the lease, he is deemed to have elected not to avoid it."[32] The court noted that receipt of rent has always been regarded as a clear and unequivocal act of waiver:[33] "[a]part from any special term in a lease.. or any statutory modification of the common law"; since: "..acceptance of rent due in respect of a current period is an obvious recognition of the tenancy then subsisting."[34] The task before the court was therefore to consider whether a provision to the contrary, either by statute or in the lease, was capable of displacing the common law rule regarding receipt of rent. Windeyer J held that the terms of the lease ousted the common law, and governed the dispute. Since the lease required that any waiver be in writing, it was held that receipt of rent did not constitute waiver by the landlord of the particular breach.[35]

The decision of Windeyer J in *Owendale* was reversed on appeal. The main thrust of the appellant lessee's case was the *inequity* of allowing a lessor to accept rent, and yet deny that he had waived the breach of covenant, even where the parties had agreed that any waiver must be made in writing. The court was clearly influenced by the inconsistency inherent in allowing a landlord: "..on the one hand [to] insist that the lease is still

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[28] "..to hold in fact the price of what the latter paid for, the enjoyment of his holding for the entire term during which the rent actually paid was accruing, and yet deprive him of half of that very property", *Paulson, op cit,* at 283.

[29] "..it may well be that many cases may occur to which the clause as to waiver would be applicable; their Lordships think that it is not applicable in the present case under all its circumstances"; *Paulson, op cit,* at 286.

[30] "The point is that he cannot do both at the same time. He cannot by receiving twelve months' rent determine that the lease was a subsisting lease while that rent was accruing, and in the middle of that period determine that it no longer subsists."; *ibid,* at 284.

[31] (1967) 117 CLR 539.

[32] *Ibid,* para 47, *per* Windeyer J.

[33] "One act which, by the common law, is always regarded as unequivocal and therefore necessarily a waiver of a right of re-entry on account of a breach of covenant by the lessee, is the lessor's acceptance, with knowledge of the fact of the breach, of rent accrued due after the breach", *op cit,* para 47.

[34] *Ibid.*

[35] "A lessor's acceptance of rent for the period cannot, in my view, be said to be a waiver of his right to determine the lease.", *Owendale* v *Anthony, op cit,* para 51, *per* Windeyer J.

subsisting and on the other insist that the relationship between himself and the lessee is not that of lessor and lessee."[36]

Even though the parties had agreed in their lease that waiver was to be made in writing, the court was reluctant to enforce the terms of the lease if to do so would be inequitable. The common law principle, which enabled the court to reach an equitable result, was allowed to supersede the inclusion of an express provision to the contrary. While the terms of the lease were considered, Owen J took the view that the question of waiver rested, not upon whether a written waiver had been made, but on whether the landlord had made an "unequivocal election" not to end the lease following the tenant's breach. The inclusion of a clause in the lease, requiring waiver to be in writing, was no more than *a factor to be taken* into account by the court, when judging whether an unequivocal election had taken place.[37] It was the election which mattered, and its effect on the tenant's understanding of the position, not the manner in which that election had been made.[38]

The willingness of the court in *Owendale* to consider the fact that the lease has provided a procedure regarding waiver represents a noteworthy development of the approach in *R* v *Paulson*, where the fact the parties had included a provision requiring waiver to be in writing was said to be ineffectual where the act of waiver relied upon was receipt of rent. It remains the case, however, that the landlord may be found to have waived his right to act on breach on the basis of unequivocal *words or conduct*, notwithstanding an express provision to the contrary in the lease. The parties' agreement remained no more than a factor to be considered by the court when addressing what is now the crucial question: has the landlord *unequivocally elected* not to terminate the lease on the basis of this breach.

The Commonwealth position remains closely allied to the common law regarding a landlord's acceptance of rent with knowledge of the tenant's breach of covenant. The court's decision in *Owendale Pty Ltd* v *Anthony* indicated its reluctance to allow a landlord to 'approbate and reprobate', by accepting rent and subsequently denying that the lease remained operative, even though the parties had agreed that the landlord would only waive his rights if he did so in writing. Even where the lease contains an express provision requiring that any waiver by the landlord be in writing, the courts have considered this to be, at most, one of the factors to be taken into account when assessing whether there has been an "unequivocal election" to treat the lease as still subsisting.

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[36] *Ibid*, *per* Owen J, para 6.

[37] "I can see no good reason why the parties to a lease should not validly incorporate such a clause into their agreement and if they do so, that seems to me to be a very relevant fact to be borne in mind when it is claimed by a lessee who has committed a breach of covenant that by accepting rent his lessor has made an election to keep the lease on foot"; *Owendale* v *Anthony*, *per* Owen J, para 11.

[38] The reasoning was also adopted by the New Zealand Supreme Court in *Inner City Businessmen's Club Ltd* v *James Kirkpatrick Ltd* [1975]2 NZLR 636. Henry J considered: "..the whole of the conduct of the parties at the time, and.. the form of the statement.. and the operation of clause 18.."; before concluding that the landlord had *not* waived his tenant's breach of covenant. Although the receipt of rent was held *not* to amount to waiver, this was not based solely on the clause in the lease, but on the finding that the landlord had not, by his words and conduct, and also considering the terms of the lease, elected to waive the breach.

While the Commonwealth decisions support a construction of Deasy's Act which allows for waiver to take place by receipt of rent, it is arguable that the "writing required" provision cases are not an exact analogy. The Commonwealth decisions concern provisions inserted into the lease by the landlord, and accepted by the tenant. Section 43 of Deasy's Act on the other hand does not operate by inserting a provision concerning waiver into the lease.[39] While the Commonwealth decisions involve an agreed clause which the parties have chosen to include, section 43 of Deasy's Act is intended to apply notwithstanding the intentions of the parties.

The perceived inequity of allowing the landlord to continue accepting rent, and so leading the tenant to believe that the breach has been disregarded, has led the Commonwealth courts to find waiver on the basis of receipt of rent, even though the parties to the lease made an agreement to the contrary. The Northern Ireland courts have shared this reluctance to allow the landlord to "approbate and reprobate" the lease with knowledge of the tenant's breach. This has given rise, in the Commonwealth decisions, to a willingness to ignore the provisions which the parties have chosen to adopt as governing their relations: the sanctity of their bargain is disregarded. In Northern Ireland, the result has been an attempt to preserve the common law position, regardless of a clear statutory provision to the contrary. The following section will consider whether any alternatives exist, which might enable the Northern Ireland courts, as the Republic of Ireland has done,[40] to follow the clear meaning of section 43 while protecting tenants against the inequitable actions of landlords who endeavour to "have their cake and eat it".

ESTOPPEL

An alternative means of avoiding the undesirable outcome, whereby a landlord can 'approbate and reprobate' by accepting rent with knowledge of a breach, may be found in the doctrine of estoppel. *Craigdarragh Trading Co.* v *Doherty*[41] raised the possibility of utilising estoppel principles in order to achieve a just result, where the landlord accepted rent with knowledge of his tenant's breach. Having stated that section 43 required that waiver be in writing, Murray J revealed that he was:

> "..sympathet[ic] with the view that if the facts disclose a situation in which it would be unconscionable for the landlord to insist upon the formality of a written consent or written waiver, our law does allow for the lessee's equity, whether by estoppel or otherwise, to prevail."[42]

This led the Land Law Working Group to ask:

> "..whether implied waiver is the best way of tackling the question of what should be the effect of acceptance of rent in knowledge of a breach of obligation, or whether it would be better to rely on a kind of estoppel - that the landlord's conduct led the tenant to believe that the landlord would not

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[39] Contrast the provisions of sections 41 and 42, which do imply terms into the lease.

[40] *Crofter Properties* v *Genport*, *op cit*.

[41] *Op cit*.

[42] *Op cit*, at 230A.

> seek to have the tenancy terminated, and a reasonable tenant would have taken that view."[43]

Having consulted on the question, the report concluded that waiver was preferred to estoppel.[44]

The search for an equitable solution has continued to appear in arguments before the court, and was acceded to by Girvan J, *in Belfast West Power Ltd* v *Belfast Harbour Commissioners*.[45] Counsel for the tenant submitted that the landlord had waived his right to object to a change in user of the leasehold property by consenting to a sub-lease, or an assignment which permitted or required a different use. An estoppel argument was raised on the basis that the landlord had represented, actively or impliedly to the tenant, that he would not object to the change in user. The court accepted that as a consequence:

> "..it would be inequitable for him at a later date to seek to revert to the contractual provisions which he has expressly or impliedly agreed not to enforce."[46]

The estoppel principle was advanced with the object of ensuring that where a landlord represented to his tenant, by acceptance of rent or otherwise, that the lease was still 'on foot', he would not subsequently be permitted to deny that the breach had not been waived.

Estoppel arguments have been raised in the past, in relation to section 18 of Deasy's Act. In *Byrne* v *O'Neill & Dempsey*,[47] a plaintiff sub-landlord argued against his tenant, that the sub-letting was void, due to his own failure to obtain the required consent in accordance with section 18. The court accepted the defendant's submission, that the doctrine of estoppel could be utilised in order to prevent a landlord from expressly endorsing a lease, and then subsequently relying on Deasy's Act to vitiate the tenancy which he had recognised. Although the reference to estoppel was *obiter*, Maguire J stated that he would have been prepared to rest his decision on his opinion that:

> "..the plaintiff is estopped from relying for his own advantage upon this implied prohibition to vitiate the sub-tenancies which he had deliberately and expressly purported to create."[48]

The approach taken in *Byrne* v *O'Neill & Dempsey* was initially seen as "open[ing] up considerable possibilities..".[49] The application of estoppel

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[43] Land Law Working Group, *op cit*, para 4.4.11.

[44] This point is considered below.

[45] [1998]NI 112. This was reinforced in the Court of Appeal [1998]NI 347. Although the landlord was not found to have 'estopped' himself in this case, Carswell LCJ cited with agreement the English authority of *Killick 2nd Covent Garden Property Co* [1973]2 All ER 337 at 339-40, that: "Of course, a landlord who gives his consent to an assignment knowing that the assignee intends to use the premises in breach of a user covenant may incautiously estop himself from thereafter relying on the covenant or may waive the right to enforce it."

[46] *Ibid*, at 127d, *per* Girvan J.

[47] [1948]Ir Jur Rep 17.

[48] *Ibid*.

[49] 'Assignments and Sub-Lettings by a Lessee in breach of agreement: How far will the Lessee be Estopped from Impugning the Validity of his own Act' [1948]14 Ir Jur 19, at 23.

was perceived to be: "..an endeavour to mitigate the hardships and avoid the palpable dishonesty which results from the rigid operation of sections 10 and 18 of [Deasy's] Act..";[50] and could by analogy have applied in relation to section 43, where the strict application of the provision has been avoided on the basis that it can give rise to inequitable results. *Byrne* v *O'Neill & Dempsey* has not been considered in later cases, and subsequent decisions have questioned the applicability of equitable principles where a statutory provision has clearly laid down a procedure to be followed.[51]

Professor Wylie has suggested a similar approach in response *to Crofter Properties* v *Genport*, which involves the equitable doctrine that: "a statute may not be used as an instrument of fraud".[52] This analysis is supported by the decision in *Burke* v *Prior*,[53] where the court asked whether, in relation to a covenant against assignment or sub-letting, a landlord who "approbates and reprobates" the same transaction, would be thwarted by the maxim that: "equity will not allow a statute to be used as an instrument of fraud".[54] The court concluded that this could not be permitted:

> "If the landlord has been guilty of what in the view of a Court of Equity is a fraud.. the Court has a power to relieve the tenant, notwithstanding ...the provisions of the Subletting Act."

The acceptability of applying equitable doctrines to reach a result favoured by the court, where they conflict with a statutory provision remains, however, a matter of contention. The question has been considered in the context of reliance on statutory provisions in connection with registration to the effect that notice will not affect a party.

In *Re Monolithic Building Co*,[55] the court said that: "..it is not fraud to take advantage of legal rights, the existence of which may be taken to be known to both parties."[56] The Court of Appeal was not prepared to allow equitable principles to contravene the clear intention of Parliament,[57] based on the authority of *Edwards* v *Edwards*, that: "..it would be dangerous to engraft an equitable exception upon a modern Act of Parliament."[58] Since: "..[b]oth parties stood on their legal rights - neither of them was misleading the other.. It is not consistent with the policy of the Legislature to import fine equitable distinctions..";[59] where the

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[50] *Ibid*.
[51] *Re Monolithic Buildings* [1915]1 Ch 643; *Midland Bank Ltd* v *Green* [1980]Ch 590; [1981]AC 513. See below.
[52] Wylie, '*Irish Land Law'* (3rd Edn, 1998) p919.
[53] 15 Ir Chan Rep 106.
[54] "The question is whether, in the view of a Court of Equity, it is a fraud for a landlord not only to look on at but encourage the execution of an assignment or sub-lease by a tenant - to throw the tenant off her guard by witnessing the execution of the deed, and then to insist that a forfeiture had been created by the execution of the deed which he sanctioned, approved of and witnessed"; *ibid*, at 117.
[55] *Op cit*.
[56] [1915]1 Ch 643 (CA) at 662, *per* Cozens-Hardy MR.
[57] See also Astbury J (ChD): "It is no doubt extremely desirable that Acts of Parliament should be construed literally to mean what they say"; *ibid*, at 656.
[58] *Edwards* v *Edwards* 2 ChD 291, 295, 297, *per* James LJ.
[59] *Ibid.*

language of the Legislature is clear, the court's interpretation should be merely that: "..the section means exactly what it says.."[60]

This approach was endorsed by the House of Lords in *Midland Bank Ltd* v *Green*, where Lord Wilberforce rejected the application of equitable principles in the teeth of a statute, since the relevant provision[61] was:

> "..clear in its terms, should be applied according to its plain meaning, and should not be weakened by the infusion of equitable doctrines applied by the courts during the nineteenth century."[62]

The decision in *Re Monolithic Building Co* was described as:

> "..dispos[ing], for the future, of the old arguments.. for reading equitable doctrines into modern Acts of Parliament: it makes clear that it is not 'fraud' to rely on legal rights conferred by Act of Parliament: it confirms the validity of interpreting clear enactments as to registration and priority according to their tenor."[63]

Although these decisions have established that it is 'not fraud to rely on your strict legal rights', the equitable argument could find greater favour in relation to a Commonwealth-type situation, where the requirement of writing is based on the terms of a lease. The landlord who asserts section 43 in his defence may legitimately argue that the rights on which he relies are based on the 'law of the land', and that it is not unconscionable to rely on a statutory provision. Where the writing requirement has been written into the lease, this position becomes tenuous. In considering whether the defendant's reliance on his statutory rights amounted to fraud, Dillon LJ in *Lyus* v *Prowsa Developments Ltd*[64] claimed that:

> "..the fraud on the part of the defendants.. lies not just in relying on the legal rights conferred by an Act of Parliament, but in .. reneging on a positive stipulation in favour of the plaintiffs in the bargain under which the defendants acquired the land. That makes, as it seems to me, all the difference."[65]

While the Commonwealth cases deal with the perceived inequity of allowing a landlord to rely on a 'writing required' provision which he has inserted into the lease, under section 43, the landlord is not relying on a provision of the lease, but on the statute itself. The court in Owendale Pty Ltd v Anthony noted that the term in the lease was based on agreement, and Owen J commented that:

> "I can see no good reason why the parties to a lease should not validly incorporate such a clause in their agreement and if they do so, that seems to me to be a very relevant fact to be borne in mind when it is claimed by a

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[60] *Re Monolithic Building Co*, *op cit*, at 672, *per* Joyce J.
[61] Land Charges Act, 1925, section 13(2).
[62] *Midland Bank Ltd* v *Green*, (HL) *op cit*, at 530 G-H, *per* Lord Wilberforce.
[63] *Ibid*, at 531A-B, *per* Lord Wilberforce. This statement reinforce the observation of Oliver J at first instance, that he: "[could not], with the best will in the world, allow my subjective moral judgment to stand in the way of what I apprehend to be the clear meaning of the statutory provisions"; [1980]Ch 590 at 614.
[64] [1982]2 All ER 953.
[65] *Ibid*, at 962.

> lessee who has committed a breach of covenant that by accepting rent his lessor has made an election to keep the lease on foot."[66]

Where a landlord seeks to argue that receipt of rent is not a waiver, even though the agreed terms of the lease state that waiver must be in writing, the court may be more willing to find his conduct unconscionable.

The recent English decision in *Banker's Trust Co.* v *Namdar*,[67] has indicated, however, that there may remain some scope for the application of estoppel, even where the Legislature has laid down a clear provision to govern the dispute. Gibson LJ in the Court of Appeal acceded to the submission that *estoppel* could nullify the effect of a statutory provision, in this case, section 2 of the Law Reform (Miscellaneous Provisions) 1989 Act. The court held that, since a transaction was not rendered illegal by s2, an estoppel argument could be made.[68]

It remains unclear whether the doctrine of estoppel could be, or ought to be available to a tenant, when the landlord has accepted rent, and yet proposes to rely on the absence of writing to assert that there has been no waiver in accordance with section 43 of Deasy's Act. The Land Law Working Group recognised that the estoppel doctrine had some advantages, particularly since it would enable a landlord to accept rent already accrued, 'for periods now past', without condoning the tenant's breach of covenant. It was suggested that: "..if estoppel could be tailored to produce this result it would be useful."[69] While the application of equitable doctrines, where a statutory provision is clear, has been judicially discouraged, the decision in *Namdar* suggests that there may remain some scope for the doctrine of estoppel, where one party has led the other to expect that his strict legal rights will not be asserted.

CONCLUSION

The Northern Ireland position regarding the requirements for a valid waiver where a tenant has breached a covenant, remains unclear. Current judicial opinion in the Republic of Ireland supports a strict interpretation of section 43, so that any waiver must be made in writing in order to have effect. The inequity of allowing a landlord to accept rent from his tenant, and yet deny that the lease subsists, has been a source of concern where a landlord seeks to rely on the strict application of section 43. The Commonwealth decisions also indicate judicial reluctance to allow a landlord to accept rent with knowledge of a breach of covenant, and thereafter demand his right of action on the breach. This has remained the case, even where the parties have provided in their lease that any waiver

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[66] *Owendale* v *Anthony*, *op cit*, para 11, *per* Owen J.

[67] 14 February 1997, (CA), Unreported; Transcript: Lexis.

[68] The court held that, since the relevant transaction was not rendered illegal by section 2, estoppel remained available where necessary to avoid harsh results. Although the Court of Appeal had previously rejected such an argument: *Godden* v *Merthyr Tydfil Housing Association* ([1997] NPC 1) on the basis that "A contract void for non-compliance with the statutory formalities is not saved by estoppel.. This was not sufficient answer to the statutory defence: the doctrine of estoppel was not to be invoked to render valid a transaction which the legislature had on grounds of public policy enacted was to be invalid."; Gibson LJ in *Namdar* relied on the earlier CA decision of *McCausland* v *Duncan Lowrie Ltd* [1996] NPC 94, which raised as a possibility, the doctrine of estoppel in the same context. See also Law Com No 164, paras. 5.4-5.5.

[69] Land Law Working Group, *op cit*, para 4.4.11.

must be made in writing. A landlord's acceptance of rent, followed by his reliance on the breach of covenant, has been found to lead to inequitable results.

The Northern Ireland courts may follow the decision on the Republic of Ireland in *Crofter Properties Ltd* v *Genport Ltd*, which has interpreted section 43 according to its clear meaning. Judicial reluctance to allow a landlord to have it both ways may, however, present an enduring difficulty. This could be resolved through an application of the doctrine of estoppel, whereby a landlord who represents that the lease is to continue, by acceptance of rent or otherwise, is estopped from relying on a breach of which he had knowledge, in order to bring the tenancy to a premature end. Alternatively, a more equitable approach to the problems associated with waiver and receipt of rent could be found by adopting the maxim: "equity will not allow a statute to be used as an instrument of fraud." in relation to section 43.[70]

The suitability of adopting equitable principles within a statutory framework is questionable, however. It is submitted that the court's unwillingness to permit a landlord to act unconscionably will ensure that, if the decision in *Crofter Properties* is followed in Northern Ireland, an alternative means of protecting tenants from the inequitable actions of the landlord who seeks to 'approbate and reprobate' the tenancy, will be found. It may, however, be preferable if section 43 were to be repealed, and replaced with a provision to which the courts can, in good conscience, interpret according to its clear meaning.

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[70] Wylie, *op cit*, (3rd ed) p919.