Rentcharges: The Land that Time forgot?

Thomas Braithwaite
Barrister, Serle Court

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Rentcharges are periodic sums of money charged on land. They create an obligation binding on land (usually but not inevitably freehold land) requiring the landowner to pay a periodic sum to a third party (the rent owner). Rentcharges proved popular in certain parts of the country where they came regularly to be imposed on new developments, creating perpetual obligations on freehold owners to pay rent. These often proved inequitable, and the ability to create rentcharges was therefore abolished by the Rentcharges Act 1977.[1] Rentcharges created before 1977 remain valid until 2037.[2] Whilst the sums payable tend to be very modest, they still remain enforceable ultimately—and perhaps remarkably—by a right of re-entry and sale.[3]

The 1977 Act also continues to permit the creation of so-called "estate rentcharges". These are sometimes popular on industrial estates and in holiday villages where a freehold rather than leasehold structure has been adopted: they allow the owner of the common parts to require the various freeholders on the estate to contribute for services, and create an obligation that binds successors in title without having to impose messy contractual chains that are liable to break down.

Like easements and profits, rentcharges are themselves a form of land: that is to say they are an incorporeal hereditaments. Unlike easements and profits, however, rentcharges have long been subject to the law of limitation: the failure of the rent owner to enforce his rentcharge eventually leads to the barring of his remedies and the extinction of the rentcharge itself. Since the Limitation Act 1939, this result has been achieved by making rentcharges subject to the principles of adverse possession: where the owner of land subject to a rentcharge ceases to pay the rent owing, the rent owner is treated as being dispossessed from his rentcharge as from the date of the last payment.[4] As rentcharges are registrable interests under the Land Registration Act 2002, two separate adverse possession regimes now apply: the regime for unregistered rentcharges is contained in the Limitation Act 1980 ss.15 and 17, as supplemented by Sch.1, whilst the regime for registered rentcharges is contained in the Land Registration Rules 2003 Sch.8, and closely follows the regime for registered land contained in the Land Registration Act 2002 Sch.6.

[1] Rentcharges Act 1977 s.1.
[2] Rentcharges Act 1977 s.3.
[3] Law of Property Act 1925 s.121(4).
[4] See the Limitation Act 1980 Sch.1 para.8(3), read with s.38(8) of the Act.

Or at least that was the position until 6 April 2014, when the Tribunals, Courts and Enforcement Act 2007 Pt 3 came into effect. That provided, amongst other things, for the abolition of the common law right to distrain for arrears of rent. This change in the law affected not just landlords seeking to recover rent from their tenants, but also rent owners seeking to enforce their rentcharges.[5]

The various amending provisions consequent to this abolition were contained in Sch.14 to the 2007 Act. These also took effect on 6 April 2014. Paragraphs 35 and 37 of Sch.14 stated:

> "The Limitation Act 1980 is amended as follows
>
> ...
>
> In section 38 (interpretation) omit 'rentcharges and' and 'rent or'."

The words "rentcharges and" and "rents or" appear in s.38 of the 1980 Act in three distinct places: in s.38(1), in s.38(7) and in s.38(10). Most significantly, s.38(1) contains the definitions of terms used in that Act. In particular, it defines "land". In so doing, s.38(1) has to distinguish between incorporeal hereditaments to which limitation applies, and those to which it does not. Thus immediately prior to the amendments made by the 2007 Act, the definition of "land" under s.38(1) was in the following terms:

> "'land' includes corporeal hereditaments, tithes and rentcharges and any legal or equitable estate or interest therein but except as provided above in this definition does not include any incorporeal hereditament."

The effect of para.37 of Sch.14 to the 2007 Act is to remove the words "rentcharges and" from this definition. Rentcharges are now not specifically included in the definition of "land". Indeed, they are specifically excluded by reason of the fact that they are incorporeal hereditaments.

Prima facie, this amendment has a remarkable effect. If a rentcharge is no longer regarded as land for the purposes of the Limitation Act 1980, then ss.15 and 17 of the Act no longer apply to it, because they only apply to actions involving land. It follows that the remedies to enforce a rentcharge are no longer capable of being time-barred; and indeed that the rentcharge itself would no longer be extinguished regardless of how long it went unpaid. The limitation regime for both unregistered and registered rentcharges is therefore at a stroke abolished: because both require time to run under s.15 to make them work.[6]

This was obviously not intended. Not only does the abolition of the limitation regime for rentcharges go well beyond the amendments necessary to give effect to the abolition of distraint, but it leaves inexplicably intact numerous provisions (such as s.38(8) of the 1980 Act) that assume that rentcharges are, in fact, land, and assume that s.15 of the 1980 Act continues to apply to them.

What, then, of ss.38(7) and 38(10) of the 1980 Act where the expressions "rentcharges and" or "rents or" also featured?

[5] Until the 2007 Act came into force, distraint was a remedy available to a rent owner under Law of Property Act 1925 s.121(2).

[6] In the case of registered rentcharges, a person is considered to be in adverse possession only if a period of limitation would have run in his favour under the Limitation Act 1980 s.15: see the Land Registration Rules 2003 Sch.8 para.11

The latter provision, s.38(10), is a clarificatory provision that addresses when a cause of action accrues for the purposes of the disability provisions of the 1980 Act. In particular, it stated that in actions to recover arrears of rent or interest, the cause of action would accrue when the rent or interest became due. To remove the words "rents or" from this provision does not seem to serve much purpose, other than to make uncertain that which the Act had previously sought to clarify.

By contrast, the amendments to s.38(7) make more sense. This had previous stated as follows:

> "References in this Act to a right of action to recover land shall include references to a right to enter into possession of the land or, in the case of rentcharges and tithes, to distrain for arrears of rent or tithe, and references to the bringing of such an action shall include references to the making of such an entry or distress."

The amendment of this provision by removing references to rentcharges and rent does, therefore, serve a purpose connected with the abolition of distraint.

The corollary of all this, it is suggested, is that para.37 of Sch.14 to the 2007 Act contained a rather significant error. It should not have referred to the whole of s.38: it should only have referred to s.38(7).

Until this mistake is corrected by Parliament, one imagines that the court would try to find a way around the problem should the question of limitation on an affected rentcharge arise. The role of the courts is, of course, one of interpretation only, and they have a limited ability to correct even the most obvious of errors. Can, therefore, s.38(1) be construed so as to re-insert the words that the 2007 Act has removed? There are two routes by which this might be done.

First, the introductory words of s.38(1) state the statutory definitions apply "unless the context otherwise requires". Words to this effect have been used since statutes first started containing definitions. The Act therefore expressly allow for the possibility that the definition of "land" may differ from that set out in s.38(1). Of itself, however, this would hardly seem sufficient, as the derogation from the definition would by necessity be absolute in order to address the apparent mistake made.

More promisingly, the courts have sometimes been prepared to interpret statutes so as to overcome obvious mistakes. In *Inco Europe Ltd v First Choice Distribution*[7] Lord Nicolls noted at 592–593:

> "The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have

[7] *Inco Europe Ltd v First Choice Distribution* [2000] 1 W.L.R. 586.

used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation ..."

Here, the relevant test appears to be met:

- the intended purpose of Sch.14 to the 2007 Act was to give effect to the abolition of distraint (rather than to abolish limitation for rentcharges);
- it is (it is suggested) clear that the reference to "s.38" rather than "s.38(7)" in para.37 of Sch.14 was an inadvertent mistake by the draftsman; and
- had the error been noticed, ss.38(1) and 38(10) would have remained unamended.

The amendments made to the Limitation Act 1980 ss.38(1) and 38(10) affecting claims for the recovery of rent and the enforcement of rentcharges should therefore be regarded as obvious errors, which—if it proved necessary—the court could overcome by the *Inco Europe* test. Hopefully, however, Parliament will repair the damage before that proves necessary.