Do gagging clauses work?

There has been considerable interest in the use of gagging clauses by public authorities. David Schmitz examines the legal principles relating to them.

THE RECENT, and growing, trend of governments to hire charities to carry out work previously done by the State has raised concerns that this could lead to a loss of the independence of charities or, at least, to a stilling of their independent voices.

In an attempt to meet these concerns, the government entered into a 'Compact' with the voluntary sector, entitled *The coalition government and civil society organisations working effectively in partnership for the benefit of communities and citizens in England.*

Respecting civil society

This document comprises a series of undertakings given by the government in 2010 (following earlier versions) which seek to assure the independence of charities. It undertakes, in particular, that the government will:

- "Respect and uphold the independence of civil society organisations (CSOs) to deliver their mission, including their right to campaign, regardless of any relationship, financial or otherwise, which may exist;" and
- "Ensure greater transparency by making data and information more accessible, helping CSOs to challenge existing provision of services, access new markets and hold government to account."

> "This could lead to a stilling of charities' independent voices"

More generally, the government undertakes in the Compact that it will use its powers to assist civil society organisations rather than to suppress them.

figure 1: Example of a gagging clause

The Panel for the Independence of the Voluntary Sector, in its report *Independence under threat: the voluntary sector in 2013,* gave as an example of a clause forbidding criticism the following wording which is imposed by the Department for Work and Pensions (DWP):

- The supplier shall not make any press announcements or publicise the contract or its contents in any way;
- The supplier shall pay the utmost regard to the standing and reputation of the prime contractor and the contracting body [ie the DWP] and shall not do anything (by act or omission) which may:
  - Damage the reputation of the prime contractor or the contracting body;
  - Bring the prime contractor or the contracting body into disrepute;
  - Attract adverse publicity to the prime contractor or the contracting body; or
  - Harm the confidence of the public in the prime contractor or the contracting body.

The Compact notwithstanding, however, there is now a serious concern that when it comes to hiring voluntary organisations to provide services on behalf of the government, these organisations are coming under pressure to hold back from criticising both the government and its policies, and the government's prime contractors.

The pressure has been seen to result in self-censorship; but also, it is beginning to take the form of the imposition of contractual terms which on some interpretations can be construed as forbidding criticism (see Independence Panel example in figure 1).

Now it can be said that the panel may be reading too much into this clause and that it is not intended to restrict the freedom to comment – instead it is intended merely to impose a requirement that the supplier carry out its obligations with integrity so that it will not attract criticism which, in turn, could allow the prime contractor or the contracting body to be tarred with the same brush.

Nonetheless, it cannot be taken for granted that this is in fact the true meaning of the clause and, in any event, an unambiguous gagging clause might some day be inserted into a contract of the kind that we are considering.

The question of whether gagging clauses are enforceable is therefore a question which needs to be addressed, whether or not this particular clause falls within that category.

Relevance of the Compact

The government's Compact, and the various similar local Compacts made by local authorities, probably do not confer private law rights which can freely be sued upon.

On the other hand, they "doubtless would form the expectation

of behaviour in the absence of compelling reasons to the contrary" (see *R (on the application of Rahman) v Birmingham City Council, 2011*).

This means that it can sometimes be possible to rely on the Compacts, but for the limited purposes of judicial review proceedings in the Administrative Court – where the object of the proceedings is to quash decisions made by public bodies, rather than to obtain a remedy such as damages for the breach of a private law right.

Given that one cannot claim for a remedy for such a breach, the question which then arises is whether the Compacts can nonetheless be used to defend a civil action along the lines that the decision by a public body to impose a particular contractual term was a decision which no reasonable public body could have taken, that the decision to impose it was therefore unlawful, and that for this reason the public body ought not to succeed in its action, even though the Compact is not itself legally enforceable.

The answer to the question of whether such a defence can succeed, it would seem, is yes (see *Wandsworth LBC v Winder, 1985*).

This will reassure those wishing to pray the Compacts in aid, in order to resist the enforcement of a gagging clause where its imposition – or the decision to enforce it – is said to be unlawful. There are limits, however, to the amount of reassurance that the Winder case can give.

> "We need to address whether gagging clauses are enforceable"

Firstly, it will only protect against a suit by a public body, not against an organisation such as a prime contractor which may be a private company or another charity, whose decisions are not subject to judicial review.

Secondly, the protection afforded by Winder will only apply, in general, where the decision to impose the clause can be attacked not merely on the basis that it was wrong or unwise, but on the basis that no reasonable public body, properly directed on the law, could have made it in the circumstances. The defence therefore would frequently have to fail on the facts of the individual case.

Other problems with gagging clauses

There is a well-established rule of law which a gagging clause may be said to offend – namely that trustees must not fetter their discretion in the exercise of their powers.

It is therefore strongly arguable that a trustee who agrees to such a clause would be committing a breach of trust.

If this is correct, the court would not enforce a gagging clause by ordering its specific performance. This is because specific performance is a discretionary remedy and the court will not exercise its discretion so as to order trustees to commit a breach of trust.

This does not mean, however, that a party with the benefit of a gagging clause would be wholly without remedy. Thus, in contrast with specific performance, the court is obliged to award damages for breach of contract (including breach of a gagging clause) as a matter of right.

Such damages, however, would probably be nominal only because:

- It would be difficult to see how criticism could result in pecuniary loss to public bodies in the first place; and

- Whether with regard to public bodies or prime contractors, even if damage flowed from the breach of a gagging clause it is most unlikely that damages would be recoverable as having been caused by the comments, rather than by the underlying matters which the comments merely exposed.

I shall develop these points in turn.

Can trustees fetter their powers?

If trustees have a power, what duties do they have with regard to it?

If trustees have powers, they must properly consider whether or not to exercise them (see comments by Lord Wilberforce in *McPhail v Doulton, 1971*).

This principle would be breached if trustees were to fetter their discretion to exercise their powers – see *Thomas on Powers*, second edition, para 10.64: "Trustees cannot fetter the exercise by them at a future date of a discretion possessed by them as trustees."

Thomas also observes, at para 10.72: "The application of the principle (or prohibition) may be excluded or restricted by an express provision (although unlike express provisions authorising the release of powers, this is perhaps neither common nor always easy to draft)."

This contemplates an express provision in the trust deed or other documents which establish a trust. In the case of charities, it is particularly unlikely that anyone would seek to exclude the principle in this way, so as to permit the trustees to enter into gagging clauses. Any attempt to authorise gagging provisions in a charity's constitutional documents would be unlikely to be met with any enthusiasm by the charity's potential donors.

Thomas then does go on to note that there may be exceptions to the principle that trustees cannot fetter their discretion. The examples which he gives, however, are unlikely to be relevant to charities.

They relate to the administration of private trusts and would be unlikely to apply to a charitable one, save for certain examples which are often trivial in their effect on trustees' powers.

> "A trustee agreeing to such a clause is arguably in breach of trust"

Such examples include the granting of short-term options to a potential purchaser of trust property (which by necessity operate to prevent a trustee from disposing of it to somebody else), and the giving of undertakings by new trustees to discharge obligations owed to retiring trustees (thereby restricting temporarily the trustees' freedom to distribute the funds).

None of these examples, however, would seem to lend themselves to extension by analogy into the law governing those activities of charities' trustees which are directed to the achievement of their charitable purposes.

There is, moreover, a further objection to trustees contracting to fetter their powers.

Making public comment

This derives firstly from the fact that it is the purposes of the charity, as opposed to the individuals who may benefit from a charity's activities, to which the trustees owe their duties and which are the true beneficiaries of the charity.

Secondly, as we shall see in the second part of this article next month, it is the case with many charities that the making of public comment is actually one of the purposes which they, and therefore their trustees, are obliged to serve.

From this it is highly arguable that, just as private trustees are obliged to serve their beneficiaries and not to fetter their powers to the prejudice of any one of them, so charity trustees are obliged to serve the purposes of their charities and not to fetter their powers to the prejudice of any of those purposes.

It should also be noted that because charitable trusts and their purposes are not limited in time, the prohibition against the fettering of a power must apply with even more force in the case of a charitable trust, than it would in the case of a private trust.

As Thomas observes (para 10.64): "The donee of a power can exercise that power properly only by giving honest and appropriate consideration to those relevant facts and circumstances which exist at the time or times at which the power becomes or is exercisable."

Inherently objectionable

For trustees to bind themselves indefinitely not to exercise a power which exists in order to benefit a lasting purpose must therefore be inherently objectionable.

The second part of this article will examine the powers charities have to make public comments, and conclude that trustees cannot bind themselves contractually to refrain from comment on government agencies or prime contractors. ■

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What powers do charities have to make public comment?

The extent of the power of a charity to engage in public advocacy and comment is a matter of debate, but it unquestionably exists, albeit subject to the important restrictions which apply to advocacy that is political in character. The exact location of the boundary between permissible comment and impermissible political campaigning has become controversial in recent years. Thus, the Cabinet Office's Summary of Consultation Responses of September 2009 regarding 'The Charitable Incorporated Organisation (CIO)' says:

> "The Office of the Third Sector in the Cabinet Office leads work across government to support a thriving third sector…, enabling the sector **to campaign for change** , deliver public services, promote social enterprise and strengthen communities. [Emphasis added]

Then again, the Charity Commission in 'Speaking Out: Campaigning and Political Activity by Charities' CC9 (March 2008) has advised that 'political activity' is acceptable although it must be undertaken to contribute to or support the achievement of the organisation's charitable purposes, which must not of themselves be political.

On the other hand, this is not the last word on the subject as there has since been what is, arguably, a change of course – see the Charity Commission's Guidance CC4 'What Makes a Charity?' (September 2013). This designates organisations as non-charitable if their political activity is integral to their work, and it states that the question, charitable or non-charitable, is not necessarily governed by how much campaigning the organisation does. More to the point, CC9 does not have the force of law and its predecessors (substantially resembling it) have been criticised in *Picarda on Charities* (4th ed, 2010) p249 to 262, as being at odds with cases:

- which designated as non-charitable, organisations that engaged in campaigning to change the law or government policy, notwithstanding that the campaigning was not party-political and that it was done in order to pursue objects which were in some cases undoubtedly charitable, for example *IRC v Temperance Council etc* [1926] as approved by the House of Lords in *National Anti-Vivisection Society v IRC* [1948] and with cases;
- which held organisations to be non-charitable if they aimed to sway public opinion on controversial social issues: see *Southwood v AG* [2000].

It is therefore possible that general guidance by the Charity Commission may in the end be disregarded by the courts. Moreover, in view of recent ministerial comments about the supposed need for charities to "stick to their knitting" and keep out of politics, future guidance from the commission may become more restrictive than it is at present.

Wherever the boundary may lie, however, it is nonetheless indisputable, as already noted, that charities do have the power to make some public comment in aid of their objectives. See, for example, *McGovern v AG* [1982], where, notwithstanding that the organisation in question (Amnesty International) was held to be non-charitable because its objects included campaigning for changes to the policies of foreign governments, it was nonetheless held that Amnesty's research into the observance of human rights and its dissemination of the results of such research were matters which were capable of adding usefully to the store of human knowledge, and that Amnesty's trusts for this aim were therefore trusts for the benefit of the public and capable of being charitable. A charity must not, of course, express political opinions, whether based on its charitable researches or not. However, a merely theoretical possibility that it might do so will not affect the charitable status of its work.

How does the rule against the fettering of trustees' powers apply specifically to charities?

The *McGovern* principle is of particular importance here, because it establishes that the dissemination of knowledge can be charitable in and of itself, and that it need not merely be an activity which a charity is permitted to undertake in aid of its other purposes. From this it follows that the fettering of a charity's ability to comment and above all to provide information to the public falls within the principle which, as suggested above, forbids the fettering of charitable trustees' powers to serve any of the objects of the charity.

Just as trustees of a private trust cannot bind themselves as to the benefits which they will confer upon the beneficiaries in the future - *re Gibson's Settlement Trusts* [1981] – so charity trustees (I would argue) are not permitted to restrict their future powers to make comment, where making comment is one of the objects of the charity. Indeed, it can be said that the fettering of a power to serve one or some of the charity's objects is particularly objectionable, given the harm which could follow from the silencing of charities whose expertise and gravitas might not be duplicated elsewhere.

A further, and related point, is that the purposes of a charity comprise those purposes which may be proved, whether by evidence or inference, to have been intended by the donors at the charity's foundation and that a departure from those purposes is not permitted: *General Assembly of the Free Church of Scotland v Lord Overtoun* [1904].

The founders of a charity which has a role in providing information to the public should not lightly be regarded as having countenanced the abandonment of such a purpose and the conversion of their charity from sounding brass to tinkling cymbal by virtue of its acceptance of a gagging clause.

Can a gagging clause be enforced? Specific performance

It would seem highly unlikely that equitable remedies (which the Court awards as a matter of discretion rather than as of right) such as specific performance or injunction could be available. See *Lewin on Trusts* at 29-206 :

> "Where the principle [against fettering of powers] does apply, the consequence is that the undertaking to exercise the power in a particular way cannot be enforced, either by injunction or by damages"

This is but one example of the general principle that a contract to commit a breach of trust will not be specifically enforced.– *see Halsbury's Laws* vol 95 (5th ed, 2013) para 367 and the cases cited at footnote 3.

Damages

Notwithstanding the remark in *Lewin* just quoted, there is a strong possibility that a court would treat the breach of a contractual obligation not to comment in the same way as it would treat any other breach of contract – ie it would treat it as giving rise automatically to an entitlement to damages, the reason being that the court has no discretionary power to refuse an order of damages.

That said, it is unlikely that damages would be anything other than nominal. This is because any pecuniary loss, which a public body or prime contractor might prove to have resulted from a disclosure or criticism of its acts or their consequences, would be seen to be the result of the acts themselves, rather than any revelation of those acts. See for example *Weld Blundell v Stephens* [1920] where A, who wrongfully revealed that B had libelled C, was not obliged to compensate B when C sued B for the libel. B's loss was due to him having libelled C, and not to A having revealed it.

Conclusion and postscript on confidentiality

Charities cannot bind themselves contractually to refrain from comment on government agencies or on prime contractors, and any such obligations which they assume will not be enforced by the court, save at most by way of a nominal award of damages. The reason is that if charities were to bind themselves thus, their trustees would necessarily and improperly be fettering the powers which they possess for the advancement of the purposes of the charity in question, and further they would, in some cases, be committing the charity to restrictions on the charitable purposes themselves.

However, that does not prevent charities from being under a duty to refrain from disclosing particular information which is imparted to them in confidence. This is most obvious in the case of charities, such as Citizens Advice Bureaux, which offer confidential counselling services to the public, but there seems to be no reason why duties of confidentiality should not apply generally to charities as they do to other organisations. Therefore, it should be proper for charitable trustees to undertake to public bodies in an appropriate case that they will keep such information confidential. The justification is that charities need to inform themselves as much as they can about the fields of activities in which they operate, and that much essential information will not be imparted in the first place unless confidentiality is promised and observed.

The rule against trustees fettering their discretion which might be breached by their assumption of a duty of confidence may therefore be relaxed to such extent as is necessary to enable the trustees to discharge the charity's essential task of informing itself.

On the other hand, a public body would be unlikely to succeed against a charity if it were to adopt the ploy of imposing a clause restricting the publication of, or comments upon, information which has not been imparted to the charity in conditions of confidence or which indeed has not been imparted to the charity at all – for example data which relate to the charity's own activities under the contract, or which it has possessed all along. There would be no difference between such a term and a pure gagging clause, and it should fail accordingly.

More generally, if a public body were to seek to uphold a gagging clause by drawing upon an analogy between such clauses and those relating to employee confidentiality, such an attempt ought to fail, because clauses of that type exist in order to prevent the employee from gaining financial advantage from information created for the benefit of the employer, whereas in cases such as those mentioned here, no such advantage is envisaged on either side from information of the type which the charity might wish to disclose.

The Panel for the Independence of the Voluntary Sector has expressed misgivings about a tendency on the part of the government to employ contractual restrictions in order to inhibit the publication of material which a charity has generated in the course of its work. See p 41 of its Report. For the reasons just given, however, such restrictions are unlikely to prove effective.