Power to voice?

In his concluding article David Schmitz discusses the legal position for charitable trustees faced with a gagging clause

David Schmitz is a barrister at 10 Old Square, Lincoln's Inn

'If a charity was to bind itself thus, its trustees would necessarily and improperly be fettering the powers which they possess for the advancement of the purposes of the charity, and would be committing the charity to restrictions on the charitable purposes themselves.'

The first article on this subject (*TELTJ*155, April, p18) examined broadly whether the trend for governments to use charities to carry out work previously executed by government bodies could compromise a charity's independence: it discussed the equitable principle that trustees must not fetter their discretion and it contended that charity trustees might offend against that principle if they entered into a contract containing such a clause. This article will examine that contention more closely and will conclude with some observations on confidentiality.

Objects of a charitable trust

Charities exist at least in part to serve charitable purposes, rather than individual beneficiaries. As is observed in *Halsbury's Laws* vol 8, para 235 (10th ed 2010):

> As charitable corporations exist solely for the accomplishment of charitable purposes, they are sometimes said to be but trustees for charity, whether the beneficiaries are members of the corporation, as in the case of hospitals and colleges, or not.

I would argue that because charities exist to promote the purposes to which they are dedicated, it follows that their trustees (or in the case of corporate charities, their directors) are in the same position, with regard to the charitable purposes of their charity, as private trustees are in with regard to their beneficiaries: namely they are under a duty to consider the exercise of the powers which they possess for the accomplishment of the charitable purposes that they are obliged to serve and they are forbidden generally to fetter the discretion which they have in exercising their powers, there being no apparent justification for treating these two types of trustees differently from one another.

I would further argue 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. To repeat the principle mentioned before:

> ... 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.

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.

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 (voluntary and community

> groups, social enterprises, charities, cooperatives and mutuals), 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.

- also 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.

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, that Amnesty's trusts for this aim were therefore trusts for the benefit of the public and that the mere theoretical possibility that the trustees might have implemented them in a political manner did not render them non-charitable. Of particular importance to the present enquiry, as we shall see, is the fact that this case recognises that the dissemination of knowledge can be charitable in and of itself, and that it is not merely an activity which a charity is permitted to undertake in aid of its other purposes.

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.

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;

Can a charity fetter its power to comment?

The question which arises in respect of charities is this:

> Given that a charity can carry out contracts with or for the government or other public bodies, and given that to do so not only confers funding upon the charity for work which carries out its purposes, but also enables the charity to earn a profit which can fund yet further work, and given further that a lack of funding from other sources might threaten the existence of a charity, can it be proper for the charity to enter into a gagging clause if the government or public body so requires?

I would argue that the answer to this question is no because the examples, given in the previous article, of proper fettering of a trustee's powers in a private trust, are not in point when it comes to gagging clauses. Those examples cover in effect three things – first, the ability of trustees to grant a short-term option over property or enter into covenants so as to bind their future dealings with the property; secondly, the ability of trustees to restrict temporarily their ability to distribute the property of the trust in order to ensure that the expenses of administering the trust are met or that undertakings by new trustees to retiring trustees with regard to those expenses are honoured; thirdly, the ability of trustees to restrict temporarily their ability to distribute proceeds of sale of property which has been sold subject to a warranty. All of these examples of restrictions upon the powers of trustees, it should be noted, can be justified as following necessarily from the exercise of powers which trustees necessarily possess. None of them lends itself to extension by analogy into the law governing the activities of charities directed to accomplishing their charitable purposes. Turning to the examples individually:

- A trustee who sells property outright no longer has any discretion at all with regard to it. Yet most trusts permit outright sales. If outright sales are not objectionable, then it is difficult to see how the grant of a short-term option, which by its nature is less restrictive than an outright sale, could be objectionable either. Indeed,

such a restriction amounts to little more than an application of the rule that you cannot have your cake and eat it.

- A trustee's ability to bind the trust to covenants is a necessary incident of any power to acquire property which is subject to them, and such property includes virtually all leasehold property. A trustee who could not enter into covenants, moreover, would be rendered unable to carry out any business which the trust might own.

- So far as the retention of monies for administering a trust is concerned, this money is in effect already spent. The absence of a power to retain such money would only result in those expenses having to be met the moment they were incurred.

- If a trustee could not agree a purely temporary restriction on distribution on the proceeds of sale during a warranty period, this would often negate any power which the trustee might have to sell any property, because no weight would be attached to a warranty if it were known that any claim upon it might be unsatisfied.

Above all, all of these fetters on trustees' powers are merely temporary, and none of them can harm the beneficiaries, except by means of a temporary delay in the distribution out of the fund of the property to which the obligation attaches.

By contrast, the fettering of a charity's ability to comment and above all to provide information to the public can in some circumstances do noticeable harm to the purposes of a charity, given the fact that a charity may have expertise and gravitas which is not duplicated elsewhere. The harm can be particularly severe if the required silence is prolonged.

A contractual restriction on the ability of charity trustees to exercise their powers to comment is not inherent in the trustees' exercise of any of their powers; it is the result of a specific decision to please a particular customer.

Also (as observed above in connection with the *McGovern* case), the provision of information can constitute a charitable object in itself, a fettering of the ability of a charity to comment may in some cases amount to a fettering of the ability of the charity to serve one of its objects. This, it is submitted, would be the equivalent of the trustees of a private trust giving an undertaking that, at some time in the future, distributions to the beneficiaries would only take one particular form. Such an undertaking by private trustees cannot be given and will not be enforced: *re Gibson's Settlement Trusts* [1981]. As regards a charitable trust, the position is a fortiori. The purposes of a charity are those which may be proved, whether by evidence or inference, to have been intended by the donors at the charity's foundation, and a departure from those purposes will not be 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 would be unlikely to be regarded as having countenanced the abandonment of such a purpose and the conversion of their charity from a sounding brass to tinkling cymbal by virtue of its acceptance of a gagging clause.

The purposes of a charity are those which may be proved, whether by evidence or inference, to have been intended by the donors at the charity's foundation, and a departure from those purposes will not be permitted.

Can a gagging clause be enforced?

Specific performance

I would argue that the equitable remedies of specific performance or injunction are not available. As noted, there is authority which states specifically that the court will not enforce an undertaking that involves the fettering of the exercise of a trustee's power – see *re Gibson* – this being 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, especially *Mortlock v Buller* [1804]:

> But it would be impossible to decree a specific performance, when in the very same day the Court might be compelled to say, it would be a breach of trust.

See also *Dunn v Flood* [1882], a particularly strong example because specific performance was successfully resisted there, not at the instance of the trustees or the beneficiaries, but by the opposite party in the contract, ie by the party in whose favour the trustees had committed the breach.

Damages

Because specific performance, and by implication injunctions, are not available, it follows that damages in lieu under the Senior Courts Act s50 are not available either. On the other hand, as with any other contractual obligation, the breach of a contractual obligation not to comment will sound in damages at common law as a matter of right and the award of such damages will not be subject to the discretion of the court. Despite this, however I would argue that, the common law provides no effective remedy in cases such as those considered here because, as noted above, any damages for such a breach will be nominal. This is because any pecuniary loss which a public body or prime contractor might prove to have followed from a disclosure of the consequences of its deeds or from criticisms thereof would be the result of the deeds themselves, rather than of the revelation of those deeds:

see *Weld-Blundell v Stevens* [1920], where the plaintiff sought an indemnity from an agent who had negligently disclosed a libellous letter to a third party who had then recovered damages from the plaintiff, per Lord Sumner at paras 981-2:

> The way in which the appellant must naturally and necessarily state his case seems to me to put this view in a nutshell. 'True it is,' he says, 'that I libelled Messrs Comins and Lowe to Mr Stephens; but, if Mr Stephens had not lost my letter, they would have known nothing about it, and I should have escaped the consequences of my own wrongdoing.' My Lords, what is this but saying in plainer language: 'My own act was the *causa causans* of the judgment against me, and Mr Stephens's omission to be careful was the *causa sine qua non*.' From the moment when the libel was published the appellant was under legal liability, and the effect of the action was merely to ascertain its amount and to compel the appellant to discharge it. If he had been in possession of lost property, belonging to Mr Comins, and the letter had betrayed to the owner the secret of its whereabouts; if he had encroached on Mr Lowe's land and the letter had apprised that gentleman of the fact, just before title accrued by lapse of time; if he had owed a debt to them and the letter had recalled it to their attention, I can hardly suppose that the several judgments recovered could be alleged to be caused by the respondent, even though it was by his fault that Messrs Comins and Lowe got at the letter. As Bankes LJ says: 'The damages and costs in question are payable by reason of the plaintiff's own wrongdoing and were legally recoverable from him independently of the defendant's breach of his obligation.

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 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.

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 nominal award of damages.

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. By the same token, it should be proper for charitable trustees to undertake to keep such information confidential. The reason 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. Any rule under which equity might restrict the ability of trustees to assume obligations of confidence may therefore be regarded as being lifted to the such extent as is necessary in order to enable the trustees to discharge the charity's essential task of informing itself, just as restrictions affecting the entry into covenants may be regarded as being lifted to the extent necessary to enable trustees to acquire property.

On the other hand, the government would be unlikely to succeed if it were to adopt devices such as the insertion of a term as to confidentiality in relation to information which the charity has not received in conditions of confidence, or which indeed has not been imparted to the charity at all – for example data which relates 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 would fail accordingly. Moreover, any analogy which the government might seek to draw between such a clause and one relating to employee confidentiality should fail, because clauses of the latter 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. ■

Dunn v Flood
(1885) 28 ChD 586
General Assembly of the Free Church of Scotland v Lord Overtoun
[1904] AC 515
Re Gibson's Settlement Trusts
[1981] Ch 179
IRC v Temperance Council etc
(1926) 136 LT 27
Jones v Firkin-Flood
[2008] WTLR (w) 2008-8
McGovern v AG
[1982] Ch 321
Mortlock v Buller
(1804) 32 ER 257
National Anti-Vivisection Society v IRC
[1948] AC 31
Southwood v AG
[2000] WTLR 1199
Swales v IRC
[1984] 3 All ER 16
Weld-Blundell v Stevens
[1920] AC 956