Threat to independence?

In the first of two articles David Schmitz examines whether gagging clauses are enforceable against charities

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'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 the government and its policies, as well as the government's prime contractors.'

The recent and growing trend of governments to hire voluntary organisations such as charities to carry out work previously done by governments has led to concerns that this could lead to a loss of the independence of charities or, at least, to a stilling of their independent voices.

Thus, the authors of *Tolley's Charities Manual* have observed at para 34.19:

> Trustees should not surrender their discretion to act independently and they should only restrict their discretion where they are satisfied that this is in the best interests of the charity...
>
> In delivering public services, a charity should not be inhibited from engaging in political activity and campaigning. The same rules apply as for all other charities.

(Out of context, this seemingly unqualified endorsement of 'political activity and campaigning' gives the wrong impression: this will be discussed later in the article.) The authors then refer to the government's Compact with the voluntary sector and to guidance provided by the Charity Commission on campaigning.

Turning first to the Compact entitled, 'the Coalition Government and civil society organisations working effectively in partnership for the benefit of communities and citizens in England', this consists of a series of undertakings given by the government in 2010 (following earlier versions) which seek to assure the independence of charities. It accordingly undertakes (p8) that the government will:

> 1.1 Respect and uphold the independence of CSOs [ie civil society organisations] to deliver their mission, including their right to campaign, regardless of any relationship, financial or otherwise, which may exist.
>
> 1.4 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.

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

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 the government and its policies, as well as the government's prime contractors. The pressure has been seen to result in self-censorship; but more dramatically, it is beginning to take the form of the imposition of contractual terms which on some interpretations can be construed as forbidding criticism.

Thus, the Panel for the Independence of the Voluntary Sector in its report *Independence Under Threat: the Voluntary Sector in 2013* (p41) gives as an example of such a term, a clause which is imposed by the Department of Work and Pensions which reads as follows:

> X.1 The Supplier shall not
>
> 39.1.3 make any press announcements or publicise the Contract or its contents in any way; ...

> X.3 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:
>
> 39.3.1 damage the reputation of the Prime Contractor or the Contracting Body
>
> 39.3.2 bring the Prime Contractor or the Contracting Body into disrepute
>
> 39.3.3 attract adverse publicity to the Prime Contractor or the Contracting Body
>
> 39.3.4 harm the confidence of the public in the Prime Contractor or the Contracting Body

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, but is instead intended merely to impose a requirement that the supplier carry out its obligations with integrity so that the supplier 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 there is always the possibility that an unambiguous gagging clause might someday 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.

The panel's report on p41, moreover, mentions this additional problem:

> DWP also place contractual restrictions on the publication of Work Programme data by each organisation, which require that providers should not release management information for purposes other than the needs of the business and not without DWP permission. This is because it wishes to publish all performance data itself – and present that data in its own way.

The concern here is that charities might encounter pressure not to release information too early for the government's liking, thus getting in the way of efforts by the government or its prime contractors to 'spin' their version of events.

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 could be sued upon. On the other hand, however, 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]). In other words, a breach of a compact could sometimes lead to a finding that a public body has behaved in a way which is judicially reviewable, but its significance does not go beyond that.

Given that the Compacts do not confer private law rights which can be sued upon, the question nonetheless arises as to whether the Compacts might anyway be used, in an appropriate case, to found a defence in a civil action along the lines that the decision to impose the particular contractual term and/or the decision to bring proceedings to enforce that term were decisions which no reasonable public body could have taken, that therefore the decisions were *ultra vires* and void 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]). In that case the claimant council claimed rent arrears and possession of the defendant's flat, but the defendant claimed that the resolution to increase the rent of his and of other properties was *ultra vires* and void. The claimant sought to contend that the defendant's only recourse was to seek judicial review and that it was an abuse of process to advance the defendant's contentions as a defence in a civil claim. The House of Lords rejected the claimant's argument and held (at p505):

> It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour.

Winder provides some limited reassurance to those who would seek to pray the Compact 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 ultra vires.

This passage will provide some limited reassurance to those who would seek to pray the Compact 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 *ultra vires*.

Is the *Winder* case enough to ensure that the principles of the Compact will be applied?

There are limits, however, to the amount of reassurance that *Winder* can give.

Firstly, it will only protect against suit by a public body, not against a body 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 where the imposition of the clause or the decision to enforce it are judicially reviewable. Because judicial review will only lie in a case where the decision can be attacked as '*Wednesbury* unreasonable' – ie as a decision that no reasonable public body properly directed on the law could have made in the circumstances – the defence would frequently have to fail on the facts of individual cases.

> 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.

For a charitable trustee to agree to a gagging clause would amount to a breach of the well-established principle that trustees must not fetter their discretion in the exercise of their powers. For a trustee to enter into such a clause, therefore, would generally be a breach of trust.

Is there another principle which can defeat gagging clauses?

There is a well-established rule in equity which a gagging clause may be said to offend. In brief:

- For a charitable trustee to agree to a gagging clause would amount to a breach of the well-established principle that trustees must not fetter their discretion in the exercise of their powers. For a trustee to enter into such a clause, therefore, would generally be a breach of trust.
- The court will not, as a matter of discretion, specifically enforce a contractual provision which would require a party to commit a breach of trust.
- Although the court will award damages for breach of contract as a matter of right, such damages would probably be nominal only in a case such as this 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)

General trust law: fettering a trustee's discretion

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

If trustees have powers, they must *bona fide* consider whether or not to exercise them. This was noted by Lord Wilberforce in *McPhail v Doulton* [1971] with regard to powers to make distributions.

> It is striking how narrow and in a sense artificial is the distinction, in cases such as the present, between trusts or as the particular type of trust is called, trust powers, and powers... To say that there is no obligation to exercise a mere power and that no court will intervene to compel it, whereas a trust is mandatory and its execution may be compelled, may be legally correct enough but the proposition does not contain an exhaustive comparison of the duties of persons who are trustees in the two cases... It would be a complete misdescription of [a trustee's] position to say that, if what he has is a power unaccompanied by an imperative trust to distribute, he cannot be controlled by the court unless he exercised it capriciously, or outside the field permitted by the trust.'

Is it a breach for trustees to fetter their powers?

It is usually a breach of trust for trustees to fetter their discretion to exercise their powers. See *Thomas on Powers* (2nd ed) para 10.64 [emphasis added]:

> ... the donee of a special power (whether or not it is a fiduciary power) cannot, as a general rule, fetter the exercise of that power. It is this principle (or prohibition) that underpins the rule that the donee of a special power cannot covenant to exercise it in a particular way... It has a much wider application, however, and serves to prohibit a donee [of a power] from entering into any undertaking or from adopting an inflexible policy or a premature and irrevocable view, as to the future exercise of a power or discretion. In the absence of authority to the contrary, *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. Indeed, 'it is trite law that trustees cannot fetter the exercise by them at a future date of a discretion possessed by them as trustees.*' [*Swales v IRC* [1984] 3 All ER 16]... If the donee could commit himself irrevocably, in advance to a particular mode or form of exercise in the future, by which time circumstances may have changed, the actual execution of the power could have an entirely different and unintended effect.

The author then gives examples of the operation of this principle, both with regard to dispositive powers of appointment, and also administrative and managerial powers. See paras 10.69 to 10.70, referring to *Moore v Clench* [1875], where even the grant of an option was held to constitute an improper fettering of the trustees' discretion because a trustee 'shall exercise his discretion in the choice of a tenant when the property falls into possession, and not many years before.'

See also *Lewin on Trusts* (18th ed, 2008) paras 29-204:

> When the power is fiduciary, the donee must exercise his judgment according to the circumstances as they exist at the time: he cannot anticipate the arrival of the proper time by affecting to release it or by pledging himself beforehand as

> to the mode in which the power shall be exercised in the future. Any form of undertaking as to the way in which the power will be exercised in future is ineffective...

And para 29-206:

> Where the principle 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 [*Thacker v Key* (1869) LR 8 Eq 408; *Palmer v Locke* (1880) 15 Ch D 294; *Re Evered* [1910] 2 Ch 147, 156].

Note, further, that although s155 of the Law of Property Act 1925 provides that 'a person to whom any power is given may release, or contract not to exercise, the power', this does not extend to powers coupled with a trust or duty (Thomas, *op cit*, para 17.32):

In what circumstances, if any, can trustees lawfully fetter their powers? Thomas (above) observes, first of all, at para 10.72:

> The application of the principle (or prohibition) may be excluded or restricted by an express provision (although, unlike express provisions authorizing the release of powers, this is perhaps neither common nor always easy to draft).

So far as charities are concerned, furthermore, it is particularly unlikely that this possibility could have any practical effect, because 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 however continues:

> Moreover, it must be doubtful whether fetters and restrictions of all kinds are prohibited, irrespective of the circumstances. Thus, on a sale or purchase of land by trustees, are they prohibited (in the absence of express provision to the contrary) from entering into a covenant which restricts their future use of either retained land or the land thus purchased? Would they be acting properly if they were to grant a short-term option as part of the transaction for example so as to enable the purchaser to arrange finance?... [I]n those cases in which the purpose for which one power (particularly a dispositive power) was created may be better achieved by adopting or entering into some fetter or restriction on another, ancillary, power, it may be that the prohibition may have been impliedly excluded.
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> [10.73] Indeed, there may be a greater willingness, in modern conditions, to acknowledge the fact that, in many circumstances, it is entirely appropriate for trustees to be able to fetter their discretions by entering into covenants or binding agreements which have such an effect...
>
> A similar robust approach might also be appropriate in relation to those powers of trustees of a family trust which have a 'commercial' purpose, such as powers to invest and to deal with property. In such cases, an appropriate implication of terms might well be justifiable by the relevant context to give 'business efficacy' to both the power in question and the underlying purpose of the scheme.

Examples of acceptable fetters on trustees' discretions which appear from recent cases, comprise:

- an undertaking by new trustees to retain sufficient funds in order to discharge obligations owed to retiring trustees (thereby restricting the trustees' freedom to distribute the funds) – *ATC (Cayman) v Rothschild Trust Cayman Ltd* [2007]; and
- an undertaking, in an agreement to sell company shares which were owned by a trust, whereby the trustees would retain the proceeds of sale and not distribute them to any beneficiary during the warranty period of the agreement, in order to ensure that any claim under the warranty would be satisfied – *Jones v Firkin-Flood* [2008].

The second part of this article will assert that charitable trustees are like other trustees in being under a duty to consider the exercise of their powers. It will consider the scope of the powers of charitable trustees to make comment, and discuss whether charitable trustees would commit a breach of trust if they fettered their discretion to comment, not merely because to do so would be to inhibit their powers but also because the making of comment is often a charitable object in itself. The article will also revisit the contention that gagging clauses are not specifically enforceable in equity and that only nominal damages are recoverable at common law, and it will look at the applicability of the law of confidentiality. ■

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.

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
ATC (Cayman) v Rothschild Trust Cayman Ltd [2007] WTLR 951
Re Evered [1910] 2 Ch 147
McPhail v Doulton [1971] AC 424
Moore v Clench (1875) 1 ChD 447
Palmer v Locke (1880) 15 Ch D 294
R (on the application of Rahman) v Birmingham City Council [2011] EWHC 944 (Admin)
Thacker v Key (1869) LR 8 Eq 408
Wandsworth LBC v Winder [1985] AC 461