

**CONTROL OF FUND-RAISING FOR
CHARITABLE INSTITUTIONS:
THE NEW LAW - Part II**
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E. Cooling-off Period in Special Situations

Whereas the foregoing disclosure provisions are of general application, there are two special situations in which the donor has a limited right to repayment of sums paid and to cancel any agreement (e.g., to purchase goods) which he may have entered into. These relate to certain appeals made on television or radio, and other appeals made orally but not directly to and in the presence of the intended donee.

In each case, the right to a cooling-off period applies only to payments of (or agreements to pay) at least £50. No such minimum figure was contained in the original Bill; but the need for it was accepted, following a long debate in Committee, in order to save charities wasting money in respect of small sums: see HL Com cols 230-238; Parliamentary Debates, House of Lords, Report, 18th February 1992, cols 1208-9. The Secretary of State may by order substitute a different amount: s.61(8). The right to a refund extends only to the payment made less any administrative expenses reasonably incurred by the professional fund-raiser or commercial participator in connection with the refund or in dealing with a notice of cancellation. Furthermore, a refund claimed in the case of payment for goods already received is conditional upon the goods being returned: s.61(4). The right to cancel a payment made or to be made, in respect of services, is lost after the services have been supplied: s.61(5).

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1. Television or Radio Appeals which Invite Payment by Credit or Debit Cards

If a solicitation or representation is made in a radio or television programme in association with an announcement that payment may be made by credit or debit card, the professional fund-raiser's or commercial participator's statement must also include full details of the right to a refund of any payment of £50 or more: s.60(4).

There is no right of cancellation in respect of payment made by means other than credit or debit cards: this distinction is justified by the ease with which, through the use of such cards during the broadcast, it is possible to make telephone pledges of large amounts. A payment by cheque, by contrast, involves more effort and thus perhaps greater deliberation and so is not covered. In this latter case, of course, the drawer can cancel the cheque before payment has been made. It should also be noted that the right to cancel applies only where payment by credit or debit cards is invited. In the absence of such invitation, a contributor by credit card of even very large sums will have no right to cancel.

A donor has seven days from the date of solicitation or representation to cancel any payment of (or agreement to pay) at least £50. This must be done by serving on the professional fund-raiser or commercial participator a notice in writing which, however expressed, indicates the donor's intention to cancel. If the donor serves such a notice, he is entitled to have any payment of £50 or more (less permitted deductions) refunded to him forthwith, and any agreement (and liability under it) is cancelled: s.61(1).

The introduction of a cooling-off period in this context is clearly designed to deal with the fund-raising techniques utilised in charity advertisements on commercial channels. Similar techniques are also used, however, in Telethons and the Children in Need Appeals; but, as they stand, the sections apply only where a professional fund-raiser or commercial participator is involved. However, s.64(2)(d) provides that, in the context of television and radio appeals, the provisions relating to up-front disclosure (in s.60), and to the cooling-off period (in s.61) may be applied by regulation to solicitations or representations made by charitable institutions or companies connected with them.

2. Other Oral Impersonal Appeals

Special provisions apply where a solicitation or representation is made orally but not by speaking directly to the person or persons to whom it is addressed and in his or their presence or in the course of any radio or television programme: s.60(5). Here, the professional fund-raiser or commercial participator must, within seven days of any payment of £50 or more being made, give the payer a written statement setting out:

- (i) The information which must be disclosed at the point of solicitation (i.e., that specified in s.60(1) to (3), paras (a) to (c), discussed supra);
- (ii) full details of the right to cancel any agreement made, and the right to a refund of any payment of £50 or more made in response: s.60(5).

The information in para (i) should of course already have been given at the point of solicitation; now it must be given in writing. It should be noted that, whereas the cooling-off period in the case of television and radio appeals applies only to credit or debit card payments, the cooling-off period in respect of other oral impersonal appeals applies to payments made by whatever means: s.61(6).

The clearest instance of a solicitation or representation within s.60(5) is one made by telephone. Another is a solicitation or representation made to A with the request that A asks B. Beyond these examples, however, the scope of this provision is uncertain, and seems ripe for litigation. What, for instance, if an appeal for funds is made with the aid of a loudspeaker at a fête or in a shopping precinct? Whether a person delivering a message by such means can be described as speaking directly to particular persons and in their presence needs clarification both legally and evidentially.

Since the written statement must be provided within seven days of the payment being made, it is important to know when, for this purpose, a payment is made. S.60(6) states that where the person making any such payment:

- (a) makes it in person, it shall be regarded as made at the time when it is so made;
- (b) sends it by post, it shall be regarded as made at the time when it is posted; and
- (c) makes it by giving, by telephone (or other telecommunication apparatus) authority for an account to be debited with the payment, it shall be regarded as made at the time when any such authority is given.

It is readily apparent that para (a) is circular.

Anonymous Donations

Serious problems may arise if the subsection is interpreted to require a written statement to be given to a person whose identity and address are not known. Non-compliance with subss.(1) to (5) of s.60 is, after all, an offence punishable by a fine: s.60(7); although where the commission of such offence is due to the act or default of some other person, that other person is guilty: s.60(9).

There is a defence: viz., that the professional fund-raiser or commercial participator took all reasonable precautions and exercised all due diligence to avoid committing the offence: s.60(8). This may mean, in effect, that to avail himself of this defence in such cases, the professional fund-raiser or commercial participator should request that contributors accompany payments of £50 or more with a note of their name and address. The danger with the regulatory regime in respect of oral impersonal appeals, therefore, is that its scope may exceed the practicality of compliance with its obligations.

Cancellation

This must be effected within seven days of receiving the professional fund-raiser's or commercial participator's statement. It must be made by serving on the professional fund-raiser or commercial participator a notice in writing which, however expressed, indicates the donor's intention to cancel the agreement or the payment (as the case may be). Such notice cancels any agreement (and any liability under it), and the donor is also entitled to have refunded to him forthwith any payment made of £50 or more: s.61(2) and (3).

F. Right of Charitable Institution to Prevent Objectionable Fund-raising

A professional fund-raiser or commercial participator, of course, must enter into a written agreement before soliciting or making a representation; and, in such cases, as already discussed, breach may be prevented by injunctive relief: s.59(3). There remains, however, the problem of fund-raising by persons other than professional fund-raisers or commercial participators. This is dealt with by s.62, which is therefore not applicable to professional fund-raisers or commercial participators: s.62(5). It enables a charitable institution, in some circumstances, to obtain an injunction to prevent a person soliciting for its benefit or representing that charitable contributions are to benefit it. The circumstances are:

- (a) that the person is using methods of fund-raising to which the institution objects;

- (b) that the person is not a fit and proper person to raise funds for the institution; and
- (c) where the conduct complained of is the making of representations that charitable contributions are to be applied for the benefit of the institution, that the institution does not wish to be associated with that particular promotional or other fund-raising venture: s.62(2).

A charitable institution may therefore prevent certain types of unauthorised fund-raising. The RNLI, for instance, could obtain an injunction to stop unauthorised solicitations for its benefit by means of a sponsored paddle across the Channel in a bath-tub.

The section does not, however, enable a charitable institution to prevent all unauthorised solicitations; and, to this extent, the section's side-heading is slightly misleading. Thus, if the charity already raises funds in a particular way, it is difficult to see how it could, under para (a), object to someone using a similar method.

Para (a) does not enable a charitable institution to object to a solicitation merely because it considers that an excessively large proportion of the funds raised go to the fund-raiser in expenses or remuneration. The rationale for this appears to be that, under the system of up-front disclosure, such decision is the donor's. This rationale is, of course, undermined if the disclosure requirements prove as limited as is feared.

Under para (c), by contrast, it appears that a charitable institution can assert that it does not wish to be associated with the particular fund-raising venture upon any ground - including, therefore, the ground that it considers that it will receive too small a proportion of the money raised. This paragraph, however, applies only to representations, not to solicitations.

Before a charitable institution may obtain an injunction, however, it must give the person in question 28 days' written notice requesting him to desist. The form and content of such notices may be prescribed by regulation: s.64(2)(a)(ii). Since much objectionable fund-raising can occur in this period, such delay undermines the usefulness of injunctive relief.

It should be noted that the injunctive power in s.62 is applicable only where fund-raising is for one or more charitable institutions. There is therefore no comparable means of preventing fund-raising merely for charitable, benevolent or philanthropic purposes.

G. Solicitations Ostensibly for Registered Charity

It is an offence for a person soliciting for the benefit of an institution which is not a registered charity (i.e., a charity registered under the Charities Act 1960) to represent that it is: s.63.

H. Funds Held by Professional Fund-raisers or Commercial Participators

Tucked away in the middle of s.64, which deals with regulations, is a paragraph of potentially great significance. Under s.64(2)(c), regulations may specify the manner in which money or other property acquired by a professional fund-raiser or commercial participator for the benefit of charitable institutions is to be transmitted to such institutions.

At present, some professional fund-raisers or commercial participators insist on contracts which entitle them to deduct their fees and expenses from the gross amount received. In the event of a dispute over such sums, the professional fund-raiser or commercial participator therefore has the upper hand. Regulations under Part II could, however, oblige such persons to transmit the entire sum received by them to the charitable institution, leaving it to the latter to pay their fees and expenses. Such an obligation is surely most desirable; but why, it must be asked, should such an important matter not have found its way into the statute itself? In this respect, the legislation reveals, perhaps, an excess of caution.²

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