

## Property issues in charity mergers

When charities merge, whether this involves a change in membership or transfer of assets, it is very important for the acquiring charity to be aware of the property held by the target charity. Liabilities and conditions attached to such property may not only make the merger process more difficult, but in some cases could cast doubt on the financial and operational wisdom of completing the merger at all.

The importance of property in mergers varies from case to case. Sometimes property is incidental to the main transaction but sometimes property related problems can derail the whole merger.

### **Getting charities and trustees into a position to transfer**

It is particularly common for unincorporated charities to overlook the need to vest property in successive individual trustees. In the case of either unincorporated or corporate charities, the need to transfer property in previous mergers or incorporations may have been overlooked. The property that is held by the merging charity may simply be legally owned by the wrong party.

The standard way of transferring property is to use Land Registry Forms TR1 or TR5. This is only possible if at least one of the legal owners of the property is alive and can be traced (or if a corporation is still in existence). In many cases however, individual trustees may have died or be impossible to trace, and charitable companies that no longer have a management function may have been dissolved.

There may be ways around this. For unincorporated charities, the provisions of section 334 of the Charities Act 2011 permit charities to use the mechanisms for appointment of trustees to vest property. Sometimes section 280 of the Charities Act may be used to render any inconvenient conditions fit for this purpose but there may be limitations to the section 280 power.

Alternatively, it may be possible to resolve the position by incorporating the trustees under part 12 of the Charities Act, or by obtaining a Charity Commission order vesting the property in the Official Custodian for Charities, or by making a vesting declaration under section 310 of the Charities Act. All of these procedures allow the current trustees to make transfers of the property (notwithstanding the usual position to the effect that only the person named at the Land Registry as the legal proprietor can do so).

These procedures will not be available where property is held by a dissolved company. It would be expensive to reinstate a charitable company simply to perfect a previous merger or incorporation. As an alternative, it may be possible to obtain a vesting order from the Charity Commission under section 69(1)(c) of the Charities Act, or if the Commission will not do so, it may be necessary to rely on adverse possession under the Land Registration Acts.

### **Consents and prohibitions**

Most procedures for vesting property in a merged body will require the consent of any mortgage lender, secured funder, or in the case of a leasehold property, the landlord.

A vesting order under section 69 of the Charities Act will override any such restrictions but the Commission may be wary of making an order without the consent of relevant parties. A section 310 vesting deed will override the need for some consents but will require landlord's consent if this is required for a leasehold property.

If consents cannot be readily obtained and vesting procedures are not available to get the charities in a position to merge or to actually carry out the merger disposition, or if the need for consents cannot be overridden by such procedures, the charities may want to consider implementing the merger in a different way. For example, they could enter into a 'reverse takeover', whereby the target charity holding the asset (as opposed to the acquiring charity) will be the merged body and will if appropriate change its name into that of the acquiring charity. Alternatively, one charity could become the sole member of the other to gain control via the governance structure, rather than through a transfer of assets.

### **Non-transactional vesting**

Certain types of organisation are of course blessed with methods of merger that involve governance procedures rather than legal transactional paperwork or authority from another body or court.

There are a number of statutory provisions permitting transfers of undertakings or amalgamations between Community Benefit Societies and registered companies. These provisions can override contractual or leasehold requirements for consent, which can be very convenient.

The anticipated legislation intended to enable the conversion of charitable companies, CICs and Community Benefit Societies to CIOs may be similarly helpful and useful tools in facilitating mergers, but the detail is yet to be finalised.

### **Poisoned chalice?**

Even where there are no property transfers and the merger will be on a purely corporate basis, so that one charity becomes sole member of the other, full due diligence is appropriate to ensure that there are no material liabilities or obligations that either need management before transfer or will be of significance post-merger. For example, property in the voluntary sector often turns out to be subject to extreme restrictions on use, transferability and alteration, and subject to burdensome maintenance obligations imposed by lease terms, commercial mortgages, grant funding clawback agreements or planning provisions.

Where such property is also in poor repair, and may have significant health and safety issues such as unmanaged asbestos, the property may not only potentially have a negative value but could also be an administrative headache, taking up staff time that could be much better spent on delivering and administering service provision.

### **Initial appraisal**

It may therefore often be fruitful to briefly appraise property assets of a merging charity by obtaining information on the Land Register and Local Land Charges Register (which may reveal planning gain provisions, personal planning permissions and other material planning limitations) and historic information regarding the condition of the building (surveys, asbestos reports, service charge demands and accounts, fire safety and Equality Act access assessments) so that any major issues can be identified and their potential effect on the merger plans can be fully appraised.

An initial appraisal should identify the significant issues, or establish where records are inadequate or incomplete, and at the very least indicate whether further investigation is necessary.

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