Charity & Social Enterprise

Autumn 2020

Contents

Decision tool

In consultation with NCVO, we've designed a free decision tool to guide charities and social enterprises through the next steps when faced with serious financial difficulties.

The simple tool provides clearly structured, tailored guidance on the options available to you. You just answer six questions to receive a detailed report on the options, covering cost cutting, raising finance, collaboration, merger, insolvency advice and mechanisms, and more.

You can find the tool on our website at bateswells.co.uk/crisis-decision-tool

In this update

Across the sector, charity and social enterprise boards and leadership teams are considering different forms of collaboration and restructure to allow them to continue doing their good works in a way that minimises disruption to their beneficiaries.

We've tailored this update to include a range of articles about what to think about when considering collaboration or merger – from an analysis of the options for collaboration (Augustus Della-Porta and Rachael Southern on page 6), to the need for caution when considering a merger (Lawrence Simanowitz, page 9).

We also look at some of the property (Amanda Gray, page 13), immigration (Chetal Patel, page 16), legacy (Leticia Jennings and Sophie Cass, page 22) and employment (Paul Seath and Bill Lewis, page 19) aspects of a merger, collaboration or restructure.

Finally, we see how collaboration is intrinsic to the work People's Health Trust does in local communities (client focus, page 25).

Welcome

Lawrence Simanowitz
Partner
l.simanowitz@bateswells.co.uk

Welcome

I think it is fair to say that we may soon be reaching a turning point in the impact of the pandemic on the charity sector.

When lockdown happened, nearly every charity faced an uncertain future. Charity leaders and managers were so preoccupied with addressing the challenges posed by the pandemic – not least a shortfall in funding – that anything non-essential was relegated in priority.

We are now out of that phase and in a period where many charities have gone back – as far as possible – to business as usual, but with two key differences. The first is the new operating environment. New health and safety measures are at the forefront of every organisation's mind, and we are all learning new working practices. The second is that future planning is immeasurably different. Risk matrices have changed, new budget lines have been introduced, financial forecasting is light years away from what it was less than a year ago.

Thanks mainly to government intervention, and a range of other new types of funding, the sector has not collapsed. It is needed more than ever; it is struggling more than ever. Cutbacks have started, but, so far, we have not seen the predicted shake up.

That will come in the next phase – or at least that is what many commentators are saying. As government support for the economy is gradually withdrawn in the coming months, charities will not be immune. In a survey conducted in June 2020 by Civil Society Media and Pro Bono Economics, one in eight charities thought it was likely that, due to financial challenges, they would not be operating in six months' time.

We are doing everything we can to support you during these difficult times, with tailored advice available from your Bates Wells contact and with additional resources, including our free decision tool and detailed guides in our Coronavirus Hub. Please get in touch with us to see how we can help you.

Lawrence Simanowitz,
Partner

Collaboration – strength in numbers?

Augustus Della-Porta
Partner
a.della-porta@bateswells.co.uk

Rachael Southern
Solicitor
r.southern@bateswells.co.uk

“If a full merger sounds too drastic, then it is worth exploring a looser arrangement for working together”

We know that many trustees will be sitting in (Zoom) board meetings, reflecting on sobering financial forecasts, faced with the difficult task of deciding where their charity should go from here. If this is you, then the possibility of collaborative working should definitely be on your radar.

Collaboration can be a critical part of maximising impact – as illustrated by the work of the People’s Health Trust, described in our client focus article on page 25. Collaborative working – done well – also has the potential to bring about useful cost savings.

Could you share your back office services with another charity and split the costs, for example? Or find another charity with which you could jointly deliver one or more of your projects? Collaboration might also help open up new funding opportunities and access to your beneficiaries.

Often when we think about charities coming together, we picture a merger. In some circumstances this can be an excellent solution and Lawrence looks at this in more detail on page 9.

But if a full merger sounds too drastic to you, then a looser collaboration arrangement might be worth exploring, potentially a step to a future merger down the line.

Options for collaborative working vary in terms of levels of formality and integration between the parties:

- At one end of the spectrum, you could have an informal alliance – with or without an agreement in place.
- One step up from this would be a more formal contractual alliance under a collaboration agreement.
- Or you could take it further and set up a jointly owned joint venture company.

To choose the right structure you will need to consider things like the size and complexity of the venture, the risks involved and the anticipated length of the collaboration – as well as tax and employment considerations. More detail about the pros and cons of the different options for collaboration can be found in our Brief Guide to Collaborative Working.

Protect yourself

This is not to say that collaborative working is a magic bullet that can solve all your financial problems. There are pitfalls to be wary of and a badly executed collaboration could end up costing you more than you stand to save.

Carry out due diligence at the outset, make sure you understand your potential partners' financial position and ensure that your objectives for the collaboration are aligned.

Take time at the beginning to make sure you are all on the same page.

Make absolutely sure that you have a proper agreement in place covering key issues such as who does what, who owns what, how risk is shared between the parties, how to end the collaboration and how parties leave or join.

And get legal advice at the outset – a good set of heads of terms can save a lot of time in drafting the agreement later!

Merger – an old solution to a new problem?

Lawrence Simanowitz
Partner
l.simanowitz@bateswells.co.uk

“Merger is a significant step to take, but with preparation and good planning, the result can be a new whole that is greater than the two halves”

At one end of the collaboration spectrum lies a full merger with another organisation. Not to be entered into lightly, this is nevertheless a well-trodden path. Some of the implications are explored below and in other articles in this update. Could it be the solution for you?

When times are good, a merger under conditions of pressure, as a financial last resort, is not to be recommended. Evidence from The Institute of Voluntary Action Research shows that mergers work best when undertaken for positive reasons – such as a desire to maximise impact, an alignment of goals, an extension of existing collaborations, and so on. But, in the current circumstances, the main motive for merger may be to enable your charity’s work to continue. And there are a number of ways in which this can be done, from a staged, lighter-touch approach to a comprehensive merger starting from an agreed ‘completion date’.

If you are considering a merger, we would strongly encourage you to read the publication we produced recently with IVAR – Thinking About... Merger During Covid-19 – and, in particular, to take the following steps (all of these are covered in more detail in the publication).

- Undertake due diligence into the proposed merger partner. This should, of course, include financial due diligence. On the legal side, due diligence will cover key issues such as: compatibility of charitable purposes (as set out in each charity's governing documents); the existence of ongoing complaints, regulatory intervention or legal claims; ownership of property, including intellectual property (for more on the real estate implications, please see Amanda's article on page 13); and the status of employees.

- Consider what legal structure(s) should exist when the entities are merged – for example, will there be a single combined entity, will one charity cease to exist entirely, will both charities continue in some form, will separate trading entities continue?
- Allow sufficient time to inform and consult with staff under TUPE regulations.
- Consider how trust monies and restricted funds might be affected.
- Consult with grant funders and commissioners to ensure that the merger will not result in a breach that could lead to termination of funding or contracts.
- We would also recommend that you use the decision tool we have created with input from NCVO.

Merger is a significant step for an organisation to take, but with preparation and good planning, the end result can be a new whole that is greater than the two halves that previously existed.

“For organisations with their backs against the wall, the proposition may be the preservation of something versus the gradual disappearance of everything. But even if you enter merger explorations on the back foot – preoccupied, say, by survival rather than growth – it’s still important to identify and then pursue a positive agenda about change in relation to the needs of beneficiaries.”

From Thinking About… Merger During Covid-19

Merger and real estate

Amanda Gray
Senior Associate
a.gray@bateswells.co.uk

Real Estate team

We can advise you on the full life cycle of your property assets, including supporting you on development projects and funding, as well as buying, selling and landlord and tenant matters.

We'll solve disputes. We also handle planning and tax issues, as well as insolvency and receivership.

If you're a charity, we'll also make sure you understand your responsibilities and how charity law affects your property plans.

To assist our clients to navigate the coronavirus crisis, we're offering fixed fee packaged services to help.

Covid-19 fixed fee packages

As Lawrence has pointed out in his article on page 9, planning and organisation are important for a successful merger.

One aspect of this is to identify, at the outset, any real estate implications that are likely to be involved.

What?

It is important to know what properties the merging charities own and occupy, and on what basis. Everything from commercial to residential – from a freehold building to a desk licence – is relevant. Unexpected property issues – such as a forgotten basement storage licence – could lead to increased costs or delays.

Why?

You will need to consider whether, going forward, all the properties of both charities are required or whether some are surplus to requirements. This is a chance to ensure the properties are working in the most cost-effective and manageable way for the merged entity and its future strategies.

You also need to understand any potential liabilities associated with the property, and the mechanism for any property transfers.

How?

It is essential that you undertake proper due diligence of all the properties involved:

- Investigate titles – to establish ownership, the extent of the properties and what rights and restrictions the properties may be subject to, such as a right of way.
- Undertake property searches such as a local authority search, local land charges register search, drainage and water search, environmental and flooding search and chancel repair search.
- Raise enquiries with the other property-owning charity – to obtain information that would not be revealed by the title investigation and the searches.
- Carry out property surveys – to ensure that the properties are in a good state and condition, and all the services and utilities are in working order.
- Check to see whether there are any grants or loans and check all the detailed terms of any grant or loan. For example, are the properties charged, is consent required to any disposition or are there any claw-back provisions?
- Where leasehold properties are involved, review the leases and other ancillary documents to establish the extent of the tenant's responsibilities for the property, the length of the term, and existence of any break rights. If a leasehold property is no longer required or is to be transferred to the merged charity, you should check the provisions on assignment and underletting to see whether these are permitted and whether landlord's consent is required.

Who?

You will need professional advice from the outset, including advice on the disposal requirements of the Charities Act 2011, from surveyors to accountants to solicitors.

How can we help?

Bates Wells is here to help you. Please get in touch with Amanda Gray, or any member of our Real Estate team, who would be happy to assist you further.

Immigration and changing your structure

Chetal Patel
Partner
c.patel@bateswells.co.uk

"Does the new merged entity need just one licence for the whole group, or will you need licences for each separate entity?"

Organisations shouldn't underestimate the immigration considerations when faced with a change in structure.

You may be affected if you already have a licence to sponsor migrant workers from outside the EEA or you are considering applying for one in order to sponsor new arrivals from the EEA from 1 January 2021.

A licence can reflect your organisation's structure, so it might cover multiple legal entities and locations, in the UK and overseas. If there are changes to your structure, whether in relation to a merger, takeover or acquisition, a change in employment arrangements such as those outlined in Paul and Bill's article on page 19, or simply down to internal restructuring, you need to consider the impact on the licence. Unfortunately, the rules aren't straightforward.

What if there are no changes to your day-to-day operations or the employment relationship with existing sponsored migrants? In some instances, you will still be required to surrender your existing licence and reapply for it. This can have a knock-on effect on existing migrants and you will need to ensure their sponsorship transfers (irrespective of TUPE applying).

What if the situation doesn't require a whole new licence? You still need to notify any changes to UK Visas & Immigration (UKVI) in a prescribed manner and within strict time limits (normally 20 working days).

In the case of mergers or takeovers, each organisation may already have its own separate licence and may be treated differently by UKVI depending on the details of how ownership and control is changing.

Five questions to ask yourself

1. Do any of the relevant organisations already have a licence? If so, are they currently sponsoring any migrant workers, or do they intend to do so in the future?

2. What are the specific proposed changes to the structure and how far removed are they from the entity holding the licence? Is there going to be a change in the immediate ownership or control of the organisation?

3. Will each entity continue to operate as a separate concern? Does the organisation require one licence for the entire group, or do they require individual licences for each (or just for specific) entities?

4. Does the organisation operate from a number of different premises that may need to be covered by a licence?

5. Will employees continue to be employed by the same organisation or will their employment be transferred? Will TUPE apply?

It's important that you consider the immigration aspect of any structural change early on, as otherwise you may face the wrath of UKVI.

Employing shared staff

Paul Seath
Partner
p.seath@bateswells.co.uk

Bill Lewis
Consultant
b.lewis@bateswells.co.uk

If you are thinking of collaborating by sharing employees with another organisation you need to understand the two options – secondments and joint employment contracts. Here we look at the differences between them.

Secondments

Secondments involve one employer 'loaning' an employee to a 'host' employer.

The employer does not change, and the employee continues to be paid as normal. Their employment does not transfer. The employee usually – but not always – returns to the employer following the secondment.

Written agreements, setting out the practical arrangements and obligations, should be put in place between the employer, the host and the employee.

Whether there is a genuine secondment depends on the written terms – and on the way the employee is treated by the employer and the host.

Note that any payment the host makes to the employer will generally be subject to VAT, because HMRC will consider there to be a supply of services. There is a useful HMRC concession that – in some circumstances – can allow the loan of staff from one charity to another to be treated as outside the scope of VAT. But as with all VAT rules, the devil is in the detail: you should seek advice on whether it might help you.

If you do have to pay VAT, this will add a significant cost – so another option might be to enter into a joint employment arrangement.

Joint employment contracts

Under these arrangements, the employee is employed by more than one organisation.

Their employment contract must specify that there is more than one employer and who the employers are: the employers must be named as joint employers.

To avoid uncertainty and misunderstanding, joint employers should set out in the employment contract or otherwise in writing the obligations that each employer has to the employee, and the obligations the employee has to each employer.

It is essential that the management of the employee reflects the joint nature of the arrangement and the work they do. Each employer must manage the employee in respect of the work that the employee does for that employer. This division of management should extend to all of the employee's rights and obligations. This can be difficult where there is no natural line manager within the second employer.

One employer can act as the paymaster and pay the employee's salary, NICs, pension contributions and so on. The reimbursement of the share of those costs by the other employer is treated as a disbursement and so is not subject to VAT.

The benefits of joint employment include greater flexibility and cost savings. But there are also pitfalls. First you have to persuade the employee to accept joint employment. There are practical, everyday issues around which employer's processes and procedures apply, as well as management and termination. You will also need a bespoke employment contract.

The appropriate option in each case will depend on business need and practical reality. Please do contact us for further advice.

Top tips for managing legacies when merging

Leticia Jennings
Partner
l.jennings@bateswells.co.uk

Sophie Cass
Associate
s.cass@bateswells.co.uk

> “If you have substantial legacy income, it may be worth keeping the charity in existence as a ‘shell’”

One often overlooked element of the merger process is how to protect your legacy income.

If, as part of the merger, Charity A’s assets are likely to be transferred to another charity – Charity B – legacies to Charity A may fail. The problem generally arises where Charity A’s supporter has made a legacy in a will signed before the merger – but dies after the merger has taken place.

There’s no one-size-suits-all solution to this problem, but there are a number of steps you can take to put the merging charities in the best possible position.

What are your options?

There are two main routes to deal with legacies post-merger:

1. Wind up Charity A and register the merger on the Charity Commission’s Register of Mergers

This gives you the least administration going forwards as legacies to Charity A can be paid by executors straight to Charity B. However, this isn’t fool proof, as it’s not uncommon for the wording of the will to mean the legacy would be lost under this option as Charity A has officially ceased to exist.

2. Keep Charity A in existence as a so-called 'shell' charity

By not winding up, Charity A remains in existence and is readily identifiable by executors looking to pay out a legacy. However, this comes with an ongoing administrative burden.

Whichever option you choose, a key to success is clear communication with your donors: make sure they know the merger is taking place and how legacies should be drafted in their wills/codicils.

Before you merge

Key questions you'll need to consider prior to any merger are:

- Do legacies make up a substantial part of your charity's total annual income?
- Do you have the administrative resource to run a shell charity?
- Is it relatively easy to contact the charity's donors who may plan to leave a legacy?

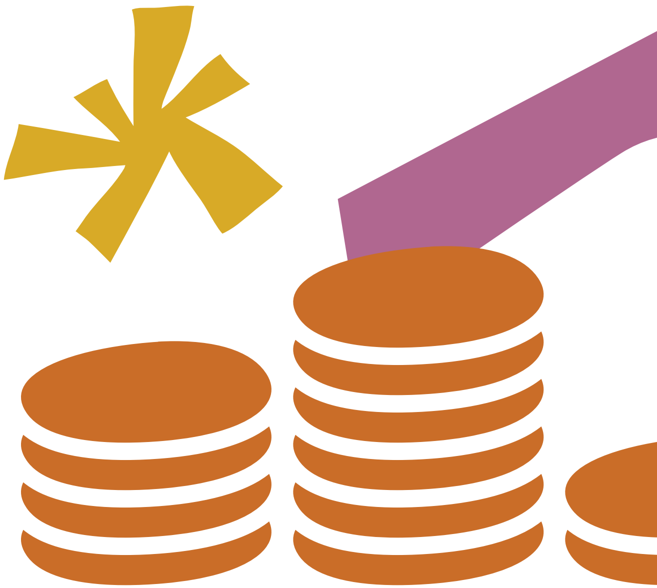
If legacies make up a small part of your charity's annual income, it may be worth the risk to simply wind up and put the merger on the Register of Mergers.

If legacies are substantial income for your charity, it may be worth the ongoing administrative upkeep to keep the charity in existence as a shell to preserve all future legacies.

What if it goes wrong?

Many times, when we advise on a legacy dispute, part of the background involves a merger, so it does pay to plan for this eventuality. We have lots of experience advising on the best option for legacies when a merger is being considered; as well as unpicking complications arising from a historic merger.

If your charity is in legacy limbo, please get in touch.



Client Focus: People's Health Trust

John Hume

Chief Executive

People's Health Trust

We all know people who are ill or die much younger than they should, but for some sectors of our society this is the norm. The gap which exists between the health of the less well-off and the well-off continues to widen. Since 2010, life expectancy has flat-lined for the first time in 100 years and has decreased for working-class women – and health inequalities have widened.

People's Health Trust raises and distributes money to address health inequalities in Great Britain. To date, we have raised over £115m. We provide funding and support to organisations operating in local communities, working only with neighbourhoods that experience the sharp end of these inequalities. Developing our fundraising model using society lotteries was complex and ground-breaking in many ways – having the support of Bates Wells was critical throughout.

Covid-19 has shone a huge spotlight on health inequalities and on the socioeconomic factors that cause them. They are not new and for many, they are not surprising. They are, however, unjust and entirely avoidable.

Our view is that if we really want to understand the complex factors that cause early death and illness, we must work together and listen to the views and wisdom of people with lived experience of these inequalities.

We have ensured that collaboration is baked into our approach by working alongside our funded partners, understanding their progress, building relationships and learning from their experiences to address systemic failure. We collaborate.

From early on in the pandemic, we knew what we needed to do because we have been working closely with and learning from our funded partners for years. We released conditions of grants to enable them to respond to the needs in their communities. A staggering 80% of them stayed open and operating in some form or other.

We drew on our strong established networks with funded partners to ensure there was mutual support for leaders. We had 400 conversations to understand how people were doing and produced a report outlining the Covid-19 community response three months in. This collaboration meant that we learnt early on about the serious (and worsening) mental health issues for residents and leaders; the significant digital divide; and the devastation in some BAME communities – and the calls by them for investigation into long-term neglect. We saw serious isolation among older and disabled people; and we saw increasing financial hardship emerging on top of already existing poverty.

This collaborative work has meant we have been in a stronger position to directly advocate with local people for the changes they think are necessary around mental health, digital connectivity, support for BAME communities and further financial assistance to those who need it most.

The beauty of collaboration isn't just the end 'product' or goal – although this is critical – but the process along the way: the building of trust, the challenging of power, the anchoring together in a set of common beliefs and the reciprocity.

Above all, the most critical aspect of collaboration is privileging the voices of those who are seldom heard and often ignored.

+44 (0) 20 7551 7777

bateswells.co.uk
hello@bateswells.co.uk

Follow us

Previous updates are available at:
bateswells.co.uk/insights

To update your contact details or mailing list preferences please contact the BD & Marketing department at bdm@bateswells.co.uk

10 Queen Street Place, London EC4R 1BE