MAKING MERGERS WORK: THE ROLE FOR CHARITY TRUSTEES

NPC briefing, October 2013

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On 21 October 2013, NPC and the Clothworkers' Company held a seminar for trustees to explore the process of charity mergers—for those embarking on a merger themselves, considering doing so, or simply curious about a complex and increasingly important topic. This report highlights the main themes discussed during the seminar, which looked at the technical elements of the merger process, the lessons learned from the personal experiences of panellists and the potential benefits of mergers done well.

The seminar was chaired by Rob Abercrombie, Director of Research and Consulting at NPC. The panellists provided four perspectives on the merger process, common pitfalls, and key considerations:

- **Richard Litchfield** (Chief Executive, Eastside Primetimers) outlined his good practice tips in managing the merger process, drawing on varied experience in advising on mergers as a consultant.
- **Anne-Marie Piper** (Partner, Farrer & Co.) talked from a legal perspective about the duties of trustees, common merger models and outlined the ideal merger timetable.
- **Anand Shukla** (Chief Executive, Family and Childcare Trust) spoke from personal experience of three merger processes. He spoke in detail about the 2013 merger of the Daycare Trust and the Family and Parenting Institute, which formed the Family and Childcare Trust.
- **Patrick Healy** (Vice-Chair, Carers Trust) spoke about his experience of the merger between the Princess Royal Trust for Carers and Crossroads Care to form the Carers Trust—outlining the lessons learned along the way from his perspective as vice-chair.

Introduction

In the current climate, mergers are a subject that is on many people's minds in the charity sector. In theory, mergers are about creating fewer, stronger organisations that are ultimately of benefit to shared beneficiaries. In the right circumstances, the business case for merger can be strong—increased public profile, strengthened fundraising capabilities and concentrated, efficient service provision. However, many still see the process as unattractive given its risk and complexity. Ultimately, the majority of mergers are carried out with the well-being of beneficiaries in mind[1]—so it's important that, as a sector, we draw on the help that's available and the lessons learned by others to get the process right.

[1] A 2009 survey by Breakthrough—which finances social enterprises through Permira, the European private equity firm—found that 76% of charities surveyed identified 'adding / improving services for beneficiaries' as their main driver for merger.

Good practice guidelines when embarking on a merger

Eight top tips for a successful merger

Richard Litchfield drew on his experience in advising charities through the merger process, drawing on case studies from *The Good Merger Guide*, to outline the key things to keep in mind when carrying out a merger.

- **Start with a strategy:** A merger, in itself, is not a strategy. Rather, a merger is a tactic that could help you to reach the place you want to be. Any merger strategy should really seek to go 'back to basics' and address the question of where are you going.
- **Be proactive:** Finding the right partner can be time-consuming—but it's worth taking the time to get this right. You might have to really go out and test the market, as it may not be the closest or most familiar charity that makes the most sense as a partner.
- **Have a clear vision and business case:** The business case is the rationale for the whole process and it needs to be outstanding. It needs to make clear why you're pursuing a merger, what it will achieve for you as a charity and for your beneficiaries, and why merger is a more attractive proposal than other options—such as partnership or going it alone. Ultimately, as a trustee, you must be happy in your own mind that the move makes sense.
- **Find your own process:** It's easy to fall into thinking that there are certain ways that everything *must* be done in a merger—but this isn't always the case. A lot of decisions, such as choosing when to communicate about the merger, can be customised to fit with your organisational culture and business needs.

There are a lot of points in any merger when you have the opportunity to choose what to do

Richard Litchfield, Chief Executive, Eastside Primetimers

- **Clarify leadership roles:** The question of who should lead the new body can be one of the more sensitive things to resolve and may get put off—but making a decision on who will fill these roles as early as possible will avoid losing direction and drive further down the line.
- **Due diligence should be proportionate:** As trustees you can choose the level of risk that you're prepared to take on, and how much you want to 'dig'. Due diligence should be tailored to what's appropriate for your size, and what will ultimately matter to the success of the merger.
- **Focus on people, not numbers:** The numbers will tell you whether or not you should go ahead with the merger—but success is ultimately dependent on people. Whilst it's important to make sure that a merger will be financially viable, this isn't enough in itself. Success will depend on the extent to which senior leaders gel, staff feel engaged and communication is effective.
- **Take advice:** More often than not this should be done at the earliest possible stage, to ensure that the project starts out on the right foot. Legal, financial and strategic professionals will be a cost in the short term—but this will most likely be outweighed by the benefits of a smoother merger. Most importantly, it will also take some of the burden off the organisation and its managers, ensuring that the charity can continue to run smoothly.

Lawyers in early. Project managers in early.

Patrick Healy, Vice-Chair, Carers Trust

The legal side of the merger process

Anne-Marie Piper spoke from a legal perspective, based on her many years' experience as a partner at Farrer & Co. providing legal advice to charities during the merger process.

Your duties as a trustee during the merger process

The duties that Anne-Marie outlined apply to all trustees—regardless of their particular method of appointment. First and foremost, trustees are tasked with acting 'in the best interest' of the charity. However, remember that this should not always be taken to mean defence of the charity as an entity, but rather the protection of its goals, or 'objects'.

Subsidiary duties

- **To run the charity according to its constitution and law**: In the context of the merger process, it may be wise to separate trustees into two groups—with some tending to the merger, whilst others are charged with ensuring that the day-to-day running of the charity continues to work smoothly.
- **Stewardship of assets:** Mergers invariably take a long time—often much longer than you think. A common mistake, based on Anne-Marie's experience, is to assume that pursuit of the merger itself amounts to the stewardship of assets. However, given such long time-scales, this duty should not be forgotten during the merger process. Assets must be handled as usual, without relying on the ultimate merger to fix any problems.
- **Avoiding conflicts of interest:** People in the charity sector are likely to have a lot of connections in their area of expertise. Identifying potential conflicts of interest, and planning accordingly, should be a careful consideration of trustees at the outset.
- **Providing technical expertise:** The importance of professional advice during the merger process cannot be understated. But this does not necessarily mean paying for it. Trustees' skills, expertise and contacts are a key resource that should be drawn on throughout the merger process.

The most common merger models

Depending on the number of parties involved and your particular goals, there are any number of possible merger models that can be pursued. The table below summarises the most common models, based on a simple two-party merger:

Merger model	Description	Comments
Take-over	A transfer of assets and liabilities in which a larger charity takes over a smaller one	This is the most common model and often the simplest—provided that both parties see a benefit
New Charity	'A marriage of equals'. Charity A and Charity B become Charity C	This option can be quite expensive, as each charity needs to be advised separately
Trusteeship	One of the charities becomes the sole trustee of the other	This is a good option when you're in a hurry
Multiple Nations	Merger between organisations in different nations (e.g. Scotland and England)	This approach can be extremely complex and requires very careful planning and advice

An ideal merger timetable

Stage one Exploratory discussions and preliminary checks	The first task is to sit down and check that everybody is fundamentally on the same page and that the merger is financially viable. Getting some professional legal and financial advice at this stage can save wasted time and costs further down the line.
Stage two In principle decision to merge	Both parties need to feel secure at this stage. It may be worth signing something to agree that neither party is looking for other potential partners. However, formal 'Heads of Agreement' can be costly and cause division. As such, the formation of a merger working group may serve as a good alternative signal of commitment.
Stage three Due diligence and assessing potential issues	This is where you take a detailed look at finances, pension liabilities, personnel issues and operations. Representations and Warranties are not generally used in the charity sector, meaning that you need to have a good picture of your partner before formalising the arrangement.
Stage four Creating a merger plan	A good merger plan, covering how everything will work in practice, is 'absolutely vital'. This will include issues such as VAT, TUPE, assessing the cost of property transfers and pension arrangements. These processes can be extremely complex—so remember to draw on the expertise of the board if you can, or seek external advice.
Stage five Merger documentation and meetings	This is the stage at which the agreement becomes contractual and legally binding. Seeking proper legal advice at this stage is essential. Remember that these material contracts may require the prior consent of various parties—so be sure to sort this out at an early stage.

Stages one to five are the solid foundations of any merger, but once the process is planned and legally formalised, there is the difficult task of navigating the integration of the two charities. This will mean tackling the integration of two organisational cultures, and working through the less tangible, human side of the merger process. Our next two speakers spoke from personal experience of taking mergers from stage one right through to integration and successful completion.

The task of integration is where the lawyers leave and the real work starts

Anne-Marie Piper, Partner, Farrer & Co.

Case studies from our speakers

The Family and Childcare Trust

Anand Shukla has been involved in three charity mergers since 2008. His most challenging was the recent merger of the Daycare Trust and the Family and Parenting Institute to form the Family and Childcare Trust. Discussions began in November 2011, with the formal merger taking place in January 2013. His key lessons from the experience were:

- **Getting an extra pair of hands can be invaluable.** The mergers took up a huge amount of time, necessitating a great deal of unpaid time from the trustees. Trustees need to balance the responsibilities of running the charity, the merger, and their personal lives. Bringing in external expertise can help ensure that the merger strategy is sustainable and that trustees aren't too heavily burdened.

  Getting communications right. The communications dynamic in a merger can be very complex. Communications operate on a number of levels: from the chief executive, to the respective chairs, to the trustees. Time should be built in when planning the process to reflect this complexity. Where the decision has been made to split trustees between duties related to the merger and 'business as usual', there needs to be a clear process by which the trustees 'outside' the merger process are kept updated and in the loop.

It's important to invest some time in making sure everybody's singing from the same hymn sheet

Anand Shukla, Chief Executive, Family and Childcare Trust

- **Be ready for the big issues and potential 'deal-breakers'.** In this case, pensions were the issue that *'could have killed the merger'.* This issue altered the way in which the merger was effected legally. Despite the charities being of relatively even size, they chose the course of a take-over as a way in which to deal with the pensions issue. Working out what these issues might be, and how best to deal with them, requires careful thought at the outset.

The Carers Trust

Patrick Healy was vice-chair of Crossroads Care at the time of its merger with the Princess Royal Trust for Carers (PRTC) to form the Carers Trust. The two charities had identified that there was an overlap in services and that they had complementary funding models. Whilst PRTC had a national profile and a broad donor base, Crossroads had specialist local knowledge and statutory funding. This positive assessment of the benefits that merger would bring was borne out in eventual success, but there were a number of lessons along the way:

- **Make sure you understand the other board.** Joint meetings between members of the two boards *outside* the formal process can be invaluable in terms of building trust. Social interaction can help to build a greater understanding of where the likely 'pinch points' and areas of disagreement are likely to arise. Bear in mind that this requires you to be very clear, from your own side, what your goals are.
- **Identify and manage your stakeholders.** Depending on your particular situation this may vary, but invariably you should consider the place of your donor base, staff, clients and legal bodies in the merger process. Staff should be treated with particular sensitivity, as a merger could mean losing their job.
- **Create a merger steering group.** This is 'absolutely vital as it helps to ensure that the day-to-day business of the charity is not impacted by the merger process—and vice versa. Careful thought should also be given to *who* will be on the steering group. It is important that the group should be sufficiently powerful, as to be able to take decisions, but there should equally be a good cross-section, to avoid the alienation of trustees.
- **Support your CEO.** Trustees should be aware from the outset of their role in providing technical support and expertise to the CEO. Most importantly, trustees should bear in mind their role in acting as a sounding-board in the decision-making process.
- **Share information.** Being up-front is critical to a smooth merger. Any surprises, or the perception that information is being withheld by other side, will erode trust and ultimately jeopardise the whole process.

An excess of information is better than a shortfall. Surprises will only erode trust.

Patrick Healy, Vice-Chair, Carers Trust

- **Be realistic in your expectations**. In terms of time and cost, the merger process can be a shock. Mergers will undoubtedly cost more than you think. But, by seeking professional advice at an early stage, you can stop the process from wandering off course, and save money in the long term. As a trustee, you should also be aware of the time commitment that you are taking on in a merger.

Discussions with our attendees

Was the merger process worth it in the end?

Patrick Healy felt that, in his case, the merger had absolutely been worth it—as it achieved a much higher funding profile, with a bigger central brand proving much more beneficial than either charity alone. Anand Shukla agreed that his merger experience had been positive—allowing the charities to build a greater profile and to get things done more efficiently, given a marrying of services.

But how far down the line do you need to be before you can really judge success? What is clear is that 'success' should not be allowed to amount to 'completing the merger'. Rather, it should be judged in terms of your ability to help your beneficiaries.

It's not enough for one and one to make two. It needs to make three.

Anand Shukla, Chief Executive, Family and Childcare Trust

What do you do when trustees simply don't have the time to offer?

Getting the process right and putting in the necessary work at the front end of the process can be very important in reducing the time burden further down the line. That being said, it's very difficult to estimate the amount of time that a merger will take—as it is inevitably subject to unavoidable and unpredictable delays. It may be worth considering bringing in independents to the process to balance the trustees from either side.

As previously stressed, it's also important to separate the work of trustees, in terms of those that will tend to the everyday running of the charity, and those that will lead the merger. This is important in making sure that trustees and managers don't become overwhelmed.

How do you decide between merger and insolvency?

Too many mergers fail because adequate planning is not done at an early enough stage. This is particularly true when it comes to financial matters—where a merger is taking place in order to 'rescue' a weaker charity. If a merger is taking place because one party is in financial crisis, it's important to think about the alternatives to merger right at the outset. What would be the costs involved in an orderly winding down of the charity in trouble? Embarking on an ill-advised merger may only lead to liquidation further down the line.

When pursuing a trusteeship merger model, what happens to the trustees?

Where one charity becomes the sole trustee of another, common practice is for the board of trustees in the subsidiary charity to stand down. There will also be some reconfiguration of the top charity's board. It's preferable at this stage to bring in new people to the main charities board, to provide fresh perspective.

What will be the biggest savings achieved through a merger?

The biggest savings, and biggest benefit to beneficiaries, comes where there is duplication of infrastructure or services. There may, however, be a short-term cost where two charities also share donor pools. Donors are unlikely to give double the amount to the newly-formed charity, than they were giving to each of the two individual charities previously. However, bear in mind that this can be made up for in the long term, by way of a 'leaner, meaner' fundraising team, and a clearer 'ask' from donors. Donors interested in a particular area will have a clearer idea of where their donations should be directed.

Though undoubtedly a sore topic in any merger process, one of the biggest areas for savings will unfortunately come through redundancies.

How do you keep people motivated and energised throughout the process?

The key here is to remember that a merger is more than just a technical process and that you (should be) doing it for a good reason—to make the sector more efficient and provide a better service to your beneficiaries. Building a vision rooted in these first principles can be very beneficial in maintaining energy and drive. It is therefore of paramount importance to focus on the vision and how the merger can help you with that. Creating a shared vision at the outset will provide something to fall back on and provide direction when times are tough.

[My biggest motivation] was focussing on how wasteful the status quo was. It maddened me.

Patrick Healy, Vice-Chair, Carers Trust

Tips for trustees

Key advice	Questions trustees could ask
Be clear on why you're pursuing a merger in the first place	• Does this feel right for me personally? • Are we merging with the right people? • Have we considered all the alternatives to merger? (collaboration, liquidation etc.) • How will this benefit our beneficiaries?
Make sure you set off on the right foot – resolve issues as early as possible in the process	• What are the potential deal-breakers? Where are the conflicts of interest? • What expertise does the board already have? What can we spend on external advice? • Who will lead the process? • How much time are the trustees willing to invest? • What form will the new organisation take? How does this affect the points above?
Make sure everything is proportionate	• What level of due diligence is appropriate for a charity of our size? • How complex is the merger model that we're pursuing? How much advice will we need? Is it within our capabilities? • What kind of risks are we taking? Are these acceptable risks? Or do we need to take further action to resolve them?
Spend some time thinking about communication	• When is the best time to communicate the decision to staff? To beneficiaries? • How can we take steps to make sure the senior managers gel? • How can we make sure that all trustees are kept in the loop?
Don't forget the human side of the process	• Who are the key stakeholders in this process? • Is the merger likely to be unpopular with any particular groups? How should they be managed?

Final thought

Getting a shared vision at the outset, built on first principles, is absolutely crucial. Focussing on the vision will help to keep the energy and give you something to fall back on when the going gets tough.

Anand Shukla, Chief Executive, Family and Childcare Trust

Further resources

Ash, M. and Vigor, J. (2013), *What's in a merger? Lessons learnt from the creation of Carers Trust*
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www.thinknpc.org/publications/what-place-for-mergers-between-charities

Eastside and Prospectus (2012), *The Good Merger Guide: For charities and other civil society organisations*
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Our speakers' websites:

Anne-Marie Piper, Farrer & Co: www.farrer.co.uk

Richard Litchfield, Eastside Prime Timers: www.eastsideconsulting.co.uk

Patrick Healy, Carers Trust: : www.carers.org

Anand Shukla, Family and Childcare Trust: www.familyandchildcaretrust.org