

Charities... managing in the recession

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The impact of the economic downturn is now clearly evident throughout the global economy.

Nobody can accurately predict what will be the long and short-term effects of the unprecedented events we have witnessed in recent months.

Action is required now. Charities need to reassess priorities in the light of increasing demands for their support whilst at the same time fundraising is becoming harder and investment returns are shrinking.

Restructuring

Our charities team has seen a significant increase in merger activity and partnership working in recent months. Many medium-sized and large charities are seeking to strengthen their position in a tough market by collaborating – whether on specific projects or by full-scale amalgamation.

Novel forms of collaborative working and organisational merger have to be completed or undertaken within the constraints of charity law. Our team of charity lawyers combine a long track record of understanding the sector, regulators and the requirements of charity law to deliver sustainable solutions. We pride ourselves in offering pragmatic advice – working with clients to realise their plans rather than coming up with legal problems.

We can assist in every aspect of the merger or partnering process – from project management, proportionate due diligence and structuring options, to helping identify possible partners from our extensive network of charity clients and contacts. Once a merger partner has been identified, advice will also be required on the impact of TUPE.

Organisational Review

Many of our charity clients are reassessing ongoing projects while at the same time looking at new opportunities to diversify income streams.

On the operational side we can help with the review of existing contractual commitments and renegotiating terms – whether with landlords, funders, service providers or suppliers. Deciding to end projects requires advice on termination provisions and liabilities. A review of funding relationships in particular can create opportunities for negotiating accelerated payments or finding alternative sources.

Hiving off activities or taking on new contracts to generate income requires careful structuring – we have considerable experience of advising charities on how best to structure trading activities and support them within the regulatory framework.

Employees

We can help charities review employment relationships and, if necessary, restructure. This might include making redundancies or more creative solutions such as secondments and the creation of contractor relationships.

Governance Review

As priorities change and new strategies to cope with the recession are developed good governance must be at the heart of the decision-making process. Ensuring the Board and governing documents are still 'fit for purpose' forms a large part of the advisory services we provide. Charitable objects and powers may need to be revisited to enable new opportunities to be grasped. Often significant constitutional change will require the prior consent of the Charity Commission (and where relevant, OSCR). We have an excellent track record of working with regulators to get the desired outcome for clients.

In particular, our knowledge and experience of the way in which the Commission works (and who to approach) means we can get results quickly when time is of the essence.

We can also assist with a review of restricted funds (including permanent endowment) to ascertain where it could be possible to lift restrictions and how to do so.

Investment Review

Current market conditions dictate that very close scrutiny will need to be paid to the risk in investment portfolios. However, custody agreements can be an overlooked risk area – it may be surprising to know that in some instances title to the custodied assets can pass to the custodian leaving the charity very exposed in the event of insolvency.

Where a bank holds a charity's assets as a custodian this means it assumes responsibility for the safekeeping and administration of deposits. Typically, as custodian the bank will hold equities, bonds and other forms of investments. In essence, the custodian holds as nominee for the charity, who retains ownership of the assets, so minimising risk from counterparty exposure.

We are advising charity clients that the terms of any custody agreements to which they are a party be reviewed to assess risk exposure. For example, custodian agreements sometimes provide that the custodian is entitled to take title to some or all of the custodied assets. Depending on the terms of the agreement, the custodian may be allowed to take ownership of all the assets as its own. Were the custodian to become insolvent, all of those assets could be at risk. In the first instance the position should be checked under the relevant custody agreement, and then it may be possible to limit the value of the custodied assets to which the custodian can take title.

In addition, it is common for custodians to aggregate assets such as cash or securities which it holds for its various clients in one commingled account. While the custodian is required to maintain proper records showing each client's title to the pooled assets, if these records are not properly maintained complications would inevitably arise in the event of the custodian's insolvency. It is often possible to agree that assets will not be pooled, but this may well come at the cost of not then being able to undertake transactions which involve any element of lending by the custodian.

Insolvency

If the prospect of insolvency looms we can provide advice on English insolvency law and procedure. For charities, this includes advising trustees on their legal duties (as company directors and charity trustees) and their personal risks during this uncertain period.

Litigation and Dispute Resolution

When charities are working hard to survive market turmoil, trustees may be forced to enlist the assistance of the judicial system to enforce important contractual rights. Whether you are defending an action or attempting to reclaim what is rightfully yours, we can help you assess the risks and develop strategies for managing those risks in the long and short term. Getting sound advice at the outset is key.