Article

Incorporating an unincorporated charity

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Abstract

Every year, a substantial number of trustees 'convert' their unincorporated charities to incorporated charities. However, there is surprisingly little guidance in charity law books on the powers that trustees have to make and give effect to the decision to incorporate. This article seeks to redress the balance. It will explain what incorporating a charity involves and why it is so popular. It will then set out the powers which charity trustees might have to incorporate an unincorporated charity and the methods for transferring the unincorporated charity's assets.

Introduction

Taking the title literally, this should be a two-word article: 'you can't'. It is not possible to restructure or convert an unincorporated charity into an incorporated charity.[1] However, it is possible in many cases for the trustees of an unincorporated charity to incorporate a new charity with materially identical purposes and people and transfer the unincorporated charity's assets to it.[2] Because in practice this can achieve much the same effect as a 'true' incorporation, this slightly longer process is often colloquially referred to as the 'incorporation' of an unincorporated charity. For simplicity, the same phrase will be used in this article.

It is not possible to restructure or convert an unincorporated charity into an incorporated charity

The incorporation of unincorporated charities appears to be on the rise. Between August 2017 and May 2019, the number of registered charitable incorporated organisations more than doubled, from around 7900[3] to over 17,000.[4] However, over the same period, the number of registered charities overall increased by about 1000. This suggests that incorporated charities make up an increasing percentage of all registered charities. More specifically, over the last three years, the number of registered charity mergers has increased by about one-third.[5] Looking at the register, around two-thirds of those mergers appear to involve an unincorporated charity transferring its assets to an incorporated charity with a materially identical name.

But why are the trustees of unincorporated charities incorporating their charities? And how can trustees of other unincorporated charities do the same? There is surprisingly little guidance on these issues in the main

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1. For example, Charity Commission Operational Guidance 715-4, section B2.

2. It is also possible for charity trustees to become an incorporated body under sections 251-266 Charities Act 2011 or to appoint a corporate trustee in their place (cf sections 36(1) and 39(1) Trustee Act 1925). However, neither of these arrangements alters the fundamental unincorporated nature of the charity.

3. See paragraph 6 of the Impact Assessment for the Charitable Incorporated Organisations (Conversion) Regulations 2017: https://www.legislation.gov.uk/uksi/2017/1232/impacts.

4. See paragraph 4 of the written evidence submitted by the National Council for Voluntary Organisations to the Select Committee for Digital, Culture, Media and Sport in May 2020: https://committees.parliament.uk/writtenevidence/697/html/.

5. See https://www.gov.uk/government/publications/register-of-merged-charities.

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charity law practitioner works,[6] and it does not appear to be the subject of a reported case. This article aims to fill that gap by answering both questions. In the next three sections, this article will set out the reasons for incorporating, the powers to incorporate, and the various options for transferring assets from the unincorporated charity to the new incorporated charity.

Why incorporate an unincorporated charity?

Unincorporated charities must act through their trustees.[7] In contrast, incorporated charities have separate legal personalities and can act in their own name. This basic difference means trustees can obtain three benefits through incorporation.

First, an incorporated charity can contract with third parties in its own right and can therefore be liable for its own debts. This can be particularly important for trustees of smaller charities. Although trustees of unincorporated charities have a right of indemnity out of the charity's assets,[8] this may be of little comfort if the unincorporated charity's assets are modest. In contrast, trustees of incorporated charities are generally only liable in a limited way for the charity's debts.

The second benefit of incorporating a charity is that this will allow the charity to own assets in its own name. In particular, this can simplify the administration of land because the charity itself can be registered as the owner. In contrast, land owned by an unincorporated charity must be registered in the name of some or all of the trustees, or in the name of the Official Custodian for Charities.[9] If, as is common, the former approach is adopted, trustees must remember and arrange for title to be transferred every time one of the registered trustees resigns or dies. This is inconvenient and can easily be forgotten.

The third main benefit of incorporation is that some third parties find it easier to deal with an incorporated charity than an unincorporated charity. While it is straightforward for the trustees of a charitable trust to open a bank account for the charity, lenders are often less willing to loan money to the charity because the loan must be made to the trustees personally.[10] Similarly, an unincorporated charity cannot grant a floating charge over its assets, so it can be more difficult to obtain secured finance. If the charity in question is likely to need to borrow large sums of money, for example, to purchase or renovate a property, then incorporation can simplify the process.

However, incorporation is not entirely free from difficulty. For example, if an incorporated charity is registered under the Companies Act 2006, then the trustees will be subject to two sets of regulatory duties under both company law and charity law.[11] Most obviously, the trustees will need to file annual accounts with both Companies House and the Charity Commission.[12] Furthermore, in some cases, incorporating a charity can involve a relatively long and reasonably expensive process, particularly if legal advice must be sought.

Nevertheless, these disadvantages are often relatively modest in practice. For example, trustees may feel that the one-off costs of incorporation outweigh the ongoing costs associated with the administration of registered charity assets. Furthermore, the additional company law requirements imposed on trustees of incorporated charities are relatively modest. For example, since 2017, incorporated charities with an income of under £500,000 have been able to use one set of accounting templates when filing returns at both Companies House and the Charity Commission.[13]

6. See, for example: W Henderson and J Fowles, *Tudor on Charities* (10th ed, Sweet and Maxwell 2015), paras 21-002–21-014; Bates Wells Braithwaite LLP, *The Charities Acts Handbook: A Practical Guide* (Jordan 2016), paras 14.228–14.239; C Alexander, *Charity Governance* (2nd ed, Jordan 2014), paras 15.106–15.114; *Charities: The Law and Practice*, paras I.40 and I.44. Douglas Cracknell, Pesh Framjee and Francesca Quint, Charities: The Law and Practice, Sweet & Maxwell.

7. For example, Henderson and Fowles (n 6) para 6-002 (trusts), and *Re Horley Town Football Club* [2006] EWHC 2386 (Ch), [2006] WTLR 1817, [5] (Lawrence Collins J) (unincorporated associations).

8. For example, section 31 Trustee Act 2000 (trustees) and Alexander (n 6) para 12.32 (unincorporated associations). Also see section 189 Charities Act 2011, which gives trustees the power to use the charity's funds to purchase insurance to indemnify the trustees in certain situations.

9. Charities Act 2011, sections 69, 76(3)(c), 90 and 91.

10. Alexander (n 6) para 2.65.

11. Henderson and Fowles (n 6) para 6-051.

12. For example, Companies Act 2006, sections 854–858, and Charities Act 2011, section 169.

13. https://www.gov.uk/government/collections/accruals-accounts-pack-cc17-sorp-frs-102-for-charitable-companies.

In summary, incorporation can give both practical and personal advantages to trustees, and those advantages often outweigh the disadvantages of the incorporation process.

The power to incorporate

Trustees and their advisers should consider two key questions when deciding whether to incorporate a charity[14]:

1. Do the trustees have the power to transfer all of the unincorporated charity's assets to an incorporated charity?
2. If so, how should the trustees effect that transfer?

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This section will deal with the first question and the next section will deal with the second question. In short, there are multiple options at both stages.

An express power to incorporate

'There will usually be a power in the governing document or an implied power to transfer assets and undertakings to another charity.'[15] In practice, such a clause may permit the trustees to transfer the unincorporated charity's assets to a newly established incorporated charity. As explained above, this is in effect a 'power to incorporate'.

Frequently, the express power will be found in the dissolution clause. For example, clause 32(1) of the Charity Commission's model trust deed provides[16]:

> The trustees may dissolve the charity if they decide that it is necessary or desirable to do so. To be effective, a proposal to dissolve the charity must be passed at a special meeting by a two-thirds' majority of the trustees. Any assets of the charity that are left after the charity's debts have been paid ('the net assets') must be given:
>
> a. to another charity (or other charities) with objects that are the same or similar to the charity's own, for the general purposes of the recipient charity (or charities); or
> b. to any charity for use for particular purposes which fall within the charity's objects.

However, it is not always entirely straightforward or even possible to use a dissolution clause to incorporate an unincorporated charity. For example, if the governing document only permits the trustees to wind up the charity if its purposes can no longer be carried out, then the trustees are unlikely to be able to use that clause to transfer the charity's assets to an incorporated charity that intends to operate in the same way in the same area. This would likely be a misuse of the dissolution power. Furthermore, even if the dissolution clause is applicable, the governing document may also require the trustees to pass a resolution with a special majority and/or give prior notice to certain people (e.g. the inhabitants of the village served by the charity).

In summary, in many cases, the trustees may have a suitable power in their governing document which would allow them to incorporate the charity. However, trustees should be alive to any restrictions in the relevant clause(s).

The power to apply funds

Alternatively, '[i]n many, and possibly most, cases the trustees will be able to transfer the assets of their unincorporated charity in furtherance of the charity's

14. Henderson and Fowles (n 6) para 21-007.
15. Charity Commission Operational Guidance 715-4, section B3.2.
16. Also see clause 6 of the Charity Commission's Model Constitution for charitable unincorporated associations.

objects.'[17] If this is possible, then the trustees can avoid the more onerous requirements which apply if the statutory power[18] is used.

However, it is submitted that trustees should be cautious about using this method to incorporate a charity. First, the Charity Commission has explicitly warned trustees against applying funds purely 'to avoid using the dissolution clause or another more appropriate power in the governing document'.[19] Second, it is submitted that trustees could only apply funds in this way if the governing document allows them to make grants to other charities (usually with the same or similar purposes). Third, the governing document may still require the trustees to take certain steps, such as giving notice or passing a resolution by a special majority, before they can apply *all* of a charity's assets. If trustees act contrary to any of these principles, they risk being personally liable for a breach of duty.

In summary, while it is possible to use the power to apply funds to facilitate an incorporation, this will in many cases be an inherently risky course of action.

Sections 267–274 charities act 2011

If the governing document does not provide a reliable answer, then the trustees will need to look to external sources. Section 268(1) Charities Act 2011 is in the following terms:

> The charity trustees of a charity to which this section applies (see section 267) may resolve for the purposes of this section—
>
> a. that all the property of the charity should be transferred to another charity specified in the resolution, or
>
> b. that all the property of the charity should be transferred to two or more charities specified in the resolution in accordance with such division of the property between them as is so specified.

This is the statutory equivalent of the express power to apply funds which were discussed in the subsection above. However, the statutory power is subject to a number of qualifications. In summary, trustees may only pass such a resolution if all of the following criteria are met:

1. The transferring charity ('the transferor') must be unincorporated[20];
2. The transferor must have had a gross income of £10,000 or less in the last financial year (unless the recipient is a charitable incorporated organisation, in which case there is no financial limit)[21];
3. The trustees must be satisfied that the transfer is 'expedient in the interests of furthering' the transferor's purposes[22];
4. The transferor and the incorporated charity must have sufficiently similar purposes. The required degree of similarity depends on the nature of the property held by the transferor:
   a. If the transferor holds permanent endowment,[23] then the incorporated charity must have purposes that are 'substantially similar' to *all* of the transferor's purposes[24]; or
   b. If the transferor does not hold permanent endowment, then the incorporated charity must have purposes which are 'substantially similar' to *any* of the transferor's purposes[25]; and
5. The transferor must not hold 'designated land' (that is, land which is held on trusts which stipulate that it is to be used for some or all of the

17. Charity Commission Operational Guidance 715-4, section E2.
18. See the subsection below.
19. Charity Commission Operational Guidance 715-4, section B3.2.
20. Charities Act 2011, section 267(1)(c).
21. Charities Act 2011, sections 267(1)(a) and 267(2).
22. Charities Act 2011, secion 268(3)(a).
23. That is, *'property of the charity (including land, buildings, cash or investments) which the trustees may not spend as if it were income*': Charity Commission Operational Guidance Glossary.
24. Charities Act 2011, sections 267(3) and 274(3).
25. Charities Act 2011, section 268(3)(b).

charity's purposes—for example, a village hall, a school or an almshouse).[26]

If these conditions are all satisfied, then the trustees may pass a resolution under section 268 by a two-thirds majority.[27] The trustees must then send the resolution to the Charity Commission along with a statement of their reasons for passing it.[28] At that point the Charity Commission will do one of three things: (a) outright accept or reject the resolution; (b) ask the trustees for more information; or (c) require the trustees to give public notice of the resolution and invite representations.[29]

Importantly, a section 268 resolution does not come into effect immediately. The default rule is that the resolution will only take effect 60 days after the Charity Commission receives it.[30] However, time is suspended in two situations:

i. If the Charity Commission asks for more information, time does not run between the date on which the request for information was given and the date on which that information is provided.[31] This is likely to add at least a week to the timescale.
ii. If the Charity Commission requires the trustees to give public notice, then time is suspended between the date the direction is given and 42 days after the notice goes live.[32] This is likely to add at least eight weeks to the timescale.

Trustees should not delay when responding to the Charity Commission or complying with its directions. A section 268 resolution will lapse (i.e. be treated as if it was never passed) if any period(s) of suspension exceed 120 days.[33] In short, if the trustees delay for too long they could be required to go through the entire process again.

In summary, while on its face section 268 provides a fallback option for trustees who wish to incorporate their charity, the statutory hurdles mean it is not a straightforward process. As a result, the Law Commission has recommended that the section 268 procedure be abolished in favour of a more generous rule on amending governing documents to introduce the power to incorporate.[34] The Government has accepted this recommendation,[35] and has introduced a draft Charities Bill which will repeal sections 267-280 Charities Act 2011 and replace them with a wider power to amend the governing document Charities Bill 2021, clause 3. Practitioners and trustees should expect the Bill to become law within the next year.

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A scheme

The vast majority of cases are covered by the three options outlined above. Nevertheless, it is possible for trustees to find that all three routes are blocked. For example, this may occur if the governing document lacks an express power to incorporate and does not permit the application of all of the charity's funds to another charity, and the charity holds designated land. In that situation, the trustees would need to ask the Charity Commission to make an administrative scheme to vary the charity's governing document to introduce a power to incorporate.[36]

26. Charities Act 2011, section 267(1)(c).
27. Charities Act 2011, section 268(4).
28. Charities Act 2011, section 268(5).
29. Charities Act 2011, section 269.
30. Charities Act 2011, section 270.
31. Charities Act 2011, section 271(5).
32. Charities Act 2011, section 271(4).
33. Charities Act 2011, sections 271(6)–271(7).
34. Law Commission, *Technical Issues in Charity Law* (Law Com No 375, 2018), chapter 4 and paras 11.44–11.49.
35. https://www.gov.uk/government/publications/government-response-to-law-commission-report-on-technical-issues-in-charity-law/government-response-to-the-law-commission-report-technical-issues-in-charity-law.
36. Charities Act 2011, section 69(1)(a).

The Charity Commission has provided detailed guidance on when it will make an administrative scheme.[37] In summary, the trustees will need to show three things:

1. The change is 'expedient in the interests of the charity';
2. There is no other easier option open to the trustees to achieve incorporation; and
3. The trustees have consulted their stakeholders before applying for a scheme.[38]

When applying for a scheme, trustees should clearly explain why they currently lack the power to incorporate, why they wish to incorporate, and what steps they have taken to consult the charity's stakeholders. Similar to the section 268 resolution process, the Charity Commission may require the trustees to give public notice of the proposed scheme and invite representations.

Amending the governing document to introduce a power to incorporate

Section 280(2) gives trustees of unincorporated charities the power to:

> resolve for the purposes of this section that any provision of the trusts of the charity—
> a. relating to any of the powers exercisable by the charity trustees in the administration of the charity, or
> b. regulating the procedure to be followed in any respect in connection with its administration,
> should be modified in such manner as is specified in the resolution.

Trustees and their advisers may wonder if this is a simple shortcut to reaching an express power to incorporate. Unfortunately, this does not appear to be possible at present. The Charity Commission has confirmed that section 280 cannot be used to 'alter how the charity's property can be distributed on dissolution' or 'allow permanent endowment to be spent'.[39] As a result, trustees are rightly cautious about attempting to use section 280 to amend or circumvent any unhelpful dissolution clauses in the governing document.

However, as explained above,[40] the Government has accepted the Law Commission's proposal to expand the scope of the statutory power of amendment. Therefore, trustees and their advisers should anticipate a change in the coming year.

Transferring the charity's assets to the incorporated charity

Once the trustees have determined that they have the power to incorporate the charity, they should turn their minds to the mechanics of incorporation.

The first step to take is to create the receiving charity, whether that is a charitable incorporated organisation or a company limited by guarantee. Once the incorporated charity has been established, the trustees can start to think about the transfer of assets. Again, trustees have multiple options.

A bespoke transfer deed

'[I]t is generally simpler to have a tailored transfer agreement covering all that needs to be dealt with specifically.'[41] Fortunately, even if charity land is being transferred, the trustees are unlikely to need to go through the process outlined in sections 119–121 Charities Act 2011. As section 117(3) confirms:

> nothing in this section or sections 119 to 121 applies to. . .
> (c) any disposition of land held by or in trust for a charity which—

37. See, for example, its Operational Guidance 500.
38. Charity Commission Operational Guidance 500, sections B4.1 and B4.2.
39. Charity Commission Operational Guidance 519, section B5.3.
40. See text to footnotes 34 and 35.
41. Law Commission, *Technical Issues in Charity Law* (Law Com No 375, 2018), para 11.21, quoting Francesca Quint of Radcliffe Chambers.

i. is made to another charity otherwise than for the best price that can reasonably be obtained, and
ii. is authorised to be so made by the trusts of the first-mentioned charity. . .

Nevertheless, there is always scope for error in a bespoke deed. This risk is exacerbated if the charity cannot afford or does not want to pay for legal advice. In those situations, the trustees may wish to rely on one of the following alternatives.

A pre-merger vesting declaration

Pre-merger vesting declarations were introduced into charity law by section 44 Charities Act 2006 and are essentially the charity law equivalent of a vesting deed under section 40 Trustee Act 1925. In summary, the trustees of the unincorporated charity make a declaration by deed that from a specified date all of the charity's property is to vest in the incorporated charity. If all of the relevant criteria are met, then the transfer happens automatically.

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While it may be straightforward to describe what a pre-merger vesting declaration is, it is a little more complicated to explain when charity trustees can use one. The starting point is the meaning of 'relevant charity merger' in section 306(1) Charities Act 2011:

In this Part 'relevant charity merger' means—
a. a merger of two or more charities in connection with which one of them ('the transferee') has transferred to it all the property of the other or others, each of which (a 'transferor') ceases to exist, or is to cease to exist, on or after the transfer of its property to the transferee, or
b. a merger of two or more charities ('transferors') in connection with which both or all of them cease to exist, or are to cease to exist, on or after the transfer of all of their property to a new charity ('the transferee').

The first situation covers most incorporations.[42] If a proposed incorporation falls within that definition, then the trustees may make a declaration by deed under section 310 Charities Act 2011 that all of the charity's property will vest in the recipient charity on a specified date. Helpfully, the Charity Commission has produced a model vesting declaration for just such a situation.[43]

One of the main advantages of using a pre-merger vesting declaration is that once the 'merger' (i.e. incorporation) is registered most gifts that are expressed to be to the unincorporated charity will automatically take effect as gifts to the incorporated charity.[44]

However, there are five important caveats to the scope of pre-merger vesting declarations.

First, a pre-merger vesting declaration does not automatically transfer: (a) land which is held as security; (b) any lease which contains a covenant against assignment (unless consent has been obtained from the landlord[45]); or (c) any property which is only transferrable in books held by another body as required by legislation (e.g. shares).[46]

Second, a vesting declaration cannot transfer the unincorporated charity's liabilities.[47]

Third, a charity cannot use a vesting declaration to transfer any permanent endowment *unless* the recipient is a charitable incorporated organisation.[48] If the recipient is a company limited by guarantee, the company will likely hold the permanent endowment on trust for

42. Charity Commission Operational Guidance 60, section A2.
43. https://www.gov.uk/guidance/how-to-transfer-charity-assets#how-to-transfer-an-unincorporated-charitys-assets.
44. Charities Act 2011, section 311(2). However, this does not apply to gifts to the permanent endowment of the unincorporated charity: section 311(3).
45. It is not settled whether a vesting declaration takes effect if the lease contains an *absolute* covenant against assignment: Law Commission, *Technical Issues in Charity Law* (Law Com No 375, 2018), para 11.55. It is submitted that this is not a problem because a pre-merger vesting declaration does not breach *any* anti-alienation clauses: Charities Act 2011, section 313.
46. Charities Act 2011, section 310(3).
47. Law Commission, *Technical Issues in Charity Law* (Law Com No 375, 2018), para 11.57. The position is different where two charitable incorporated organisations merge: Charities Act 2011, sections 239(2) and 244(1)(b).
48. Charities Act 2011, section 312(1)(b), Charitable Incorporated Organisations (General) Regulations 2012, SI 2012/3013, reg 61. However, the permanent endowment must still be held on '*the same trusts, so far as is reasonably practicable, on which the property was held immediately before the*' transfer: reg 61(2)(b).

the unincorporated charity.[49] In practice, this means that the unincorporated charity could not be dissolved after the transfer of assets.

Fourth, transfers of land must still be registered at the Land Registry. Therefore, the trustees should execute the appropriate Land Registry form(s) as well as the pre-merger vesting declaration.[50]

Fifth, the trustees must inform the Charity Commission of the transfer.[51] Although statute states that notice 'may be given... at any time after... the transfer', the Charity Commission has confirmed that it will accept a conditional notification *before* the anticipated transfer date.[52] This will ensure that the merger (i.e. incorporation) can be registered on the day of the transfer. In practice, it is therefore advisable for trustees to notify the Charity Commission as soon as the vesting deed and any Land Registry forms are executed. Once the Charity Commission has been notified, it will record the incorporation on the register of charity mergers.[53]

In summary, pre-merger vesting declarations provide a useful statutory back up for trustees wishing to transfer all of a charity's assets on incorporation. However, there are several important caveats that restrict when they can be used, so trustees should not assume that this process will always work.

A vesting order

If none of the options above are open, the trustees could invite the Charity Commission to make a vesting order under section 69(1)(c) or section 272(4) Charities Act 2011. In theory, this power is unlimited in width.[54] However, in practice, the Charity Commission will only make an order in exceptional circumstances.[55] For example:

- The charity cannot execute a transfer because the holding trustees no longer exist[56];
- The cost of instructing solicitors would wipe out the assets of the transferring charity[57];
- The transferring charity is particularly large[58]; or
- The trustees hold a lease for the charity and the cost or difficulty of obtaining the landlord's consent to an assignment would be disproportionate.[59]

A scheme

If the Charity Commission will not make a vesting order, the trustees could instead invite it to make a scheme that directs that assets shall be transferred or vested in the incorporated charity on a specified day.[60]

This is most likely to be appropriate if the unincorporated charity holds designated land or 'functional permanent endowment',[61] or a scheme is the only way in which the trustees can acquire the power to incorporate in the first place. In either of those situations, it may make sense for the trustees to invite the Charity Commission to create the power and order the transfer in one document. The process of applying for a scheme in this context is briefly discussed above.[62]

An order from the charity commission

The final option for transferring assets is to apply to the Charity Commission for an order under section 105

49. This was doubted in Law Commission, *Technical Issues in Charity Law* (Law Com No 375, 2018), paras 11.41–11.43.
50. *Ruoff and Roper: Registered Conveyancing*, para 38.018.01.
51. Charities Act 2011, section 307(1).
52. Charity Commission Operational Guidance 60, section A10.
53. Charities Act 2011, sections 305 and 308.
54. Law Commission, *Technical Issues in Charity Law* (Law Com No 375, 2018), para 11.28.
55. Charity Commission Operational Guidance 519, para B2.5.
56. *Ibid.*
57. *Ibid.*
58. G Dawes and others, *Jordan's Charities Administration Service*, Document O1, para [54].
59. See the letter dated 22 February 2013 from the Chief Legal Adviser to the Charity Commission to the Chair of the Charity Law Association, available on Practical Law. A vesting order does not breach an anti-alienation clause: Charities Act 2011, section 116, and *Marsh v Gilbert* [1980] 2 EGLR 44 (Ch), 47 (Nourse J).
60. Charities Act 2011, section 67(2) or 69(1). Cf *Bartley v Charity Commissioners* (First-tier Tribunal (Charity) (General Regulatory Chamber), 21 July 2014), [32] (Judge Jonathan Holbrook).
61. *Oldham Borough Council v AG* [1993] Ch 210 (CA), 222 (Dillon LJ); Charity Commission Operational Guidance 548, section B5.
62. See text to n 37 and n 38.

Charities Act 2011. This appears to be the least common method for effecting the transfer, but it has been known to happen.

In summary, the Charity Commission will only make an order if it is satisfied with five things[63]:

1. The trustees cannot make the transfer themselves using either an express power, an implied power, or a power of amendment;
2. There is no more efficient, effective or economic way of dealing with the matter (e.g. by the Charity Commission giving advice to the trustees under section 110 Charities Act 2011 or treating the transaction as 'de minimis');
3. Making an order 'would be expedient in the interests of the charity' (i.e. 'the decision of the trustees to take the proposed action is within the range of decisions which a reasonable body of trustees might make');
4. The action is not expressly prohibited by the charity's governing document; and
5. The order would not allow the trustees to do anything to extend or alter the charity's purposes.

In practice, the second condition outlined above is likely to be problematic in most cases because, as described above, the trustees could have up to four other options open to them to transfer the assets to the incorporated charity. Nevertheless, if all five conditions are satisfied, then the Charity Commission may make an order for the transfer of assets. As with vesting orders and pre-merger vesting declarations, the order would not breach any anti-assignment clauses in any leases which the charity holds.[64]

Conclusion

The incorporation of unincorporated charities is a common yet rarely described misnomer. This article has sought to shed some light on the process. It has explained why trustees of unincorporated charities may wish to incorporate, when they will have the power to incorporate and how they can transfer the charity's assets to the new incorporated charity.

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63. See generally Charity Commission Operational Guidance 501, sections B2.2–B2.7.
64. Charities Act 2011, section 116.