

## Clinks/Women's Breakout Working Group, 22 May 2017

### Transfer of Assets & Liabilities

#### 1. Introduction

This paper presents the second draft transfer of assets documentation for consideration by the Working Group and the two organisations. Agreement on transfer of assets and liabilities from Women's Breakout to Clinks is an essential part of the merger process. This draft documentation needs to be seen by all parties in the context of the detailed agreements reached by the Working Group, regarding future operations.

Trustees in both organisations should read this documentation carefully and raise any queries they might have at the earliest possible stage. There is some further guidance on the draft agreement at the end of this paper.

#### 2. Considerations

**Points in the text to be completed** – readers will note that there are several specific points in the text to be completed. These include:

- Transfer date – Subject to confirmation, I understand this to be at midnight on 28 July 2017
- Names, registration details and addresses of the Transferor and the Transferee
- Establishing which accounts of Women's Breakout will be referred to
- Details of assets to go from the Transferor to the Transferee
- Names and addresses of the Transferor Trustee Board

**Confirmation of points since first draft** – reference has been removed to employees and pensions as no staff will be transferring. Clauses on these points that would otherwise have been included have been left blank. In line with the findings of the due diligence exercise, confirmation has been given that:

- Trust property does not apply
- Subject to further agreement, it is expected that laptops and mobiles owned currently by Women's Breakout will pass to its employees prior to the transfer date
- There are no investments of Women's Breakout to be taken into consideration
- There are no premises, freehold or leased, to be considered in this transfer
- There is no trading company or any shares
- There is no permanent endowment for Women's Breakout
- There are no Software Rights that apply
- It is up to Lucy Baldwin to consider where she wishes to pass the royalties of her book 'Mothering Justice'

**Signatories:** Each Board will need to agree their two signatories to the merger agreement. Most commonly, the signatories tend to be the Chair and the Treasurer.

Agreement to this documentation is **only part of the merger process**. Women's Breakout will still need to adopt by Special Resolution in a General Meeting the proposal to transfer its assets and liabilities to Clinks.

Hilary Barnard  
16 May 2017

**Date:**

**2017**

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**(1) [Women's Breakout]  
and  
(2) [Clinks]**

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**MERGER AGREEMENT**

**Merger of Women's Breakout and Clinks**

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	amendment or re-enactment thereof;
“Assets”	all property, title, rights and other assets of the Transferor at the Transfer Date, as listed in Schedule 2;
“Beneficiary Grants”	all grants awarded by the Transferor;
“Cash”	all net cash assets of the Transferor;
“Charitable Objects”	the charitable objects of the Transferor;
“Charitable Undertaking”	the Assets, the Liabilities, the operations and activities of the Transferor collectively as a going concern;
“Charity Trustees of The Transferor”	the individuals whose names and addresses are set out in Schedule 1 in their capacity as the trustees and directors for the time being of the Transferor;
“Contracts”	all current contracts and residual contractual commitments and obligations of the Transferor, excluding the Employee Contracts;
“Debts”	all debts owed to the Transferor at the Transfer Date;
“Equipment”	all equipment, furniture, furnishings, stock and other personal property of the Transferor;
“Excluded Liabilities”	all liabilities of the Transferor (if any) arising as a result of any act or omission of any of the Trustees of the Transferor, which such trustee(s) knew to be a breach of trust or breach of duty, or in respect of which such trustee(s) recklessly disregarded whether such act or omission was a breach of trust or breach of duty or not;
“Funding Commitments”	All grants, (non-contractual) funding agreements, covenants, legacies (including legacies taking effect after the Transfer Date) and other funding commitments of which the Transferor has the benefit;

“Further Indemnity”	the further indemnity in respect of Excluded Liabilities provided by the Transferee to the Charity Trustees of the Transferor under Clause 5;
“Goodwill”	the goodwill of the Transferor in relation to the Charitable Undertaking, including the exclusive right to carry on the Charitable Undertaking and be recognised as the successor charity to The Transferor;
“Indemnity”	the indemnity in respect of the Liabilities provided by the Transferee to the Transferor under Clause 4;
“IP Rights”	all rights to use the names, logos, marks and domain names, and all copyrights, database rights, know-how and other intellectual property rights of the Transferor;
“Liabilities”	all liabilities of the Transferor [except the Excluded Liabilities];
“Special Conditions”	any conditions requiring any Assets to be applied towards particular purposes within the Charitable Objects;
“Subscriptions”	all membership subscriptions received from existing or prospective members of the Transferor in relation to the period prior to the Transfer Date;
“Transfer”	the transfer of the Charitable Undertaking from the Transferor to The Transferee pursuant to this deed;
“Transfer Date”	midnight on 28 July 2017;
“The Transferor Warranties”	the warranties in respect of the Charitable Undertaking provided by the Transferor to the Transferee under Clause 6 and set out in Schedule 5;
“The Transferee Warranties”	the warranties in respect of the future application of the Assets provided by the Transferee under Clause 3;

“VAT Act”

the Value Added Tax Act 1994.

## **2. Transfer of Assets**

In consideration for the Transferee Warranties, the Indemnity and the Further Indemnity, the Transferor hereby:

2.1 agrees to transfer to the Transferee, as from the Transfer Date, such of the Assets in respect of which no further formalities are required to effect such transfer;

2.2 undertakes to transfer to the Transferee, on or as soon as reasonably practicable after the Transfer Date, such of the Assets in respect of which further formalities are required to effect such transfer.

## **3. The Transferee Warranties**

To ensure that the Charity Trustees of the Transferor have acted properly and reasonably in judging that the Transfer is in the best interests of the Transferor, the Transferee hereby warrants to the Transferor that the Transferee shall apply the Assets in pursuance of the Charitable Objects and shall apply all Assets which are subject to Special Conditions in accordance with such Special Conditions.

## **4. Undertakings and Indemnity in respect of the Liabilities given by the Transferee**

Subject to clause 6 and in consideration for the Transfer of Assets and the Transferor Warranties, the Transferee undertakes to the Transferor, from the Transfer Date, to be responsible for and to promptly discharge all the Liabilities and the Transferee shall indemnify and hold harmless the Transferor against any liabilities arising in respect of any breach or non-performance of such undertaking.

## **5. Further Indemnity in respect of the Excluded Liabilities given by the Transferee**

Subject to clause 6 and in further consideration for the Transfer of Assets and the Transferor Warranties, the Transferee shall indemnify and hold harmless each of the Charity Trustees of the Transferor not criminally or knowingly or recklessly responsible for any Excluded Liabilities against such Excluded Liabilities.

6. The aggregate amount of all claims under the indemnities given by the Transferee under clauses 4 and 5 shall not exceed the value of the assets transferred pursuant to this deed.

7. **The Transferor Warranties**

To ensure that the charity trustees of the Transferee have acted properly and reasonably in judging that the Transfer is in the best interests of the Transferee, the Transferor hereby provides the Transferor Warranties to the Transferee.

8. In the event that the Transfer Date occurs after the date of this deed the Transferor shall be deemed to repeat the Transferor Warranties on the Transfer Date, except as disclosed to the Transferee prior to the Transfer Date.

9. **Contracts**

Where the benefit of a Contract cannot be assigned to the Transferee without the consent of a third party or except by an agreement of novation:

- 9.1 the Transferor and the Transferee shall use their reasonable endeavours to obtain any such consents or novation;

- 9.2 unless and until any such consent is obtained or any such novation is effected the Transferee will, to its own benefit, perform on behalf of the Transferor (at the Transferee's expense) all the obligations of the Transferor in relation to such Contract;

- 9.3 to the extent that the terms of the Transfer may or will result in any breach of the provisions of a relevant Contract, the Transferor shall take responsibility for any such breach and any liabilities arising from it shall be covered by the Indemnity.

10. **Funding Commitments and Subscriptions**

The Transferor and the Transferee shall use their reasonable endeavours to procure that any necessary consents and/or novations required to provide the benefit of Funding Commitments and Subscriptions to the Company are obtained, or effected, in liaison with the relevant third parties.

11. **Beneficiary Grants**

The Transferee shall perform all the obligations of the Transferor under

the terms of the Beneficiary Grants.

12. [leave blank]

13. [leave blank]

14. [leave blank]

15. [leave blank]

### **Completion**

16. On the Transfer Date, completion of the Transfer shall take place and The Transferor shall deliver to the Transferee:

16.1.1 the tangible Assets referred to in Schedule 2;

16.1.2 copies of all required consents obtained in respect of the transfer of Assets;

16.1.3 all further transfers, assignments and other documents necessary to perfect the transfer of all the Assets other than Assets passing by physical delivery, in such form as the Transferee may reasonably request, together with all available documents of title relating to such Assets;

16.1.4 all other material books, records and documents of the Transferor, relating to the Charitable Undertaking.

16.2 As soon as reasonably practicable following the Transfer Date the Transferee shall notify all necessary third parties in writing of the completion and effect of this Transfer, including (as applicable) donors, funders, accountants, banks, insurers, contractors, third parties and volunteers.

17. [leave blank]

18. [leave blank]

19. **Further Assurance**

The Transferor and Transferee shall do and execute, and shall use their respective best endeavours to procure that any other necessary parties do and execute all such further acts, things, deeds and documents as may be necessary to give effect to the terms of this agreement.

20. **Insurance**

20.1 The Transferor undertakes to Transferee that the interest of the Transferee will be notified to the relevant insurers and the Transferor shall seek to transfer the benefit of existing insurance policies to the Transferee.

20.2 The Transferee will use its reasonable endeavours to ensure the policies of insurance effected by it cover the liability of the Transferor as well as that of the Transferee.

21. **Access to Records**

The Transferee shall provide reasonable access to records of the Transferor which are transferred under this agreement upon reasonable request.

22. **Attorney**

The Transferor appoints the Transferee as attorney for it (but at the sole cost and risk of the Transferee) to collect, ask, demand, sue for, recover and receive, assign, give full effectual receipts and discharge of all debts, assets, property, estate and effects owing or belonging to the Transferor and to settle all accounts of any nature relating to them and compound or release all or any debts or claims belonging to the Transferor and institute any actions or other proceedings compelling payment, discharge or delivery of them.

23. **Notices**

All notices in relation to this agreement shall be in writing and shall be deemed to have been duly given if personally delivered, faxed, or mailed (first class postage pre-paid) to the address of the relevant party, as referred to above or otherwise notified in writing. If personally delivered or if faxed all such communications shall be deemed to have been given when received (except that if received on a non-working day or after 5 pm on any working day they shall be deemed received on the next working day) and if mailed all such communications shall be deemed to have been given and received on the second working day following such mailing.

24. **Variation**

No variation of this deed shall be effective unless made in writing signed by or on behalf of the parties.

25. **Entire Agreement**

This deed, together with any other agreements or documents referred to in it, comprises the whole agreement between the parties in relation to the transfer of the Charitable Undertaking and supersedes all other prior written or oral agreements.

**26. Rights of Third Parties**

No person who is not a party to this deed shall have any right to enforce any of its provisions and the Contracts (Rights of Third Parties) Act 1999 is excluded from it.

## **Schedule 1**

**Names and addresses of the Charity Trustees of the Transferor  
[to be inserted]**

## Schedule 2

### Assets

The following assets so far as they are not Trust Property:

1. the Cash;
2. the Debts;
3. the IP Rights;
4. the Goodwill;
5. the benefit (subject to the burden) of the Contracts;
6. the benefit (subject to the burden) of the Funding Commitments;
7. all other assets (if any) of whatever nature owned by the Transferor **at the Transfer Date.**

### **Schedule 3**

**[Leave blank]**

**Schedule 4**

**[leave blank]**

## Schedule 5

### The Transferor Warranties

1. All outstanding liabilities of the Transferor in relation to the Charitable Undertaking and relating to the period prior to the Transfer Date have been duly settled by the Transferor or have been disclosed to the Transferee.
2. At the Transfer Date the Transferor owned absolutely all its assets (incorporating without limitation the IP Rights), except as disclosed to the Transferee.
3. At the Transfer Date no third party had any rights whether as licensee or otherwise in respect of any of the IP Rights.
4. From the Accounts Date to the Transfer Date the Transferor continued the Charitable Undertaking in the ordinary and normal course and did not do or omit to do anything which might have materially and adversely affected the standing or reputation of the Transferor or the Transferee willingness to enter into this deed.
5. At the Transfer Date the Transferor was not engaged in any litigation or arbitration proceedings as plaintiff or defendant and there were no such proceedings pending or threatened either by or against the Transferor and there were no facts which were likely to give rise to any litigation or arbitration, except as disclosed to the Transferee.
6. At the Transfer Date there was in respect of the Transferor no outstanding guarantee or agreement for indemnity or for suretyship by or for the accommodation of the Charitable Undertaking otherwise than as given by the Transferor.
7. At the Transfer Date the Transferor was not involved in any contract of an unusually onerous nature.
8. The accounts to the Accounts Date:
  - (i) give a true and fair view of the financial position of the affairs of the Transferor and the Charitable Undertaking in all respects;
  - (ii) comply with the then current statements of recommended accounting practice applicable to an English corporate charity;

- (iii) fully disclose all the assets and liabilities (including contingent, unquantified or disputed liabilities) of the Transferor as at the Accounts Date.

9. The Transferor is not registered for VAT purposes.

**In witness whereof** this agreement has been executed as a deed by the parties and delivered by them on the date shown above.

EXECUTED as a deed by )  
[The Transferor] )  
by: )

.....  
**Director**

.....  
**Witness/ Second Director/Company Secretary**

EXECUTED as a deed by )  
[The Transferee] )  
by: )

.....  
**Director**

.....  
**Witness/ Second Director/Company Secretary**

## Note on particular clauses

Clause	Explanation
3	The Transferee (receiving) warrants (i.e. provides an enforceable contractual promise) that any assets held by the Transferor (transferring) as <b>restricted funds</b> will continue to be held for those restricted purposes by the Transferee following the merger. The accounts of the Transferor should indicate whether any funds are held for restricted purposes.
4	The Transferee agrees to be responsible for all liabilities of the Transferor after the date of transfer and indemnifies the Transferor (i.e. promises to meet any costs incurred or losses suffered by it) against any breach of this agreement. This indemnity is provided to the Transferor itself, as a separate legal entity, and not to the individual trustees of the Transferor.
5	In almost all cases liabilities of the Transferor will be liabilities incurred by the Transferor as a company and not liabilities of the individual trustees. However, no charity trustee can avoid personal liability for losses arising from actions or omissions of the trustees which were in breach of trust where they knew they were in breach of trust or acted recklessly or criminally. The Transferee cannot therefore indemnify the trustees of the Transferor for such losses and these liabilities are excluded from the transfer (defined as "Excluded Liabilities" in clause 1). Clause 5 protects innocent trustees of the Transferor in the unlikely event that any liabilities come to light after completion which resulted from a deliberate, reckless or criminal breach of trust where the other trustees have acted without the knowledge of the innocent trustees.
6	The total liability of the Transferee under the indemnities in clauses 4 and 5 is limited to the value of the assets that it is receiving from the the Transferor.
7	The Transferor provides the warranties set out in <b>Schedule 5</b> . These warranties are contractual statements given by the Transferor on which the trustees of the Transferee will rely when deciding to approve the merger. The trustees of the Transferee <b>should review these statements carefully</b> : have all matters been disclosed? Are these statements true and accurate?

### Contracts

9, 10, and 11 The general legal principle is that, subject to the terms agreed between the parties, only the benefit of a contract can be transferred (or 'assigned') to a third party without the consent of the other party or parties to the contract.

To transfer an obligation (also called 'the burden') under a contract to a third party requires either the contractual right to make such a

transfer or the consent of all existing parties to the contract. This process of obtaining consent is often called 'novation'.

The extent of the contractual liabilities of the transferring organisation must be assessed. This will involve drawing up a list of all the current contracts of Women's Breakout. These may include:

- loan agreements
- funding agreements
- equipment leasing - for example photocopiers, telephone equipment
- hire purchase
- service contracts - for example computer maintenance or cleaning services
- supply contracts - for example stationery

The terms and conditions of significant contracts and all funding agreements should be reviewed to determine whether they contain a clause permitting assignment to a third party (i.e. the receiving organisation) with or without the other party's consent, or whether assignment is prohibited.

Notice should be given to each contractor of the proposed merger giving details of the merged organisation which will take the benefit (subject to the burden) of the contract and the date of the transfer.

The vast majority of ordinary contractors will require no further action. Occasionally contractors may seek to charge a fee for agreeing to the assignment. Any fee proposed above a reasonable administrative charge should be resisted.

Major contractors, for example funders, are likely to require a formal novation to be entered into between the funder, the transferring organisation and the merged organisation.

15 Clause 15 deals with any property, such as permanent endowment, that is held by the Transferor on separate trusts and not as part of its corporate property. This will have to be transferred to the Transferee to be held by it on trust unless the trusts can be terminated and the assets donated to the Transferee. Permanent endowment trusts cannot be terminated in this way and so a transfer of trusteeship will always be needed in relation to such property. This will require a Charity Commission scheme.

16 This clause sets out what actually happens on the transfer date.

22 Clause 22 appoints the Transferee attorney (agent) for the trustees of the Transferor so the Transferee should be taking all actions that are necessary after the merger and the Transferor does not need to do

anything. This is because the Transferor will have transferred as much as it can on the transfer date, so is likely to have insufficient resources to do anything further and in any case is likely to be dissolved in due course.

26

Clause 26 provides that no one who is **not a party** to the agreement may sue on its terms.

The merger agreement must be executed by each charitable company limited by guarantee either by:

Execution  
clauses after  
Schedule 5

- two directors / trustees; or
- one director / trustee and the company secretary; or
- one director and an independent witness who witnesses the director's signature.