

Establishing a Community Shop on the Isle of Tiree

Report 2: Acquisition Guidance

Prepared for Tiree Community Development Trust

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Introduction

1. I & F MacLeod General Store, one of only two general food stores on the Isle of Tiree, has been on the market for over 2 years. The owners of the business wish to retire. In June 2013, island residents voted to give Tiree Community Development Trust (referred to as “the Trust” in this report) a mandate to look into the feasibility and viability of purchasing the shop and operating it as a community shop. In October 2013, the Trust commissioned Allanpark Consultants Ltd to undertake a feasibility study to help inform the Trust’s decision on how best to proceed with this potential business acquisition.
2. Midway through the feasibility study, another potential buyer entered into exclusive negotiations with I & F MacLeod, the business owners. At this point, the Trust decided to step back from a full feasibility study and consequently altered the focus of our commission. This new focus was to produce two reports, one focusing on the market research and community consultation and the other on bespoke guidance for the Trust. This report focuses on the guidance. A separate report deals with the research.
3. It is expected that this guidance, while shaped by the potential opportunity to purchase MacLeod General Store (referred to as “MacLeod’s” in this report), would also be useful in terms of any other, or future, opportunity for business acquisition. This means that at times the report is specific (i.e. it refers to the potential acquisition of McLeod’s) and at times it is more general (i.e. it refers to business acquisition in general terms).
4. We now understand that the business owners, having failed to secure a buyer for the business, have announced their intention to cease trading. At this stage it is therefore not clear whether there is still a business to sell (i.e. a going-concern) or whether there are physical assets for sale (e.g. buildings, land and stock). We have therefore tried to ensure that wherever practical, this report covers all eventualities.
5. This report is structured in two parts:-

PART 1 sets out our guidance for business acquisition in general. Where appropriate we have referred to the potential acquisition of MacLeod’s or the specific context of Tiree.

PART 2 is a series of appendices where we offer some samples of the key documents used in a business acquisition process. We have also provided a glossary for some of the key terms.

PART 1: GUIDANCE

Section 1: Process overview

- 1.0 When we started this study, the idea was to buy an existing business, i.e. MacLeod's. Now that the owners of MacLeod's have announced that they intend to cease trading, the community may decide to purchase the building from where MacLeod's operated, or it may decide to purchase another going-concern. Nevertheless, we have focused our guidance on business, rather than property, acquisition as this is the more complex of the two and so should a business acquisition opportunity arise in the future, then this guidance should be useful. One of the fundamental differences is that when buying a business, the purchaser runs the process and when buying a property, the seller runs the process.
- 1.1 Since each business acquisition has its own variables, this cannot be a comprehensive guide but it aims to introduce the process, provide a framework and highlight some of the challenges other community organisations have found with business and property acquisition. This guidance does not offer legal advice nor does it replace the need for good legal advice. We have provided a short glossary in the appendices to this report where the terms are not explained in the text.

Preparation for acquisition

- 1.2 There are many ways for a community to purchase and manage a shop. On the next page is a list of questions which need careful consideration before embarking on the process. The matrix in the table shows how these questions connect to other key aspects of the process including:
- Acquisition process and management: most items on the list connect to this as the process requires answers to most of these questions in order to proceed. The process is covered in Section 1 of this report.
 - Funding and Finance: the money for an acquisition can come from many sources including shares, investors, loans, grants etc. Money is also needed for various stages of the acquisition. Section 3 covers this in more detail.
 - Ownership and structure of the business: the business can be owned directly by the community or via the Trust or even by part of the community. The most direct impact of ownership is the choice of legal structure. This is covered in Section 2.
 - Management of the business: the implications of various expectations are also covered in the legal structures in Section 2.
 - Board members: this is also covered in the legal structures Section 2.

Preparation for Acquisition Questions

	Acquisition process and management	Funding / Finance	Ownership of business	Legal Structure	Management of business	Board members
Is the seller willing to sell to the community?	✓		✓			
What is key to the viability of the business under community ownership? (This could be the results of a community survey or a feasibility study or input from other sources).	✓	✓			✓	
Is a significant proportion of the community behind this acquisition?	✓	✓	✓	✓	✓	✓
Is there a core group of people from the community who are committed to managing the purchase for the following 18months?	✓	✓				
Does the community have an organisation with the legal capacity to acquire a business or does this need to be created?	✓			✓		
Have you identified an initial source of funds for the due diligence and acquisition process costs (these are likely to be in the range of £7k to £35k but this varies depending on the value of the business and property.)	✓	✓				
What support can the organisation access through HIE, HISEZ and any other support intermediaries?	✓	✓	✓	✓	✓	
Have you identified sources of funds for the acquisition itself? What are the criteria of these sources of funds?	✓	✓	✓	✓	✓	✓
Will there ever be the need or community desire to buy shares in the business?	✓	✓	✓	✓	✓	✓
If shares are made available, will these be dividend issuing shares?		✓	✓	✓	✓	✓
Does the community want to manage the business (via an employed manager) or simply own the business and have an operating lease with a private individual or another organisation?	✓	✓	✓	✓	✓	✓
Does the community have any strong preferences for products to be stocked or not to be stocked?					✓	
Does the community see it as important that this business provides employment and/or training and/or volunteering opportunities for local people?		✓	✓	✓	✓	✓

- 1.3 This is an overview of the key stages in a business acquisition (demonstrated on the adjacent page) with additional details on these topics later in this document.

Stage 1: Community Meeting

- 1.4 The acquisition requires a dedicated team of people to manage its process. It is a good idea if the community select a steering group to represent them in managing the acquisition. The easiest approach to confirm the steering group members is at a community meeting.

Stage 2: Steering Group Starts the Process

- 1.5 It is useful for the steering group to start the creation of a legal entity which will own the business and/or property as soon as possible as this can take time to agree and implement. For the same reason, the group should also begin the search for finance and funding of the acquisition and/or set-up of the shop. It can be helpful to establish a shared online document space which can be accessed by advisers, the community and the seller as appropriate. Finally the steering group should identify an accountant, lawyer and property surveyor to support the acquisition process. It is important that the accountant and lawyer understand business acquisitions (in the case where a going-concern is being purchased) in the context of small businesses as their skill in saving time will inevitably save the community money.

Stage 3: Mutual Confidentiality Agreement

- 1.6 Where a business is being acquired, the steering group should meet the seller to exchange a mutual confidentiality agreement, often called a non-disclosure agreement, as soon as possible. This gives the seller assurances when sharing commercially-sensitive information.

Stage 4: Business Information Checklist

- 1.7 When the confidentiality agreement is signed it is useful to give the seller a business information checklist. This requests the information for the valuation and also for developing a business plan to be used in applying for funding and finance.

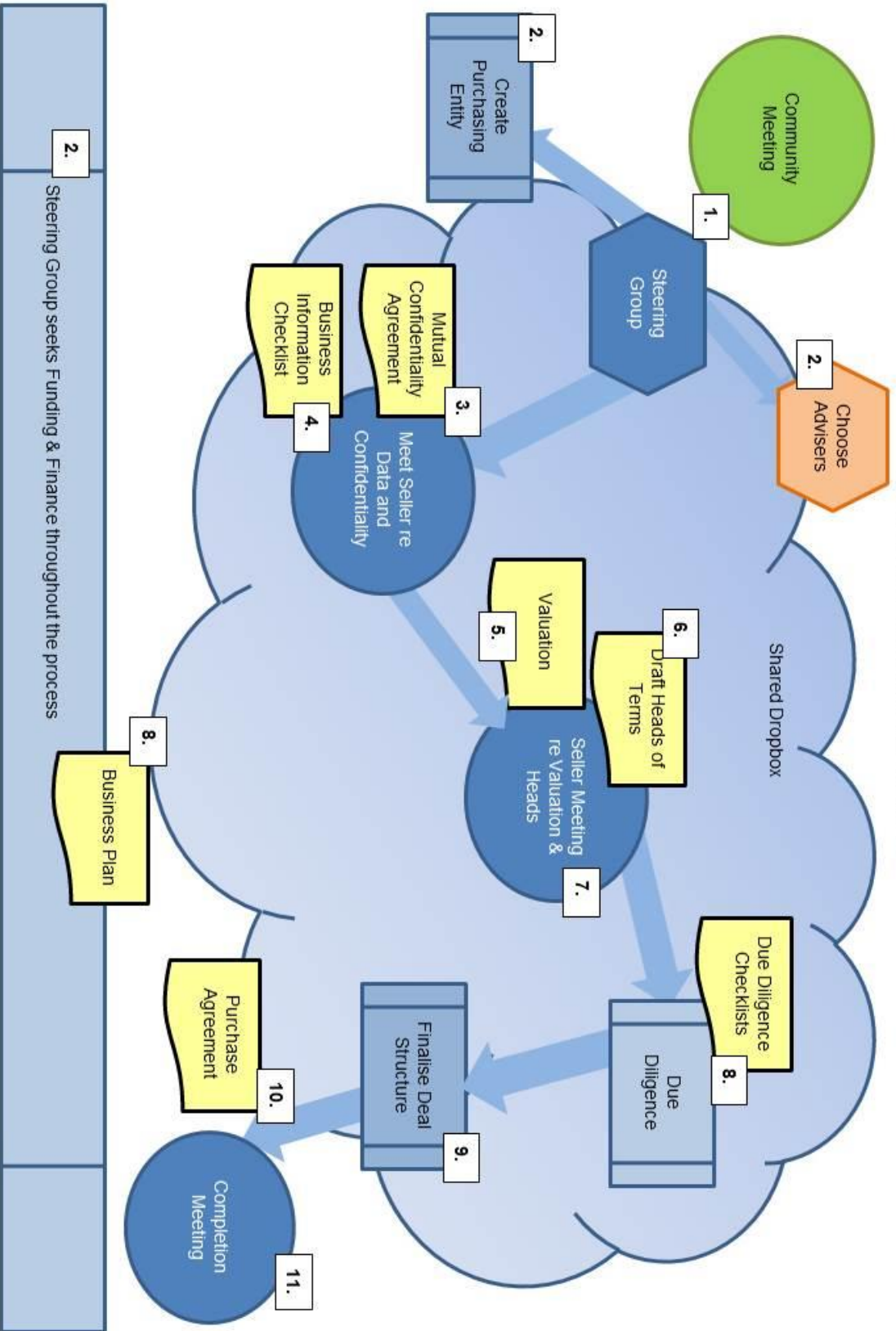
Stage 5: Valuation

- 1.8 Once the seller has provided the information which the accountant requires to assess the business then a business valuation can be provided. A surveyor will be required to assess the value of any property being sold (this may be part of a business acquisition).

Stage 6: Draft Heads of Terms

- 1.9 The steering group can use the property and business valuation to draft a *Heads of Terms* for discussion with the seller. This document provides the framework for pursuing with due diligence and sets out what the acquisition covers, the price, and the payment schedule.

Acquisition Process Framework



Stage 7: Meeting with Seller

- 1.10 Representatives of the steering group and the seller then meet to discuss the draft *Heads of Terms*. It may be useful to have advisers for both parties present at this meeting. The focus is to see if the offer that the community is prepared to make is one which the seller is prepared to consider. It is worth having extensive negotiations at this stage. If there is no basic agreement then it is not worth proceeding with due diligence or further planning.

Stage 8: Due Diligence and Business Planning

- 1.11 Assuming there is a signed *Heads of Terms* then the steering group needs to progress with due diligence working with their advisers. At this stage the steering group should also be finalising a business plan that can be submitted with any funding applications. This business plan can utilise any feasibility studies, community consultations and information provided by both the seller and advisers.

Stage 9: Finalise Deal Structure

- 1.12 Once due diligence is completed, the steering group and their advisers can draft a suggested final deal structure. At this stage any additional risks or possible costs discovered in due diligence can be taken into account by a price adjustment.

Stage 10: Purchase Agreement

- 1.13 Once the seller agrees to the finalised deal structure the purchase agreement can be drawn up. In the case of a shop, it will be an *Asset Purchase Agreement* or *Business Purchase Agreement* and include identified assets of the business as well as the property agreed to be in the deal.

Stage 11: Completion

- 1.14 At the completion meeting all signatories need to be there and there are many documents to be signed. At this stage the initial payment (or complete payment depending on the agreement) is paid and the business transfers into community ownership.

Section 2: Legal structures

- 2.0 It is advisable that a separate legal entity be created for a business acquisition. This is to create a boundary around the business which will be useful for both risk management and the practical management of the business. The most efficient approach is to create this organisation prior to the formal acquisition process beginning. This recommendation is regardless of whether the new organisation is directly owned by the community or is a subsidiary of an existing community organisation like the Tiree Community Development Trust.
- 2.1 There are a few points to consider when reviewing legal structures:
- Will you sell shares in the business?
 - Do you hope to pay dividends to investors?
 - Will you seek charitable or otherwise regulated status?
 - What are the requirements of your funders?
 - How will you compose your board?
 - How will you involve the community?
- 2.2 This guidance reviews the various structures with these questions in mind. However, for all of these structures it is important that the board is both independent of the Trust's board and that it contains directors who are appropriately skilled and experienced in running the identified business. This is particularly relevant where the new entity is to be a subsidiary of the Trust. It is considered good practice to have at least one third of the directors of a subsidiary as people who are not also directors of the holding company. Some funders or regulators may have a view on this.
- 2.3 The chart on the following page shows the variety of legal structures used by community shops in Scotland. We have included some further information on each shop in addition to the legal structure.

Industrial and Provident Community Benefit Society (IPS)

- 2.4 These are often used for community ownership as they allow for a relatively simple share-issuing process. They always have shares however there are a number of types of IPS, some issue dividends and some do not. The share structure lends itself to direct community ownership rather than a subsidiary structure where, for example, the Trust owned the shop on behalf of the community. This model has been used, for example, by Bigton community to fund the acquisition of their shop.
- 2.5 The decision regarding dividends is primarily about money - not whether there will be enough profits to issue dividends but whether the community can be sure to raise enough finance for the business through community shares and loans. This is because most grant-making bodies do not issue grants to dividend-issuing organisations. The Big Lottery is one that does not do so. Most organisations, including the Big Lottery will issue grants to an IPS that does not issue dividends. There are some social lenders that will specifically support IPS community organisations (e.g. Resonance) that underwrite community share issues.

- 2.6 This could well be an option for Tiree where there is a risk that any grants could be seen to be unfair by competitors particularly where there is a risk of displacement.

Scottish Charitable Incorporated Organisation or Charity

- 2.7 These are both charitable legal structures and monitored by OSCR. Due to the trading activity of a shop or other business, these are not really appropriate structures to use for community ownership of a shop.

Company Limited by Guarantee

- 2.8 This structure is often used as a trading subsidiary social enterprise and thus could be an appropriate option for Tiree. For a subsidiary approach, the Trust could wholly own the enterprise via its membership. This would have the benefit of a separate legal structure to manage risk, but allow the subsidiary to access most grants that the Trust itself could access.

- 2.9 For direct community control the community could be the members. This would help to demonstrate community involvement (some funders prefer to see direct community involvement as opposed to indirect involvement via a subsidiary structure). The challenge with community membership is maintaining the members' list as this is a legal document lodged with Company's House requiring at least an annual update process. Even if the company is set up with community membership the articles can connect to the Trust. For example, the articles could specify that at least one board place is reserved for a Trust representative, or that profits are distributed to the community via the Trust.

- 2.10 This is a common structure for community organisations and as long as the purpose is clearly community orientated and membership can be demonstrated to be representative of the community, it can usually access grants. This structure does not allow for the opportunity to raise funds via community shares. However it could access money from the community via a community loan scheme.

- 2.11 This structure can be combined with a Community Interest Company structure which will be covered later. This combination was used by the community of Jura to purchase their local store.

Company Limited by Shares

- 2.12 This structure would allow community members to buy shares to fund the organisation and the articles can specify that these shares do or do not earn dividends. However it is not a structure that grant funding bodies or other social lenders usually recognise as an appropriate legal structure for a community organisation or social enterprise. There are regulations about issuing shares beyond friends and family which can add to the cost and complexity of setting this up. Again, this may be appropriate where grant funding is not being sought in an effort to avoid any concerns about unfair competition. The Glenuig Community Shop used this model. It can also be used for a community organisation by combining with a Community Interest Company asset lock.

Examples of Community Shops Legal Structures in Scotland

Legal Structure	Location	Management Structure	Date opened	Other points	Website Link
Ormiston Grows Co Ltd by Guarantee	Ormiston	All volunteers	2012		http://ormistongrows.co.uk/conc/index.php/shop/
Barr Village Shop Co Ltd by Guarantee	Southern Uplands		2011	Post office too Took over previous shop when owners could not sell.	http://www.barrvillage.co.uk/community/community-shop/
Appin Community Co-op Co Ltd by Guarantee	Argyll	4 employees	1984	New build	
Ravenspoint Co Ltd by Guarantee	Isle of Lewis	Paid manager & volunteers	2001		http://www.ravenspoint.co.uk/shop/
Phoenix Community Store Co Ltd by Guarantee	Findhorn	Paid manager & volunteers	1989		http://www.phoenixshop.co.uk
Buth Scalpaigh IPS	Harris	Paid manager & volunteers	2012	Shares sold to community	http://www.scalpaycommunityshop.co.uk/
Macgregor's Market IPS	Killin				
Jura Stores CIC CLG (large membership)	Jura		2013	Community right to buy used, Bought previous shop.	http://www.juracommunitystore.co.uk/
Glenuig Community Shop Co Ltd by Shares	Glenuig	All volunteers	2000	Post office too.	
Harris Community Co-Op IPS	Harris	All paid staff	1977		
Bigton Community Store IPS	Shetland	Paid manager, some staff & volunteers	2012	Bought previous shop	https://www.facebook.com/BigtonCommunityShop

Data from www.plunket.co.uk

Community Interest Company

- 2.13 This is a structure regulated by the CIC regulator which ensures that the company adheres to its community aims and actions. It can be either a company limited by guarantee or a company limited by shares. Regardless of which type it is, there are common features:
- it is externally regulated against its community objectives which is seen as reassuring to funders and other external stakeholders
 - there is an asset lock preventing any assets from being transferred at less than market value
 - the asset lock also controls the issuing of dividends and/or interest paid on loans
 - the asset lock also provides for assets (including gift aid) to be transferred to a designated charitable organisation or CIC (this is the organisation that the asset lock is linked to.)
- 2.14 This structure provides regulation against a social purpose and unlimited trading activities unlike a charity or SCIO. Not all grant funders will fund CICs but those that do prefer either the Limited by Guarantee option or the Limited by Shares that do not issue dividends option. Social lenders recognise community interest companies as appropriate recipients of their funds and usually have individual requirements regarding dividends and shares.
- 2.15 The Community Interest Company Limited by Guarantee can be a subsidiary or direct community membership organisation. There is an added benefit if the membership is direct community membership and if the company is a CIC as it emphasises the community focus and asset control.
- 2.16 The Community Interest Company Limited by Shares is also useful model. The combination of shares with the asset lock gives the organisation the widest possible option of funding and finance. For grant funders to accept this model (and not all grant funders do) the organisation cannot issue dividends on the shares. Therefore, as with the IPS model, if the community can raise sufficient funds both for the acquisition and the continuing management of the business then the company can be created with shares with dividends, however if there could be a possibility of needing grant funding then it is suggested that the articles specify that the shares do not receive dividends.
- 2.17 The CIC Limited by Shares can also be a subsidiary of the Trust with the Trust owning 51% of the shares giving the community indirect ownership and then the remaining shares can be available for community ownership. However the regulations about offering shares constrain the use of this model for community ownership. It would only be preferred above an IPS structure where there are likely to be external (i.e. not members of the community) shareholders as there would be extra cost involved in setting it up and managing the share issue.

Section 3: Funding and Finance

- 3.0 Organising funds for a business acquisition is more complex than raising funds for a project, as money is needed for various stages. The cash flow across these stages and the various types of funding and finance needs tight management. The key aspects of an acquisition that require finance are:
- Initial feasibility and investigation
 - Valuation and draft *Heads of Terms*
 - Due diligence
 - Completion costs
 - Business acquisition including property and stock
 - Working capital for running the business after purchase.
- 3.1 The initial feasibility and investigation together with the valuation and early due diligence can often be funded by an *Investing in Ideas* grant from the Big Lottery as it should cost less than the £10,000 limit for this grant. An independent valuation and signed *Heads of Terms* are usually required by funders in order to progress to apply for funds for further stages in the process. A valuation and *Heads of Terms* can usually be prepared for under £3,000 by advisers specialising in small deals.
- 3.2 Due diligence costs vary according to the type of business being acquired and the possible risks related to it. Advisers can help the steering group to assess the various risks and decide whether they are best managed through further due diligence, insurance, warranties or indemnities (see glossary). In this case, it would be prudent to identify at least £20,000 for due diligence. In some cases far less will be spent and in some, far more.
- 3.3 Completion costs include the costs of the legal and financial advice to structure the deal and draft all the documents required to complete a deal. These would include costs related to the property acquisition too which often increase the cost of completion due to the additional legal requirements. It is almost impossible to estimate these costs as they are so dependent on the size of the deal but if the deal includes property it would be prudent to identify at least £20,000 for these cost too.
- 3.4 The consideration or money paid for the business is the amount agreed with the seller. This can be paid in various ways including deferred payments and earn-outs, which mean that not all the money needs to be paid on completion. Often where there is stock, as in the case of a shop, there is at least some of the consideration deferred until the new owner can do a stock take and post-completion accounts are prepared. This approach is covered in the *Heads of Terms* section. Some grant funders will fund the acquisition of the business and property, as will some social lenders who will often look for a clear social impact.
- 3.5 The funding which is often not planned for is the working capital for the business after it has been purchased. The amount required will be based on your business plan and should include some money to purchase stock and cover up to a year of costs (depending on your business plan).

Section 4: Confidentiality

- 4.0 It is recommended that the seller and representatives of the community group sign a mutual confidentiality agreement which specifies that the discussions are with a view to possible acquisition of the specified business by the specified community organisation represented at this stage by the steering group. Apart from the important legal value of the agreement, it marks the start of the formal discussion with the seller and demonstrates that the community is ready to engage in such discussions.
- 4.1 A confidentiality agreement (also called a non-disclosure agreement or NDA) is a legally binding document in which a person or business promises to treat specific information as a trade secret and promises not to disclose the secret to others without proper authorisation. Not all information in the business will be considered confidential. A confidentiality agreement allows the parties the opportunity to establish clearly defined levels of information security. As such, both parties agree on which information falls within the confidential arena and which information is commonly known. It also defines how information can be shared. In the example we have provided in the appendices to this report, this is only permitted after both parties and their representatives have signed a statement in writing.
- 4.2 Any profitable business depends on retaining key competitive advantage in the market and trade information should be legally protected through contracts and agreements to ensure that any prospective buyer does not use any information accessed during deal discussions to their advantage without further thought about the loss to the rightful owner. This is why the seller usually expects a confidentiality agreement to be signed before sharing current financial and business information.
- 4.3 However, it is as important to the purchaser that the confidentiality is maintained, hence the recommendation for a mutual agreement. As a community organisation negotiating with a seller who is probably also a member of the community, it is important to be able to manage how the deal process is shared. With many varied stakeholders involved in the process, including funders and potential funders, how confidentiality is managed can become highly sensitive. Whilst it is understandable that in small communities not everything remains confidential, it is particularly useful for the members of the community tasked with managing the process to have the time and space which formal communications control imposes. The acquisition process has many highs and lows and it is not always helpful to the future management of a community business if all of these are shared.

Section 5: Valuation

- 5.0 The minimum information required for a valuation is the full accounts and management accounts by month for at least 2 years. The checklist (see appendices for an example) includes additional information which can be helpful if available to the purchaser and their professional advisors to start developing a business plan that will be needed in order to apply for finance and funding for the actual acquisition, initial years of working capital and any associated costs. For example, knowing the number of staff and whether they have contracts may or may not assist in the valuation directly but will help with business planning.
- 5.1 It is most helpful if the seller provides as much information as possible in the checklist, and in an electronic format. This speeds up the valuation and assists lawyers in confirming the deal later on, thus saving the community money in fees. For this reason, creating an online *Dropbox* can be very useful.
- 5.2 Once the information has been gathered, then an accountant can complete a valuation of the business. In many cases, the business valuation will be combined with the property valuation. A surveyor can usually complete this fairly quickly.
- 5.3 When assessing value there are three main approaches:
- Asset based value
 - Turnover based value
 - Enterprise value (combines asset and turnover based value).
- 5.4 A professional who regularly advises on the value of businesses will not only know the most appropriate method of valuation for the business, but will also apply various formula to the initial value to reflect the current state of the industry, the current deal market, and the size of this particular business. In addition to providing a valuation based upon an analysis of historical results, *normalizing* them (see glossary) where necessary and reviewing projections from the target, your financial adviser may also assist you in developing your business plan.

Section 6: Heads of Terms

- 6.0 When the steering group has received both valuations, they are ready to discuss a possible offer with the seller. The offer is made in a draft Heads of Terms (sometimes called Heads of Agreement). The Heads of Terms provides a framework for proceeding with an acquisition. Heads of Terms are not binding documents except for their confidentiality, exclusivity and legal country clauses (see glossary). We have provided a sample Heads of Terms in the appendices. This and its various clauses are discussed later in this section.
- 6.1 It is recommended that a draft Heads of Terms is completed by the purchaser, detailing as much information as possible but most importantly their offer price and how they intend to pay. The recommended process at this stage is to have a joint meeting with the seller, using the draft Heads as a discussion document for seeing if the seller and community are viewing the business value in a similar way.
- 6.2 The purchaser should then present this document to the seller at a joint meeting where the negotiations usually begin. The benefit of a meeting is that both parties begin to develop a relationship that will assist with moving the deal forward. The legalities of a deal are of course important but equally, being able to agree a price and the terms of payment face to face is also important. It is recommended that professional advisers are involved where necessary.
- 6.3 It is also important to note that the price agreed in the Heads of Terms is the starting point for negotiations and is subject to the due diligence process. During due diligence the purchaser may discover extra value, or they could discover liabilities which they would use to reduce the price based on the possible costs that any liabilities would create in the business (often referred to as price chipping).

Clauses in the Heads of Terms

- 6.4 This section directly relates to the sample Heads of Terms included in the appendices to help explain this part of the process.

The Cover Page

- It should be noted that the document is a discussion document and a draft. This allows it to easily facilitate discussions in a meeting and once both parties agree the terms and wording, then it can be signed without the phrases “discussion document” or “draft”.
- The parties to the documents are those people or organisations doing the buying and selling i.e. the community organisation that has been created to buy the business is the first party and the seller the second. The seller can of course be a company or organisation too.
- Insert the name of the business under discussion.
- Check the date is correct
- These details are repeated in the first section of the agreement but include relevant addresses

Outline terms by clause

1. Ownership of the business and its assets – if various parts of the business are owned by different people or organisations then the various ownership details should be listed and representatives of all sellers listed as parties to the agreement and signatories.
2. Summarises what is being purchased and this can be brief but refer to an asset register or include the key items and the asset register. Example items are: property, buildings, stock, fixtures and fittings, goodwill (see glossary), website, vehicles etc. Each item listed should be clarified with a short description if there could be any confusion eg: address of property, registration of vehicle. Be as specific as necessary for both parties to be clear about what is being purchased.
3. Highlights that the agreement is non-binding except for paragraphs 6 and 7 (exclusivity and confidentiality).
4. Describes that the laws of Scotland control the agreement and pre-empts the fact that should the purchase proceed then the non-compete clause and various warranties and indemnities will form part of the purchase agreement. (This is binding).

Agreement by paragraphs

1. Preconditions to purchase – these can include the requirement for further surveys, particular permissions to be granted, and should include further due diligence. Our example includes a stock take as a precondition.
2. Completion – a proposed date for completion is given but it includes the option for both parties to change that date. It also highlights that certain actions will occur on completion including all assets transferred to the purchasing organization. Our example has the seller resigning as shop manager to ensure clarity on this topic.
3. Consideration – this is the money to be paid for the business. In our example it is split into two amounts: one to be paid on completion and a second to be paid after the post-completion accounts and stock take. There is a suggested calculation that shows that if there is more stock than the price is based on, then the seller gets paid proportionally more and if there is less stock than the price is based on, then the seller gets paid proportionally less. There is an agreed date by which this calculation will be completed and the second payment made.

You can use various means to pay the seller and it is recommended that some form of deferred payment be used to confirm the community receives best value for money. This example is the simplest form. Other forms are discussed in deferred payment and earn-outs (see glossary).

4. Expenses – this clause confirms that each party pays their own expenses for the negotiations and purchase.

5. General – any additional requirements can be inserted here. Our example has a useful clause specifying that the seller will assist the purchaser and their agents to complete due diligence and transfer.
6. Confidentiality – this emphasizes the key clauses in the mutual confidentiality agreement and highlights that if the deal does not complete by an agreed date then all confidential material is to be returned to the relevant parties.
7. Exclusivity – this confirms that the seller will not be in discussion with another potential purchaser during the time this agreement covers. This clause includes a relevant date to indicate the end of this period but includes the option for parties to agree in writing to an extension of the period.
8. Non-Compete – this clause prevents the seller from competing with the business sold by setting up in business relatively nearby. It is important to have legal advice on the area included in this clause as it can be viewed as too broad by courts and will then be considered null and void. Likewise the period cannot be too long either.

Signatories

- This should include representatives of all parties and each signature must be witnessed.

Section 7: Due Diligence

- 7.0 When buying a business, due diligence refers to the process of reviewing all the available information related to that business. The aim of conducting due diligence is to identify the valuable parts of the business and help protect them, whilst finding any risks and possible liabilities in the business and providing information for a purchaser to mitigate these.
- 7.1 It is helpful, and potentially cost saving, if the purchaser conducts initial due diligence themselves, even if this simply entails collecting the material in the due diligence checklist (see below). It could, for example, mean that the purchaser finds some significant liability and is able to abort the deal prior to paying any professionals.
- 7.2 After this initial stage, should the purchaser still be interested in buying the business then professionals like lawyers, accountants, surveyors would normally conduct due diligence on behalf of the purchaser. The amount of money spent on due diligence should be in proportion to the value of the business being acquired but this is not always the case. Experienced professionals will conduct an initial due diligence on the target business and based on their findings, industry knowledge and expertise, will advise if further investigations are required. It is important to be able to discuss how much you would like to spend on due diligence in order to protect the deal, and what the risk of not doing further due diligence could be.
- 7.3 There are many areas covered by due diligence but a key area is usually around TUPE (*Transfer of Undertaking (Protection of Employment) Regulations*). TUPE always applies in a business acquisition deal. The simplest explanation of TUPE is on the ACAS website: *“Employees of the previous owner when the business changes hands automatically become employees of the new employer on the same terms and conditions. It's as if their employment contracts had originally been made with the new employer. Their continuity of service and any other rights are all preserved. Both old and new employers are required to inform and consult employees affected directly or indirectly by the transfer”*.
- 7.4 Receiving appropriate employment law advice is important not only during the acquisition but in preparation for and then in managing staff. In a community shop, often it is important to receive employment law advice about the differences between employees and volunteers and the impact this has on the business and its procedures.

Due diligence checklist

- 7.5 The importance of due diligence and what this process might throw up for the purchaser cannot be underestimated. After due diligence, the purchaser should be ready to make a decision on whether to move to completing the acquisition. This checklist includes but is not limited to the following items:
- Fixed Assets
 - Intellectual property
 - Current Assets

- Liabilities
- Banking
- Competition law
- Employees, trade unions, pensions
- Contracts
- Insurance
- Insurance
- Charges and mortgages
- Facilities and licences
- Litigation
- Corporate authority
- Stamp duty
- VAT
- Grants
- Business name, printed stationary
- Trade associations

Section 8: Purchase Agreement

8.0 At completion a *Share Purchase Agreement (SPA)* or *Business Purchase Agreement (BPA)* is signed together with all the other documentation (see below) to finalise the transaction and the agreed consideration is paid. The purchase agreements cover everything that is being purchased with the relevant legal consents and agreements. The difference between the two types of agreement reflects the two different deal types that are possible. In most cases, the Business Purchase Agreement will probably be used, but if the organisation can or chooses to buy the shares in a company then a Share Purchase Agreement would be used.

Business Purchase Agreement

8.1 A business purchase is the transfer of the assets and liabilities relating to a target business. Usually more documents are required for a business purchase as there is more choice of what is being acquired, in contrast to a share purchase agreement where everything owned by the company is automatically acquired. A business purchase details the acquisition of the business via its assets and as a result there is the requirement for more documentation as follows:

- Business Sales Agreement with the following sections:
 - Details on business assets both tangible and intangible, as well as liabilities
 - Agreed price with adjustments post completion
 - Warranties
 - Conditions of completion
 - Transfer of employees
 - Pension considerations
 - Tax including stamp duty and VAT
- Disclosure letter from the seller highlighting any possible issues about the business, if issues are included in this letter then the purchaser cannot make any claims against the seller about those issues.
- There might also be the following documents:
 - Specific agreement relating to the transfer of identified intangible assets
 - Specific agreement relating to the transfer of identified debts
 - An asset register of all assets transferred.

8.2 Your professional advisers will prepare these and any other documents which they recommend and you agree are necessary.

Share Purchase Agreement

8.3 A Share Purchase occurs when the business for sale is owned by a company limited by shares. If the purchaser wishes to purchase the business in its entirety then they purchase the shares and receive everything the company owns. When the shares of a company are purchased the purchaser has no choice about which assets and liabilities are purchased. Everything, including five years' of historic liabilities, are purchased. A purchaser also would acquire contracts and all assets through the shares.

- 8.4 The Share Purchase Agreement includes the following items:
- Details of the shares being sold
 - Price of shares and details of agreed adjustments (if any) post completion
 - Any non-compete clauses or restrictive covenants on the seller
 - Warranties from the seller
 - Any conditions required for the deal to complete
 - Arrangements for the transfer of the pension fund.
- 8.5 There are then two further documents required:
- Tax Deed – confirming that the seller will recompense the purchaser if any unexpected tax liabilities occur
 - Disclosure letter from the seller highlighting any possible issues about the business, if issues are included in this letter then the purchaser cannot make any claims against the seller about those issues.
- 8.6 There might be further additional documents such as:
- New employment contracts for the seller/key employees
 - On-going agreement for supply of services from the seller to the purchaser
 - New lease
 - Administrative documents like: Board minutes, resignation from the board of those stepping down after completion, stock transfer forms, Companies House forms.

Section 9: Some lessons from others

9.0 In this final section we set out some lessons and tips that draw on the experience of other community shops.

- Throughout the acquisition process and even more so once the business is owned by the community, being clear about individual's roles is very important. This is especially the case in small remote communities where people may be called upon to play more than one role.
- Do not attempt to discuss the price with the seller until after you have a valuation and after you know what you can afford to pay.
- Valuation is the starting point for negotiating with the seller. Unless you have limited reserves, funders will usually provide finance against an independent valuation.
- When buying an existing shop, ensure that the purchasing organisation is VAT registered before purchase completes to prevent having to pay VAT on the purchase price.
- Do not underestimate how long an acquisition can take. Community deals seldom take less than a year. Finding the money is often the cause of the delay.
- Ensure you have enough funding in place. One community acquisition included a petrol station and two days after the purchase the pumps were dry and no money had been set aside to refill them.
- Sellers often offer a one-way confidentiality agreement which protects only their own interests. This means that the seller can discuss the deal and your plans publically.
- The Head of Terms allows for clarity over what is for sale and from whom. It is not uncommon for Mr X to own the business while Mrs X owns the van and the domain name.
- If a member of the seller's family is an employee but not a joint owner, then they will remain an employee after the sale. A lawyer can advise on this.
- If due diligence uncovers a risk that is too large or expensive the purchaser should walk away. This is something potential purchasers find hard to do.

PART 2: APPENDICES

APPENDIX 1: Glossary

Deferred payments and earn outs

It is quite common for an amount of the purchase price to be kept back for post-completion accounts. These are called deferred payments. The amount depends on the size of the deal and the type of business – it can be as simple as reviewing stock in a business, for example. Your professional advisers can assist with the deal structure which best protects the purchaser's interests.

There are a number of other instances where the seller does not receive the full payment on completion. For example, an amount may be retained for future payment against the business reaching performance targets. This is known as an earn out. Earn out is a contractual provision stating that the seller of a business is to obtain additional future compensation based on the business achieving certain future financial goals. The financial goals are usually stated as a percentage of gross sales or earnings.

The value of a business is part-based on its future potential earnings; sometimes a purchaser will only be willing to pay a price based on historical earnings and not a seller's asking price based on projected earnings. An earn out provision structures a deal so that the seller receives an amount over and above an agreed price only if the business achieves a certain level of earnings over an agreed period of time.

Goodwill

Goodwill is seen as an intangible asset on the balance sheet because it is not a physical asset like buildings or equipment. Goodwill typically reflects the value of intangible assets such as a strong brand name, good customer relations, good employee relations and any patents or proprietary technology.

Indemnities

In a business acquisition the seller can be asked to provide indemnities against certain occurrences which could cause damage to the purchaser post acquisition. If a seller provides an indemnity against something happening and it happens the seller needs to pay compensation. The purchaser does not need to prove loss as a result of the occurrence as in the case of warranties.

Insurance related to risks

When there is an identified risk of liability in an acquisition, professional advisers can suggest further due diligence to quantify the risk; or they can request an indemnity or warranty from the seller; or the seller can purchase an insurance policy in the favour of the purchaser that pays the purchaser compensation should that risk result in a loss.

Normalising figures

During a business's financial year there are some items that are considered extra-ordinary and if they are included in the accounts for a valuation calculation they would impact the

value. As a result, accountants remove these figures and their impact for valuation calculations and this is known as normalising the figures. An example of this would be if there was a court case which resulted in a settlement being paid to or by the business. This is not considered business as usual and therefore would be removed from a valuation calculation.

Post-completion accounts

During the acquisition of a business there will be a time lapse between the point at which the final accounts are drawn up by the seller and when the completion actually occurs. Sometimes this is simply days, and sometimes it is months. The post-completion accounts cover this time period and ensure that the purchaser receives everything they expected within the business and the seller is paid for everything included within the business. For a small business, a post-completion stock take should suffice. However it is recommended that professional advice is requested if there is any doubt or dispute on the issue.

Social Impact

Funders and stakeholders in general are becoming more and more interested in measuring the social impact of activities. There are a variety of methodologies and tools to support organisations to measure their social impact, e.g. Social Accounting and Social Return on Investment. Some funders define what social impact tools they would like to be used to reflect the changes their money has made; others simply request a clear accounting for impact. It is important to clarify funders' expectations on this topic as well as their other terms.

Social Lenders

These are organisations who lend to social enterprises and community organisations if commercial banks will not do so. They often give loans and may invest in equity. They require a clear business plan against which they invest. They usually expect a measured and clear social return on their investment.

Some social lenders who consider community acquisitions are:

- Social Investment Scotland
- Triodos
- Resonance
- Big Issue Invest

Warranties

These are contractual assurances from the seller to the purchaser. They are included as part of the purchase agreement. They are there to help the purchaser claim against the seller if there are risks and resulting costs that the seller did not tell the purchaser about. In essence the seller warrants that the business is in certain condition and if this is not so, and this costs the purchaser money as a result, then the purchaser can sue the seller for breach of warranty. A court will decide whether the warranty was breached, whether this breach cost the purchaser money and what the seller must pay the purchaser in recompense. Of course a warranty only has value if the person or entity making the warranty can be sued and has money to pay the purchaser if a breach occurs.

APPENDIX 2: Sample Business Information Checklist

NB: Please edit as appropriate before issuing

This information is required both for an independent valuation of the business (required by funders) and for developing a business plan which would be used to acquire finance for buying and developing the business.

Please can you provide as much information as possible on this list. Any information which you do not have please note that next to the item – it is as important to know that the business does not have this information due to its turnover or processes, as it is to know the information. If there is information that will take some time to collate but which would be available in time – please note this and say when it could be available.

General

1. If the business is incorporated please provide company name and number.
2. Copy of latest financial statements.
3. Details of banking arrangements and any security given.
4. Details of insurance cover.
5. Copy of company memorandum, articles and any shareholders' agreement.

Directors and Employees

6. Details of management structure and division of responsibilities.
7. Details of key employees, name, age, qualifications, length of service and remuneration.
8. Particulars of any pension scheme.
9. Number of employees analysed as to functions.
10. Brief outline of salary/wage payment structure.
11. Copy of standard contract of employment/directors agreements

Premises

12. Summary of premises showing use and area.
13. Sight of any recent independent or internal valuations or insurance reports.

Tangible Fixed Assets

14. General description, age and types of tangible fixed assets. Details of any hire purchase and leasing agreements.
15. Copy of fixed asset register.

Sales

16. Analysis of sales by main customers/product types for the years last 2 financial years.
17. Analysis of sales by month for those years.
18. Details of any contractual arrangements with customers.
19. Details of sales pricing policies and procedures, and target margins.

Receivables

20. Aged analysis of trade debtors as at the most recent month end.
21. Details of other receivables.

Banking Arrangements

22. Details of all bank accounts and balances at last balance sheet date.

23. Sight of bank reconciliations.
24. Details of all loan or overdraft facilities and sight of facility agreements.

Payables

25. Summary analysis of all creditors as at latest month end.
26. Details and terms of any non bank loans.
27. Aged analysis of trade creditors as at latest month end.
28. Summary of credit terms policy.

Taxation

29. Copy of tax computations and correspondence since incorporation (if the business is unincorporated then this information is still required but would be for the business owners).
30. Details of PAYE compliance and sight of correspondence in respect of latest tax authority inspection/visit.
31. Details of VAT registration and sight of correspondence in respect of any VAT inspections.

Current Trading

32. Copy of management accounts for period from last financial accounting period to latest month end.
33. Details of any contingent liabilities or litigation.
34. Financial projections
35. Copy of financial projections for the next financial year, by month, and any subsequent years.
36. Details of assumptions behind the financial projections, including breakdown of income by customer.

Accounting Systems

37. General description of the financial records, internal controls and management reporting procedures.
38. Details of the accounting packages used.

APPENDIX 3: Sample Mutual Confidentiality Agreement

NB: Please obtain legal advice and edit as appropriate before using

MUTUAL NON-DISCLOSURE AGREEMENT

Between

insert purchasing organisation

and

insert seller/s

MUTUAL NON-DISCLOSURE AGREEMENT

Between:

[*insert purchasing organisation*] Limited incorporated in [*insert country*], registered number [*insert registered number*] and having its registered office at [*insert registered address*]

(may be either “Receiving Party” or “Disclosing Party”)

and

[*insert seller/sellers/selling organisation*] Limited incorporated in [*insert country*], registered number [*insert registered number*] and having its registered office at [*insert registered address*]

(may be either “Receiving Party” or “Disclosing Party”).

WHEREAS one party (the “Disclosing Party”) may have disclosed and wishes to further disclose to the other party (the “Receiving Party”) certain information of a confidential nature in relation to the proposed sale of [*insert the business name*] (**The Business**) between [*insert name of purchasing organisation*] (**The Buyer**) and [*insert name/names of seller*] (The Seller) (the “Purpose”), and which the parties have agreed shall be protected in the manner set out in this Agreement.

NOW THEREFORE IT IS HEREBY AGREED AS FOLLOWS:

1. Confidential information

For the purpose of this agreement “Confidential Information” shall mean information of the Disclosing Party, whether commercial, financial, technical or otherwise, disclosed to the Receiving Party whether received or after the Effective Date which is contained in any form whatsoever (including without limitation data, drawings, films, documents and computer readable media) whether written, oral, electronic or otherwise and passed directly or indirectly to the Receiving Party, or which comes into the possession or knowledge of the receiving party as a result of the Purpose.

2. Obligations of the receiving party

The Receiving Party shall:

- maintain the Disclosing Party’s Confidential Information in confidence and shall exercise in relation thereto no lesser security measures and degree of care than that which the Receiving Party applies to its own confidential information;
- not, without prior written consent of the Disclosing Party, which shall not be unreasonably withheld or delayed, disclose the Confidential Information, other than to such of its directors, officers or employees or those of its affiliates who need to know it for the Purpose, or to the Receiving Party’s lawyers, accountants, bankers and other professional advisers who need to know it for advising in relation to the Purpose and provided that, (a) such disclosure is made under obligations of confidentiality on terms substantially the same as those contained herein, (b) the disclosure is restricted, within reasonable limits to the extent necessary, for the employee, officer or director to discharge their duty/duties;
- not use or permit the use of the Confidential Information disclosed to it pursuant to this Agreement other than for or in connection with the Purpose;
- not permit the disclosure and shall use its reasonable endeavours to prevent the disclosure of Confidential Information to or by any third party, without the Disclosing Party’s prior consent in writing there for.

- not copy, reproduce or reduce to writing any material part of the Confidential Information except as may be reasonably necessary for the Purpose.

3. Exceptions to the receiving party's obligations

The obligations and restrictions provided in Clause 2 above shall not apply to Confidential Information which is:

- now or becomes public knowledge otherwise than by breach of this Agreement by the Receiving Party; or
- lawfully in the possession of the Receiving Party prior to receipt from the Disclosing Party and was not previously acquired by the Receiving Party from the Disclosing Party under an obligation of confidence; or
- lawfully disclosed to the Receiving Party by a third party without breach by the Receiving Party or such third party of any obligation of confidentiality or non-use towards the Disclosing Party; or
- required to be disclosed by order of a court of a competent jurisdiction or to any government department or any governmental or regulatory agency or pursuant to the rules of any recognised Stock Exchange but only to the extent that disclosure thereto is compellable by law, provided always that wherever possible the Disclosing Party shall be given by the Receiving Party not less than two business days prior notice of any action which it reasonably believes may result in any such requirement and the Receiving Party shall consult with the Disclosing Party in respect thereof; or
- required to be disclosed to such extent required for any judicial, arbitration or determinative procedure provided always that wherever possible the Disclosing Party shall be given by the Receiving Party not less than two business days notice of the requirement for such disclosure and details of the related procedure, and the Receiving Party shall consult with the Disclosing Party in respect thereof;

Provided however that the foregoing exceptions shall not apply to:

- specific information merely because it is embraced by more general information which falls within any one or more of such exceptions; or
- any combinations of features merely because individual features (but not the combination itself) falls within any one or more of such exceptions.

4. No licence

The Disclosing Party reserves all rights in the Confidential Information and no rights or obligations other than those expressly recited herein are granted or are to be implied from this Agreement. In particular, no licence is hereby granted directly or indirectly under any patent, invention, discovery, copyright or other intellectual or industrial property right now or in the future held, made, obtained or licensable by the Disclosing Party.

5. No publicity

Each party agrees to keep the existence and nature of this Agreement and the discussions between the parties regarding the Purpose confidential and not to release or make any publicity statement, advertisement or other disclosure with regard to this Agreement without the prior written consent of the other party.

6. Data Protection

- Personal Data shall be defined as any data passed from either party which falls within the scope of the Data Protection Act 1998 or the data protection legislation in any country within the EU.
- The parties shall comply with the Data Protection Act 1998 or the data protection legislation in any country within the EU and shall process such Personal Data only in compliance therewith and to the degree necessary for the purposes of the Agreement.
- Each party shall fully indemnify the other against all claims, losses, costs, actions, expenses and damages arising due to any loss or damage caused to any person due to the loss, unauthorised use, access to or destruction of personal data or due to a failure to comply with this clause.

7. Notices

All notices given by one party to the other under this Agreement shall be in writing and shall be sent by facsimile or prepaid first-class, registered or recorded delivery post to the other party at its address specified above or at such other address of which such party shall have given notice. The date of service shall be deemed to be the day following the day on which the notice was transmitted or posted as the case may be.

8. Assignment

This Agreement is personal to the parties and shall not be assigned or otherwise transferred in whole or in part by either party without the prior written consent of the other party.

9. Effective Date

This Agreement shall be effective as of the last date of signature hereof.

10. Affiliate

The term "affiliate" used herein shall mean a company or corporation which is the ultimate holding company of a party or a subsidiary of such ultimate holding company and for the purpose of such definition "holding company" and "subsidiary" shall have the meanings assigned to them in Section 1159 of the Companies Act 2006 as amended.

11. No Warranty

The Disclosing Party makes no representation or warranty as to the accuracy or completeness of the Confidential Information which is provided by or on behalf of the Disclosing Party to the Receiving Party and the Disclosing Party shall have no liability to the Receiving Party resulting from the use of such Confidential Information, any such use being at the risk of the Receiving Party.

12. No obligation

Nothing in this Agreement shall be construed or implied to obligate the Disclosing Party to furnish any specific type of information hereunder, whether confidential or not.

13. Waiver

No failure or delay by either party in exercising rights, powers or privileges under this Agreement shall constitute a waiver thereof nor shall any single or partial exercise of such rights, powers or privileges preclude any further exercise thereof.

14. Remedies

The parties acknowledge and agree that damages may not be an adequate remedy for any breach by a party of the provisions of this Agreement. Either party will be entitled to seek the remedies of interdict or specific implement (or their equivalent in any other jurisdiction) for any threatened or

actual breach of the provisions of this Agreement by the other party, including its directors, officers, employees, affiliates, lawyers, accountants, bankers and other professional advisors.

15. Applicable Law

This Agreement constitutes the entire agreement and understanding between the parties in respect of the Confidential Information and supersedes all previous agreements and understandings in such respect. This Agreement cannot be changed except by written consent between the parties. The interpretation, construction and effect of this Agreement shall be governed and construed in all respects in accordance with the laws of Scotland and the parties hereby submit to the non-exclusive jurisdiction of the Scottish courts.

16. Headings

The headings in this Agreement are provided for ease of reference only and shall not be taken into account in the construction or interpretation thereof.

IN WITNESS WHEREOF these presents comprising this and the previous FOUR pages are executed in duplicate as follows:-

SUBSCRIBED for and on behalf of [PARTY A]

by

at
Director

on the

day of Two Thousand and Fourteen

Before this witness

Witness Name

Address

SUBSCRIBED for and on behalf of [PARTY B]

at
Director

on the

day of Two Thousand and Fourteen

Before this witness

Witness Name

Address

.....

APPENDIX 4: Sample Heads of Terms (Discussion Document)

NB: Please obtain legal advice and edit as appropriate before using.

HEADS OF TERMS

between

(insert company name that is proposing to buy the business here)

and

(insert the name of the seller here – this could be a person or a company name)

(insert current date)

Re: acquisition of business *(insert name of the business here)*

HEADS OF TERMS re SALE AND PURCHASE OF *(insert name of the business here)*
("the Business")

between

(insert company name and registered address that is proposing to buy the business here)
("the Purchaser")

and

(insert the name and registered address of the seller(s) here – this could be a person or a company name)
("the Vendor")

OUTLINE TERMS: -

1. The Vendor owns *(insert name of the business here)* ("the Business).
2. The Vendor has agreed to sell to the Purchaser and the Purchaser has agreed to buy from the Vendor the Business, comprising:
 - *Insert summary of what is being bought these are examples*
 - Assets listed in the attached asset register
 - Property
 - Building
 - Stock
 - Fixtures and fittings
 - Goodwill
3. The parties have agreed to sign these Heads of Terms for the sole purpose of recording their present intention to conclude a formal and legally binding agreement for such sale and purchase and to set out the principal proposed terms for such an agreement, with the intention that no legal relations will be entered into between them until such formal agreement is concluded, otherwise than pursuant to Paragraphs 6 and 7 hereof. Accordingly, apart from Paragraphs 6 and 7, this document does not constitute or form part of a contract and is not to be relied or founded upon for any purpose.
4. The Business Purchase Agreement ("the Agreement") will provide that the contract thereby constituted shall be subject to the Law of Scotland and that the parties to the Agreement prorogate the exclusive jurisdiction of the Scottish Courts. The Agreement will incorporate warranties and indemnities appropriate to the nature of this transaction and restrictive covenants consistent with Paragraph 8 hereof.

The following are the proposed terms of the Agreement: -

1. Preconditions to Purchase

1.1. The purchase by the Purchaser of the Business will be conditional on the following: -

- 1.1.1. *Insert conditions here these are examples:*
- 1.1.2. Conditional survey being completed on the shop building;
- 1.1.3. A stock take is conducted in the week of *insert proposed dates* with the Purchaser's representatives and the Vendor being present, and the Vendor making all invoicing documentation available for the current stock;
- 1.1.4. Any additional due diligence has been completed.

2. Completion

- 2.1. The completion date for the purchase will be *insert appropriate date* or such other date as may be agreed between the parties ("Completion").
any other actions to be taken on completion can be added 2.2 is always included but 2.3 is an example.

- 2.2. All of the Assets listed as comprising the Business will be transferred to the Purchaser on Completion.
2.3. On Completion, the Vendor will resign as shop manager.

3. Consideration

- 3.1. The price for the Business ("Price") shall be **insert proposed full price** (but shall be subject to adjustment as hereinafter referred to) with **insert second payment or add clauses for further payments** being payable on Completion ("Initial Consideration").
- 3.2. The Price is based on: *the agreed value of goodwill, fittings and inventory as of the stock take referred to in 1.1.3. It will be subject to a £1 for £1 adjustment (upwards or downwards) following the preparation of the Purchaser of Completion Accounts (on a normal basis) which the Vendors shall have the opportunity to review and refer to an independent accountant if they do not reach agreement. Any adjustment under this paragraph 3.2 will be made to the remaining balance of the price by way of a further payment by the Purchaser (where xxxx) or a reduction in the remaining balance paid by the Purchaser (where xxxx) in each case made within 28 days of the Completion Accounts being agreed or determined by such independent accountant.*
- 3.3. The remaining balance of the price shall be paid by **insert date**.

4. Expenses

Each party will bear their own legal and other costs as a consequence of the negotiation of these Heads of Terms and any documentation following hereon.

5. General

The Vendors shall take all reasonable steps to procure that the Purchaser is offered the opportunity to carry out reasonable due diligence investigations in respect of the Company, its assets, employees, clients and affairs as the Purchaser may reasonably request.

6. Confidentiality

- 6.1. Each of the parties undertakes to the other not to disclose to any person (other than to a Permitted Person (as defined below)) any information regarding the existence, progress or nature of the proposals referred to in these Heads of Terms or of the fact that any discussions or negotiations regarding such proposals are taking place (together "the Proposals") without first obtaining the consent of the other party. A "Permitted Person" means, in relation to either of the parties, its professional advisers and those partners, directors, officers and employees of it or in it who, for reasons of strict necessity, are or become involved in or aware of the Proposals.
- 6.2. Without prejudice to the generality of the foregoing Paragraph 6.1, each party undertakes to the other not to make any verbal or written statement concerning these Heads of Terms or the Agreement to the press or media either before or after Completion of the Agreement without the written consent of the other.
- 6.3. Each party undertakes to the other that all information, whether oral or written, relating to the Proposals or relating to the other party or to such other party's business(es) or affairs provided or made available to such party ("the Confidential Information"):-
- 6.3.1. shall be kept permanently confidential;
- 6.3.2. shall not be disclosed to anyone other than to those Permitted Persons of either party to whom it is necessary to disclose the same for the purposes of the Proposals; and
- 6.3.3. shall not be used to obtain a commercial, trading, investment, financial or other advantage or for any purpose other than assessing the proposed transaction.
- 6.4. If the Proposals do not proceed to completion of the Agreement for any reason on or before **insert appropriate date** or such other date as may be agreed between the parties, each party undertakes to

return to the other forthwith all Confidential Information including copies, notes, memoranda or written details of any such Confidential Information.

6.5. Each of the parties undertakes to procure that each Permitted Person to whom any disclosure is made pursuant to Paragraphs 6.1 and 6.3 above is made aware of and agrees to comply with the terms of the undertakings contained in such paragraphs as if he were a party to these Heads of Terms

6.6. The obligations not to disclose contained in Paragraphs 6.1 and 6.3 above shall not apply: -

6.6.1. to the extent required by law or by any governmental or regulatory authority; or

6.6.2. if and to the extent that any information is now in or hereafter enters into the public domain (otherwise than as a consequence of unauthorised disclosure by either of the parties or by any Permitted Person or any other person to whom either of the parties have disclosed the Confidential Information).

6.7. The restrictions in this Paragraph 6 shall be separate and severable.

7. Exclusivity

The Vendors will not from the date of these Heads of Terms until *insert relevant date* enter into any formal binding agreement or enter into negotiations with a view to reaching the same with any person, firm, company or entity other than the Purchaser with respect to the disposal of the Sale Shares and shall procure that the Company does not enter into any formal binding agreement or enter into negotiations with a view to reaching the same with any person, firm or company or entity other than the Purchaser with respect to the disposal of all or a substantial part of the business and assets of the Company.

7.1. Each party shall bear its own costs and expenses in relation to all matters pertaining to the sale and purchase contemplated in these heads of terms.

7.2. The undertakings and agreement set out in Paragraphs 6 and 7 shall be binding upon the parties, their personal representatives and successors in title and the liability of the Purchasers and the Vendors respectively shall be on a joint and several basis.

7.3. These Heads of Terms are not exhaustive and are not, and are not intended to be, legally binding (with the exception of clauses 6 and 7).

8. Non Compete

The Vendors will, in the Agreement, grant undertakings in favour of the Purchaser in respect of non compete, non solicitation of customers or suppliers and non enticement of employees, all for a period of *need specify time* years after Completion and (in respect of non compete) applicable *need to specify region nwith legal advice on what is considered reasonable*.

IN WITNESS WHEREOF these presents on this and the preceding five pages are executed as follows: -

SIGNED by the said *insert seller(s') names*

At _____

on the _____ day of _____ Two Thousand and Fourteen (2014)

By _____

in the presence of this witness:

Signature

Full name

Address

SIGNED for and on behalf of the said *insert purchasing party*

At _____

on the _____ day of _____ Two Thousand and Fourteen (2014)

By _____ Director
Full name

in the presence of this witness:

Signature

Full name

Address

APPENDIX 5: Bibliography

www.acquiringbusiness4good.com

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Jonathan Reuvid (Ed) (2007), *Mergers and Acquisitions* Kogan Page, London and Philadelphia