COLLATERAL WARRANTY

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**DEED OF WARRANTY**

**THIS DEED** is made on [ ]

**BETWEEN**

1. **HYNDBURN BOROUGH COUNCIL** of Scaitcliffe House, Ormerod Street, Accrington, BB5 0PF (the "Beneficiary" which term shall include for the purposes of this Deed its successors in title and its permitted assigns under this Deed)

**AND**

2. [ ] (company number [ ])whose registered office is situated at [ ] (the "Consultant")

**AND**

3. [ ] (company number [ ])whose registered office is situated at [ ] (the "Client")]

**WHEREAS**

A. The Beneficiary wishes to put into effect the design, construction, development and letting of [ ] (the "Project") at [ ] ("the Property"). The Beneficiary owns the freehold interest in the Property and has entered into a contract with the Client in respect of the Project (“the Client Appointment”).

B. The Consultant has entered into a contract dated [ ] with the Client (the "Deed of Appointment") to perform certain professional services in connection with the Project (the "Services").

**NOW THIS DEED WITNESSES AS FOLLOWS**

1. **Consideration**

In consideration of the Consultant's obligations under this Deed, the Beneficiary agrees to pay to the Consultant the sum of £1.00 (one pound) receipt of which the Consultant hereby acknowledges.

2. **Performance of the Services**

2.1 The Consultant undertakes and warrants to the Beneficiary that it has observed and performed and will continue to observe and perform all the terms and obligations on its part to be observed and performed under the Deed of Appointment, and, without prejudice to the generality of the foregoing, undertakes and warrants to the Beneficiary that it has exercised and shall exercise in the performance of the Services the reasonable skill, care and diligence to be expected of a professionally qualified and competent [architect/quantity surveyor/services engineer/civil and structural engineer/other] with experience in carrying out services similar to the Services and in connection with projects of a similar standard, quality, size, scope, nature, complexity and value to the Project;

2.2 The Consultant acknowledges that the Beneficiary has relied and will continue to rely upon the Consultant exercising reasonable skill and judgement in respect of all such matters as lie within the scope of the Consultant's professional responsibilities pursuant to the Deed of Appointment and that the Consultant owes a duty of care in respect thereof to the Beneficiary.

2.3 The Consultant's duties or obligations under this agreement shall not be negated or diminished by:

* + 1. any approval or inspection of:
       1. the Property; or
       2. the Project; or
       3. any designs or specifications for the Property or the Project; or
    2. any testing of any work, goods, materials, plant or equipment; or
    3. any omission to approve, inspect or test,

by or on behalf of the Beneficiary or the Client.

2.4 Notwithstanding any provision hereunder to the contrary but subject to clause 10, the Consultant shall have no greater or other liability hereunder than it has under the Deed of Appointment.

3. **Prohibited Materials**

The Consultant undertakes and warrants to the Beneficiary that it has exercised and shall exercise the level of skill, care and diligence referred to in clause 2.1 to see that none of the following has been or will be specified by the Consultant for use in the Project or included for use in the Project in any bill of quantities or other document prepared by the Consultant:-

3.1 high alumina cement in structural elements;

3.2 woodwool slabs in permanent formwork to concrete;

3.3 calcium chloride admixtures for use in reinforced concrete;

3.4 asbestos or asbestos containing products, as defined in the Asbestos Regulations 1987 or any statutory modification or re-enactment thereof;

3.5 any naturally occurring or man-made mineral fibres (for example, rock-wool or slag wool) with a thickness of 3 microns or less and a length of 200 microns or less, unless they are appropriately bonded to prevent migration of fibres;

3.6 aggregates for use in reinforced concrete which do not comply with British Standard 882:1983 and aggregates for use in concrete which do not comply with British Standard 8110:1985;

3.7 lead, lead paint or any other materials containing lead which may be ingested, inhaled or absorbed, except where copper alloy fittings containing lead are specifically required in drinking water pipework by any relevant statutory requirements;

3.8 urea formaldehyde foam or other materials which may release formaldehyde in quantities which may be hazardous with reference to any limits set by the Health and Safety Executive;

3.9 calcium silicate bricks or tiles;

3.10 vermiculite unless it is established as being fibre-free;

3.11 any of the products containing cadmium that are referred to in the Environmental Protection (Controls on Injurious Substances) (No.2) Regulations 1993;

3.12 any timber treated with pentachlorophenol;

3.13 non galvanised mild steel structural fixings for building elements particularly susceptible to corrosion for example, cladding panels;

3.14 concrete used in circumstances where it is susceptible to alkali silica reaction;

3.15 materials containing chlorofluorocarbons (CFCs);

3.16 mundic blocks and mundic concrete;

3.17 solvent based paints except where water based paints are unsuitable or unavailable;

3.18 tropical hardwoods unless from proven sustainable sources;

3.19 any other materials not in accordance with statutory requirements, British Standards, codes of practice (including but without implying limitation any codes of practice issued by the British Standards Institute and the International Organisation for Standardisation) and good building practice current at the time of specification;

4. **Copyright**

1. 4.1 The copyright in all designs, drawings, models, plans, specifications, design details, photographs, brochures, reports, notes of meetings, CAD materials, calculations, data, databases, schedules, programmes, bills of quantities, budgets and any other materials provided in connection with the Project and all updates, amendments, additions and revisions to them and any works, designs, or inventions incorporated or referred to in them for any purpose relating to the Project (the "Information") shall remain vested in the Consultant, but the Beneficiary and its respective appointees shall have a royalty-free, non-exclusive, non-terminable licence to copy, reproduce and use the Information (and any designs contained therein) on any medium whatsoever for any purpose related to the Project and/or the Property including, but without limitation, the construction, completion, maintenance, insurance, letting, promotion, advertisement, reinstatement, refurbishment, repair and extension of the Project and/or the Property. The Consultant shall, upon the request of the Beneficiary, supply copies of all or any part of the Information to the Beneficiary, subject to payment of the Consultant's reasonable copying charges therefor. The Consultant shall not be liable to the Beneficiary for any use of the Information for any purpose other than that for which the Information was prepared and provided by the Consultant.

4.2The Consultant agrees to indemnify and keep indemnified the Beneficiary from and against any loss, damage, cost, expense, liability or claim in respect of any breach of the copyright or the other intellectual property rights of any third party caused by or arising out of the carrying out of the Services or the use of the licence in sub-clause 4.1.

4.3The Consultant undertakes and warrants that the carrying out of the Services and/or the use of the licence in sub-clause 4.1 will not cause or contribute to any breach of the copyright or the other intellectual property rights of any third party.

4.4 This licence carries the right to grant sub-licences and is transferable to third parties without the consent of the Consultant.

5. **Insurance**

5.1 The Consultant shall effect and maintain professional indemnity insurance to cover liabilities of the Consultant which may arise out of or in connection with the provision of the Services for a minimum of £[ ] ([ ] pounds) in respect of any one occurrence or series of occurrences arising out of any one event (excluding the legal costs of both the Beneficiary and the Consultant) without unusual or onerous terms and conditions and/or excess) (the "Insurance"). The Insurance shall be maintained during the carrying out of the Services and for a period of 12 years from the date of practical completion of the Project, provided that insurance equivalent to the Insurance remains available generally in the market at commercially reasonable rates.

5.2 As and when it is reasonably requested to do so by the Beneficiary the Consultant shall produce for inspection documentary evidence that the Insurance is being maintained. In the event that the Consultant is unable to secure or maintain the Insurance it shall forthwith give notice to the Beneficiary to that effect.

5.3 The Consultant hereby undertakes and warrants that it has provided or that it will provide a copy of this Deed to the insurance company which is or which will be providing the Insurance.

5.4 The Consultant’s obligation in clause 5.1 is to maintain that professional indemnity insurance:

* + - 1. with reputable insurers lawfully carrying on insurance business in the UK or EU;
      2. on customary and usual terms and conditions prevailing for the time being in the insurance market; and
      3. on terms that:
         1. do not require the Consultant to discharge any liability before being entitled to recover from the insurers; and
         2. would not adversely affect the rights of any person to recover from the insurers under the Third Parties (Rights Against Insurers) Act 2010.

5.5 Any increased or additional premium required by insurers because of the Consultant's claims record or other acts, omissions, matters or things particular to the Consultant shall be deemed to be within commercially reasonable rates.

5.6 Whenever the Beneficiary reasonably requests, the Consultant shall send the Beneficiary evidence that the Consultant's professional indemnity insurance is in force, including, if required by the Beneficiary, an original letter from the Consultant's insurers or brokers confirming:

(i)  the Consultant's then current professional indemnity insurance; and

(ii) that the premiums for that insurance have been paid in full at the date of that letter.

**6. Assignment**

6.1 The Beneficiary may assign the benefit of this agreement:

(a) on two occasions to any person with an interest in the Project; and

(b) without counting as an assignment under clause 6.1(a):

(i) by way of security (including any reassignment on redemption of security); or

* + - 1. to and from subsidiary or other associated companies within the same group of companies as the Beneficiary so long as that assignee company remains within the same group of companies as the Beneficiary.

6.2 The Beneficiary shall notify the Consultant and the Contractor of any assignment. If the Beneficiary fails to do this, the assignment shall still be valid.

6.3 The Consultant shall not contend that any person to whom the benefit of this agreement is assigned under clause 6.1 may not recover any sum under this agreement because that person is an assignee and not a named party to this agreement.

7. **Step-In**

7.1 The Beneficiary has no authority to issue any direction or instruction to the Consultant in relation to the performance of the Consultant's services under the Deed of Appointment unless and until the Beneficiary has given notice under clauses 7.3 or 7.4.

7.2 The Consultant acknowledges that the Client has paid all fees and expenses properly due and owing to the Consultant under the Deed of Appointment up to the date of this Deed. The Beneficiary has no liability to the Consultant in respect of fees and expenses under the Deed of Appointment unless and until the Beneficiary has given notice under clauses 7.3 or 7.4.

7.3 The Consultant agrees that, in the event of an occurrence of an Event of Default as defined in the Client Appointment the Consultant will, if so required by notice in writing given by the Beneficiary and subject to clause 7.5, accept the instructions of the Beneficiary or its appointee to the exclusion of the Client in respect of the Project upon the terms and conditions of the Deed of Appointment. The Client acknowledges that the Consultant shall be entitled to rely on a notice given to the Consultant by the Beneficiary under this clause 7.3 as conclusive evidence for the purposes of this Deed of the occurrence of an Event of Default as defined in the Client Appointment .

7.4 The Consultant further agrees that it will not without first giving the Beneficiary not less that 21 days notice in writing exercise any right it may have to terminate the Deed of Appointment or to treat the same as having been repudiated by the Client or to discontinue the performance of any services to be performed by the Consultant pursuant thereto. Such right to terminate the Deed of Appointment with the Client or treat the same as having been repudiated or discontinue performance shall cease if, within such period of notice and subject to clause 7.5, the Beneficiary shall give notice in writing to the Consultant requiring the Consultant to accept the instructions of the Beneficiary or its appointee to the exclusion of the Client in respect of the Project upon the terms and conditions of the Deed of Appointment.

7.5 It shall be a condition of any notice given by the Beneficiary under clauses 7.3 or 7.4 that the Beneficiary or its appointee accepts liability for payment of the fees and expenses payable to the Consultant under the Deed of Appointment and for performance of the Client's obligations including payment of any fees and expenses outstanding at the date of such notice. Upon the issue of any notice by the Beneficiary under clauses 7.3 or 7.4, the Deed of Appointment shall continue in full force and effect as if no right of termination on the part of the Consultant had arisen and the Consultant shall be liable to the Beneficiary and its appointee under the Deed of Appointment in lieu of its liability to the Client. If any notice given by the Beneficiary under clauses 7.3 or 7.4 requires the Consultant to accept the instructions of the Beneficiary's appointee, the Beneficiary shall be liable to the Consultant as guarantor of all sums from time to time due to the Consultant from the Beneficiary's appointee.

8. **Limitation of liability**

8.1 In the event of any breach by the Consultant of this Deed (other than a breach of clause 5 (Copyright)), the Consultant's liability shall be limited to that proportion of the Beneficiary's losses which it would be just and equitable to require the Consultant to pay having regard to the extent of the Consultant's responsibility for the same and on the basis that the contractors and other consultants employed by the Client for the Project shall be deemed to have provided to the Beneficiary contractual undertakings on terms no less onerous than clause 2 in respect of the performance of their services in connection with the Project and shall be deemed to have paid to the Beneficiary such proportion which it would be just and equitable for them to pay having regard to the extent of their responsibility.

8.2 The Consultant shall have no greater liability to the Beneficiary by virtue of this Deed than it would have had if the Beneficiary had been named as the "Client" under the Appointment.

8.3 Notwithstanding the date of execution of this Deed, no action or proceedings under or in connection with this Deed shall be commenced after the expiry of 12 years from the date of practical completion of the Project.

9. **Notices**

Any notice or consent provided for in this Deed shall be deemed to have been duly given if it is in writing and is delivered by hand or sent by prepaid first class post to the other party at that party's address as shown in this Deed or as previously notified in writing to the sender of the notice by the other party. A notice sent by first class prepaid post shall be deemed to have been delivered on the second working day after posting.

10. **Governing Law**

This Deed shall be governed by and be construed in accordance with English law.

1. Third party rights

A person who is not a party to this agreement shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this agreement.

1. Jurisdiction

Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims).

IN WITNESS whereof this document has been executed and delivered as a deed the day and year first before written

|  |  |
| --- | --- |
| The common seal of the Beneficiary was affixed in the presence of:- |  |
| ................................................. |  |
| Solicitor for the Council |  |
| .......................... |  |
| Number in Seal Book |  |
|  |  |
|  |  |
|  |  |
| The Common Seal of the Client was affixed in the presence of :- |  |
| ....................................................... |  |
| Director |  |
| .......................................................  Director / Secretary |  |
| The Common Seal of the Consultant was affixed in the presence of :- |  |
| ....................................................... |  |
| Director |  |
| ....................................................... |  |
| Director/Secretary |  |