

Schedule 7
Collateral Warranty, Performance Bond and Deed of Guarantee

APPENDIX 1

Sub-Contractor's warranty

Employer/Landlord/Purchaser/Tenant/Funder Collateral Warranty

DATED 200

PARTIES

(1) [] whose registered office is []
[] (company registration number [])
("the **Contractor**")

(2) [] whose registered office is []
[] (company registration number [])
("the **Sub-Contractor**")

(3) [] whose registered office is []
[] (company registration number [])
("the **Beneficiary**")

INTRODUCTION

(A) By an agreement based upon the JCT Form of Building Contract dated [] 20 ("the **Contract**") and made between [*insert employer's name*] and ("the Contractor") [*insert employer's name*] engaged the Contractor to carry out and complete certain works of design and/or construction described in more detail in the Contract ("the **Works**") at the property known as [] (the "**Development**") which expression shall mean the land and the Works constructed or to be constructed on it.

(B) By a sub-contract ("the **Sub-Contract**") dated [] 20 and made between the Contractor and the Sub-Contractor, the Contractor engaged the Sub-Contractor to carry out and complete the works defined in the Sub-Contract ("the **Sub-Contract Works**") forming part of the Works.

- (C) The Beneficiary [is the owner/developer/purchaser/funder/tenant of the Development] has agreed to [provide finance in connection with] the Development
- (D) Under the terms of the Sub-Contract the Sub-Contractor has agreed to enter into this Deed.

OPERATIVE PROVISIONS

1. Duty of Care

1.1 The Sub-Contractor warrants to the Beneficiary that he has exercised and will continue to exercise all reasonable skill, care and diligence:

- (a) in the performance of his duties and responsibilities pursuant to and within the scope of his employment under the Sub-Contract;
- (b) in relation to the design of the Sub-Contract Works insofar as the Sub-Contractor is responsible for design pursuant to the terms of the Sub-Contract; and
- (c) in the selection of materials and goods insofar as the same have been or will be selected by the Sub-Contractor, his sub-contractors or suppliers in accordance with the Sub-Contract.

1.2 The Sub-Contractor further warrants to the Beneficiary that:

- (a) that the Sub-Contract Works have been and will be carried out and completed in a good, sound, substantial and workmanlike manner using good quality and appropriate materials and in all respects in accordance with the Sub-Contract and the Sub-Contract Works as completed will comply with any performance specification or requirement included or referred to in the documents comprising the Sub-Contract;
- (b) that he has observed and performed and will continue to observe and perform all the terms and obligations on his part to be observed and performed under the Sub-Contract;
- (c) the Sub-Contract Works as completed will comply in all respects with all applicable statutory requirements.

2. Deleterious Materials

2.1 The Sub-Contractor warrants to the Beneficiary that:-

2.1.1 it shall not specify authorise cause to be used use or suffer the use in (or about) the Development and/or land adjacent to the Development any materials known to pose a hazard to health and in particular to the health of the personnel involved in the construction or maintenance of the Development and or land adjacent to the Development or to the eventual occupants of the Development and/or land adjacent to the Development or materials which there are reasonable grounds for suspecting might in themselves or as a result of the manner of their use pose these hazards.

2.1.2 it shall not specify authorise cause to be used use or suffer the use in (or about) the Development and/or land adjacent to the Development any materials which at the time the Development (or any part of it) is being developed are generally accepted or reasonably suspected within the building industry of:-

2.1.2.1 being deleterious in themselves

2.1.2.2 becoming deleterious when used in a particular situation or in combination with other materials

2.1.2.3 becoming deleterious with passage of time

2.1.2.4 becoming deleterious as a result of poor workmanship during construction

2.1.2.5 becoming deleterious without a level of maintenance which is higher than that which would normally be expected in a building of the type under construction or

2.1.2.6 being damaged by or causing damage to the structure in which they are incorporated or to which they are affixed.

2.2 For the purposes of this sub-Clause the word "deleterious" shall be deemed to include any use of materials or combinations of materials that would or might have the effect of reducing the normal life expectancy to a period less than that which has been specified or would normally be expected:-

2.2.1 of the materials themselves

2.2.2 of any materials to which they are affixed

2.2.3 of the structure in which they are incorporated or to which they are affixed
or

2.2.4 of the Development or any part of the Development.

3. Copyright

The Sub-Contractor agrees that the Beneficiary shall be entitled on written request made at any time and upon paying a reasonable copying charge to be supplied by the Sub-Contractor with full and proper copies of all drawings details plans specifications calculations or other design documents prepared by the Sub-Contractor relating to the Development and the Beneficiary shall be entitled to use and copy the said documents and the designs contained in them in connection with any matters relating to the construction re-construction repair maintenance letting or sale of the Development but the copyright in the documents and designs shall remain vested in the Sub-Contractor. The Sub-Contractor grants to the Beneficiary an irrevocable royalty free copyright licence to use the designs and documents referred to in this clause for the purposes set out herein and such licence shall include a right to grant sub-licences. The Sub-Contractor shall not be liable for any use of such designs or documents for any purpose other than those for which they are or were prepared.

4. Professional Indemnity Insurance

4.1 The Sub-Contractor warrants to the Beneficiary that it will keep in force all insurances required under the Sub-Contract.

4.2 The Sub-Contractor covenants with the Beneficiary that it has a valid current professional indemnity insurance which it will maintain in full force and effect throughout the period of the design and construction of the Development for a period of twelve years from the date of practical completion as defined in the Contract for the Development with a limit of indemnity of not less than [] million pounds (£[],000,000) for any one claim or series of claims arising out of any one cause provided such insurance is generally available in the market at commercially reasonable rates taking no account of the Sub-Contractor's claims record.

4.3 If for any period such insurance is not obtainable on commercially acceptable terms the Sub-Contractor shall immediately inform the Beneficiary and shall obtain in respect of such period such reduced professional indemnity insurance (if any) as is available to it and as would be fair and reasonable in the circumstances for the Sub-Contractor to obtain.

- 4.4 When reasonably required to do so by the Beneficiary the Sub-Contractor shall (but not in any way which would breach any term of the insurance policy then in force) provide to the Beneficiary documentary evidence that the insurance required is this Deed is being maintained.

5. Assignment

- 5.1 The Beneficiary shall be entitled at any time from the date of this Deed to assign to any person or persons acquiring the interest of the Beneficiary in the Development all of its rights under this Deed and in this Deed references to the Beneficiary shall where the context admits include it assigns.
- 5.2 The Sub-Contractor undertakes with the Beneficiary not to contend that any person to whom this Deed and/or the rights under this Deed shall be assigned in accordance with the foregoing provisions of this Clause shall be precluded from recovering under this Deed (whenever happening) by reason that such person is an assignee and not the original promisee under this Deed.

6. Substitution Provisions (not for tenant warranty)

- 6.1 The Sub-Contractor undertakes that it shall not without first giving the Beneficiary 21 days' notice in writing (including a statement of its reasons) terminate or treat as terminated the employment of the Sub-Contractor under the Agreement.
- 6.2 If the Beneficiary serves notice upon the Sub-Contractor pursuant to Clause 6.3 below then any existing right of the Sub-Contractor to terminate the Agreement or to treat it as terminated shall cease but this shall not affect any other right or remedy the Sub-Contractor may have in respect of any antecedent breach of the Agreement by the Contractor.
- 6.3 If the Beneficiary serves notice upon the Sub-Contractor then the Sub-Contractor shall thereafter accept the instructions of the Beneficiary or its appointee to the exclusion of the Contractor under and in connection with the Agreement regardless of whether or not the Sub-Contractor has served notice under Clause 6.1.
- 6.4 If the Beneficiary has served notice upon the Sub-Contractor under Clause 6.3 above then the Sub-Contractor shall be entitled and obliged to rely upon such notice as against the Contractor and the Beneficiary and the Sub-Contractor shall not make any enquiries into the entitlement of the Beneficiary to exercise its right to serve such notice.

- 6.5 From the date of service of notice under Clause 6.3 above the Beneficiary shall assume all rights and obligations of the Contractor under the Agreement (including obligations arising prior to the service of such notice) provided that this shall not affect or derogate from any rights of the Contractor against the Sub-Contractor in respect of any breach of duty by the Sub-Contractor under or in connection with the Agreement happening prior to the date of service of notice by the Beneficiary under Clause 6.3 above.
- 6.6 If prior to the service of any notice under Clause 6.3 above the employment of the Sub-Contractor under the Agreement is determined for any reason whatsoever (and subject to the Beneficiary undertaking to pay all amounts (if any) which at the date of such determination are owed to the Sub-Contractor by the Contractor for work done under the Agreement) the Sub-Contractor shall if requested in writing so to do by the Beneficiary within 21 days after such determination immediately enter into a new agreement with the Beneficiary on the same terms as the Agreement with such revisions as the Beneficiary shall reasonably require to reflect the fact that it is the Beneficiary and not the Contractor appointing the Sub-Contractor.

7. Non-Derogation

Nothing in this Deed shall affect or derogate from any duty or liability otherwise owed to the Beneficiary by the Sub-Contractor.

8. Expiry of Deed

No action or proceedings for any breach of this Deed shall be commenced against the Sub-Contractor after the expiry of 12 years from the date of practical completion as defined in the Contract for the Development.

9. Governing Law

The law of this Deed shall be English law.

EXECUTED and delivered as a Deed

EXECUTED as a DEED by _____)
 [_____])
 acting by _____)

Director

Director/Secretary

APPENDIX 2

Performance Bond/Parent Company Guarantee

THIS GUARANTEE BOND is made on

200

BETWEEN

- (1) **[CONTRACTOR]** as principal;
- (2) **[GUARANTOR]** as guarantor; and
- (3) **[EMPLOYER]**

WHEREAS:

By a contract ("Contract") entered into or to be entered into between the Employer and Contractor particulars of which are set out in the schedule the Contractor has agreed with the Employer to execute works ("Works") upon and subject to the terms and conditions therein set out.

The Guarantor has agreed with the Employer at the request of the Contractor to guarantee the performance of the obligations of the Contractor under the Contract upon the terms and conditions of this Guarantee Bond subject to the limitation set out in clause 2.

NOW THIS DEED WITNESS as follows:

1. Promise to pay

The Guarantor guarantees to the Employer that in the event of failure by the Contractor to fulfil its obligations under the Contract (an Employer's valid determination of the Contractor's employment under clause 27 of the Contract being deemed to be such a failure) the Guarantor shall subject to the provision of this Guarantee Bond satisfy and discharge the losses sustained by the Employer and the debts payable by the Contractor to the Employer as established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract and taking into account all sums due or to become due to the Contractor.

2. Extent of liability

- 2.1 The maximum aggregate liability of the Guarantor and the Contractor under the Guarantee Bond shall not exceed the sum set out in the schedule ("Bond Amount") but subject to such limitation and to clause 3 the liability of the Guarantor shall be coextensive with the liability of the Contractor under the Contract.

- 2.2 The Guarantor shall not be discharged or released by any alteration of any of the terms conditions and provisions of the Contract or in the extend or nature of the Works and no forbearance or allowance of time by the Employer under or in respect of the Contract or the Works shall in any way release reduce or affect the liability of the Guarantor under this Guarantee Bond.

3. Expiry of obligations

Whether or not this Guarantee Bond shall be returned to the Guarantor the obligations of the Guarantor under this Guarantee Bond shall be released and discharged absolutely upon expiry (as defined in the schedule) save in respect of any breach of the Contract which has occurred and in respect of which a claim in writing containing particulars of such breach has been made upon the Guarantor before expiry.

4. Contractor's obligations

The Contractor having requested the execution of this Guarantee Bond by the Guarantor undertakes to the Guarantor (without limitation of any other rights and remedies of the Employer of the Employer or the Guarantor against the Contractor) to perform and discharge the obligations on its part set out in the Contract.

5. Assignment

The Employer may without the consent of the Guarantor assign or charge the benefit of this Guarantee Bond to any person to whom the Employer lawfully assigns or charges the benefit of the Contract.

6. Third Party Rights

A person who is not a party to this Guarantee shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Guarantee. This clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

7. Governing Law

This Guarantee Bond shall be governed by English law, and the parties hereby irrevocably submit to the non-exclusive jurisdiction of the English Courts.

IN WITNESS whereof the Contractor and the Guarantor have executed and delivered this Guarantee Bond as a Deed this day of 200.

SCHEDULE

Contractor	• (company number •) of • whose registered office is at •
Guarantor	• (company number •) of • whose registered office is at •
Employer	• (company number •) of • whose registered office is at •
Contract	A contract [dated •] [to be entered into] between the Employer and the Contractor in the form known as • (company number •) of • whose registered office is at • for the construction of the works comprising • for the original contract sum of • pounds (£•)
Bond Amount	10% of the Contract Sum
Expiry	Upon the issue of the Practical Completion Certificate in accordance with the terms and conditions of the Contract which shall be conclusive for the purposes of this Guarantee Bond.

EXECUTED as a deed by the
)
[] in the presence of:)

Director

Director/Secretary

DATED

200

(1) [PARENT COMPANY - GUARANTOR]

(2)

PARENT COMPANY GUARANTEE

- relating to -

PARTIES

- (1) **[THE GUARANTOR]** whose registered office is at ("the Guarantor")
- (2) ("the Client")

RECITALS

In consideration of the Client awarding a contract to [] whose registered office is at [] ("the Contractor") for the [] ("the Contract") the Guarantor has agreed to guarantee the due and proper performance of the Contract by the Contractor and the due observance and performance of all the covenants and conditions contained or referred to in the contract conditions (the Guarantee and the Contract together or separately being referred to in this deed as the "Contract") as set out in this Deed of guarantee.

OPERATIVE PROVISIONS**1. GUARANTEE OF PERFORMANCE**

If the Contractor (unless relieved from performance by any clause of the Contract or any other legal relief) shall fail to carry out and perform the Contract or to observe and perform all or any of the covenants and conditions therein contained then the Guarantor will be liable for and shall be responsible to the Client in respect of all loss, damages, costs and expenses which the Client may incur by reason or in consequence of such default to the extent that such losses, damages, costs and expenses are, or would otherwise be, recoverable by the Client from the Contractor provided always that the Guarantor shall not by virtue of this Guarantee acquire any liability which is greater or of longer duration than it would have owed had the Guarantor been a party to the Contract in substitution for the Contractor.

2. GUARANTEE OF PAYMENT

- 2.1 The Guarantor as primary obligor hereby irrevocably guarantees to the Client the payment by the Contractor to the Client under the Contract of all sums which may become due and payable by the Contractor to the Client under any of the provisions of the Contract or otherwise including but without limitation, sums which may be adjudged due to the Client by an adjudication award under the provisions of the Contract or by an award or judgment of a Court.

- 2.2. If the Contractor fails to pay to the Client any amount as and when it falls due in accordance with the terms of the Contract and which the Contractor does not dispute or pursuant to an award or judgment as described in Clause 2.1 then the Guarantor will pay the Client the amount due within seven days of the date of first demand in writing by the Client and the Client shall not be required prior to any such demand for payment to pursue or exhaust any of the Client's rights or remedies against the Contractor in respect of such payment.

3. NO WAIVER

The Guarantor further agrees with the Client that it shall not in any way be released from liability hereunder by any alteration in the terms of the Contract made by agreement between the Client and the Contractor or in the extent or nature of the works to be constructed completed and maintained thereunder or by any allowance of time or forbearance or forgiveness or in respect of any matter or thing concerning the Contract or by any other matter or thing whereby (in the absence of this present provision) the Guarantor would or might be released from liability thereunder.

4. NOTICE

Any notice or demand which may be required under this Deed shall be served at the registered office of the Guarantor as set out in this Deed. The sending of such notice or demand by facsimile shall also be good service upon receipt by the sender of a confirmation report that the facsimile has been received at the Guarantor's facsimile number.

5. APPLICABLE LAW

This Deed shall be governed by and construed in accordance with the laws of England and Wales.

6. LIMITATION PERIOD

The limitation period applicable to this Deed shall be coextensive with the limitation period applicable to the Contract, subject to any proceedings commenced prior to that date in which case this Deed shall continue until such proceedings are completed.

EXECUTED AS A DEED by the parties the day and year written on the first page.

SIGNED AS A DEED)
for and on behalf of)
[GUARANTOR])
by:)

Director

Director/Secretary

SIGNED AS A DEED)
for and on behalf of)
)
by:)

Director

Director/Secretary