

DATED **2017**

[EMPLOYER] (1)

AND

[CONSULANT] (2)

**DELIVERY AGREEMENT FOR THE
APPOINTMENT OF
[DISCIPLINE]**

**relating to
the development of the
[John Innes Centre Next Generation
Infrastructure]**

MILLS & REEVE

THIS AGREEMENT is made on

2017 BETWEEN:

- (1) [EMPLOYER NAME] (company number [COMPANY NUMBER]) whose registered office is at [REGISTERED ADDRESS] (the “Employer”) (which expression shall include any successors in title and assigns); and
- (2) [CONSULTANT NAME] (company number [COMPANY NUMBER]) whose registered office is at [REGISTERED ADDRESS] (the “Consultant”)¹.

WHEREAS:

- (A) The Employer may wish to carry out certain building projects on the Site.
- (B) The Employer wishes to retain the Consultant as its provider of [DISCIPLINE] services for the Project which may be notified to the Consultant from time to time during the Delivery Term.
- (C) In the event that the Employer requires the Consultant to carry out services in relation to any part of the Project such services will be carried out under an Appointment (defined below).
- (D) The Employer and Consultant accept and agree that this Delivery Agreement does not guarantee that any work will be given by the Employer to the Consultant or oblige the Employer to instruct the Consultant to carry out any particular scope of services.

In consideration of £1 paid by each party to the other, receipt of which each recipient party acknowledges **IT IS HEREBY AGREED** as follows:

1 Introduction

1.1 In this Delivery Agreement the following words and expressions have the following meanings unless the context otherwise requires:

- 1.1.1 “**Appointment**” means an appointment on the terms of which the Consultant will carry out Services following receipt of a Project Confirmation pursuant to clause 3.1;
- 1.1.2 “**Collaboration Protocol**” means the collaboration protocol at Appendix 6;
- 1.1.3 “**Confidential Information**” means all confidential, non-public or proprietary information of either party, the Contractor or any Other Consultant;
- 1.1.4 “**Delivery Term**” means the period of [TERM] years from [START DATE], subject to early termination pursuant to Clause 6;
- 1.1.5 “**Employer’s Representative**” means [Nick Goodwin] or such other person who may be notified in writing to the Consultant from time to time;
- 1.1.6 “**Key Project Deliverables**” means the key project deliverables set out at Annex 3 of the Project Confirmation (if any);

¹ [Amendments may be required to reflect the corporate structure of the successful bidder]

- 1.1.7 “**Moratorium Period**” means the period of [***] months following submission by the Employer of the outline business case (after Stage 2);
- 1.1.8 “**Order**” has the meaning given in Clause 2.1;
- 1.1.9 “**Parent Company Guarantee**” means the guarantee substantially in the form attached at Appendix 5;
- 1.1.10 “**Prices**” means the sum or sums set out in Appendix 1 which shall form the basis upon which the fees in respect of each Order are proposed;
- 1.1.11 “**Project**” means [***insert description of the John Innes II***];
- 1.1.12 “**Project Confirmation**” has the meaning given in Clause 2.4;
- 1.1.13 “**Project Programme**” means the programme prepared by or on behalf of the Employer for the Project as a whole, as updated from time to time.
- 1.1.14 “**Proposal**” has the meaning given in Clause 2.2;
- 1.1.15 “**Services**” means the services referred to in the Project Confirmation;
- 1.1.16 “**Scope**” means the scope as described by the Employer in an Order and as subsequently confirmed in a Project Confirmation;
- 1.1.17 “**Site**” means the [***John Innes Centre II***]; and
- 1.1.18 “**Terms and Conditions**” means the terms and conditions set out in Appendix 4.
- 1.2 Words importing the singular only shall also include the plural and vice versa, and where the context requires, words importing persons shall include firms and corporations.
- 1.3 The headings to the clauses of this Delivery Agreement shall not affect its interpretation.
- 1.4 In this Delivery Agreement words and expressions shall have the same meanings as are assigned to them in the Terms and Conditions.
- 1.5 In the event of conflict between the clauses of this Delivery Agreement and the appendices annexed hereto and/or the documents attached hereto, the clauses of this Delivery Agreement shall prevail.
- 1.6 Reference in this Delivery Agreement to any Act of Parliament, statute or statutory instrument shall include and refer to any statutory amendment thereto from time to time and for the time being in force and any successor to such Act of Parliament, statute and statutory instrument.

2 Call Off

- 2.1 The Terms and Conditions shall be deemed to form and be read and construed as part of this Delivery Agreement.
- 2.2 As and when during the Delivery Term the Employer requires services to carry out and wishes the Consultant to make a proposal for the carrying out of such services, the

Employer may issue an order substantially in the form set out in Appendix 2 ("**Order**") to the Consultant specifying;

- 2.2.1 a description of the Scope;
 - 2.2.2 the services to be performed by the Consultant in respect of the Scope;
 - 2.2.3 the proposed programme for the Scope;
 - 2.2.4 the Key Project Deliverables;
 - 2.2.5 the period in which the Employer requires a proposal pursuant to clause 2.3 below from the Consultant; and
 - 2.2.6 the Employer's proposed fixed fee for the Services, which shall be based on the Prices.
- 2.3 Within the period referred to in Clause 2.2.5, the Consultant shall deliver to the Employer a proposal ("**Proposal**") setting out:
- 2.3.1 the Consultant's proposed services in response to the Order and any other service in the Consultant's professional opinion that it considers necessary to satisfy the Scope, fees, rates for any additional services (which shall be based on the Prices) and designated persons in respect of the Scope;
 - 2.3.2 any other information requested by the Employer in or subsequent to the Order; and
 - 2.3.3 any other information that the Consultant reasonably considers relevant.
- 2.4 Following receipt by the Employer of the Proposal, the parties shall co-operate and work together in good faith to:
- 2.4.1 agree the extent of and best way to achieve the Scope including the services required to deliver it;
 - 2.4.2 analyse and discuss the Order and the Proposal to confirm that the fixed fee is appropriate to the agreed Services and the instalments for such fixed fee to ensure that the Employer receives value for money at all times;
 - 2.4.3 decide whether any amendments are required to the Terms and Conditions in respect of the Scope or otherwise as a result of the Order; and
 - 2.4.4 agree any modifications necessary to the Proposal in order that the Services meet the Employer's Key Project Deliverables.
- 2.5 Following negotiation and discussion pursuant to clause 2.4 above, the Employer may at its sole discretion issue to the Consultant a notice substantially in the form set out in Appendix 3 executed by the Employer's Representative ("**Project Confirmation**") setting out the outcome of any such negotiation and discussion including:
- 2.5.1 the Scope to which the Project Confirmation relates;
 - 2.5.2 the Services which the Employer requires the Consultant to provide in respect of the Scope;

- 2.5.3 the programme for delivering the Services;
 - 2.5.4 any amendments to the Terms and Conditions;
 - 2.5.5 any Key Project Deliverables;
 - 2.5.6 any notice to proceed longstop date ("Notice to Proceed Longstop Date");
 - 2.5.7 the insurances which the Consultant is required to take out and maintain;
 - 2.5.8 the fixed fee which shall be payable by the Employer to the Consultant in respect of the Scope and the times and/or stages at which the fee is payable;
 - 2.5.9 the Consultant's designated persons for the Scope; and
 - 2.5.10 any other details agreed by the Employer and the Consultant in respect of the Scope, including, without limitation whether the Employer requires the Consultant to provide a Parent Company Guarantee.
- 2.6 The Employer is not obliged to issue any Project Confirmations to the Consultant.
- 2.7 The Employer may subject to complying with the Public Contracts Regulations 2015, request any other consultants to provide the same services as set out in any Services Request and may appoint any other consultants to provide such services.
- 2.8 Following receipt of a Project Confirmation issued by the Employer under this clause 2, the Consultant shall within 7 days:
- 2.8.1 sign and return a copy of such Project Confirmation agreeing to be bound by; or
 - 2.8.2 where the Project Confirmation does not accurately reflect the agreement reached between the parties pursuant to clause 2.4, raise any objections it may have to its contents. If any valid objections are raised by the Consultant the Employer may proceed as it sees fit including amending and reissuing a Project Confirmation, in which case the procedure under this clause 2.8 shall be repeated as necessary.

3 Project Confirmation

- 3.1 The parties agree that if any Project Confirmation is issued by the Employer and accepted by the Consultant under clause 2 then the provisions of:
- 3.1.1 this Delivery Agreement;
 - 3.1.2 the relevant Project Confirmation;
 - 3.1.3 the Terms and Conditions; and
 - 3.1.4 the Collaboration Protocol,

shall together constitute an "Appointment" of the Consultant in relation to the Scope under which the Services shall be performed by the Consultant. In the event of any conflict between the documents referred to in this Clause 3.1, then the order of precedence shall be:

- 3.1.5 this Delivery Agreement;
 - 3.1.6 the relevant Project Confirmation;
 - 3.1.7 the Terms and Conditions; and
 - 3.1.8 the Collaboration Protocol.
- 3.2 This Delivery Agreement including the Terms and Conditions shall be binding on the parties for the Delivery Term and shall govern any Services provided to the Employer in relation to any Project Confirmation for the entire duration of the Delivery Term, regardless of whether such services were performed prior to the date of this Delivery Agreement.
- 3.3 The parties agree that if required by the Employer at its sole discretion (and specified in a relevant Project Confirmation), any or all of the Services in an agreed Project Confirmation may be subject to the Employer issuing a notice to proceed ("Notice to Proceed") before the Consultant commences performance of those Services.
- 3.4 If the Employer issues a Notice to Proceed on or before the Notice to Proceed Longstop Date (as may be extended by the parties), the Consultant shall commence the relevant Services on the terms set out in the Project Confirmation.
- 3.5 If a Notice to Proceed has been specified as applicable to any Services but is not issued on or before the Notice to Proceed Longstop Date (as may be extended by the parties), it shall be deemed that the Employer does not wish the Consultant to commence performance of those Services and the Employer may terminate the relevant Project Confirmation on written notice. Any such termination shall be considered and treated in all respects as a termination pursuant to clause 13.2 of the Terms and Conditions.

4 Consultant's Duties

- 4.1 The Consultant shall perform the Services for each Scope under an Appointment as defined in clause 3.1, having at all time due regard and so far as is reasonably practical to comply with the Project Programme as issued by the Employer to the Consultant from time to time.

5 Collaboration Protocol

- 5.1 The Consultant shall enter into the Collaboration Protocol within 7 days of the date of this Delivery Agreement and it shall be binding on the parties for the Delivery Term.

6 The Fee

- 6.1 The Fee for each Scope shall be as set out in the relevant Project Confirmation (for the avoidance of doubt, based on the Proposal and the Prices).
- 6.2 The Fee for each Scope shall be paid in accordance with each Appointment.

7 Confidentiality

- 7.1 The Consultant undertakes (and shall procure that its employees and personnel undertake) that it shall not at any time during the term of this Delivery Agreement, and for a period of five years after termination of this Delivery Agreement, disclose to any

third party any Confidential Information concerning the Employer, the Works, the Project, the Services, the results of the Services, business, affairs, customers, clients, research activities and plans, know how or suppliers of the Employer, except as permitted by clause 7.2.

- 7.2 The Consultant may disclose Confidential Information as may be required under law or court order only, having informed the Employer of the request to do so.
- 7.3 The Consultant shall not use any Confidential Information for any purpose other than to perform its obligations under this Delivery Agreement.

8 Miscellaneous

- 8.1 This Delivery Agreement, the Terms and Conditions and each Project Confirmation embody the complete and entire agreement between the Employer and the Consultant in relation to the Project and supersede all other oral and/or written communications. The parties shall not be bound by, or be liable for, any statement, representation, promise, inducement or understanding not set forth herein.
- 8.2 No amendments of or modifications to this Delivery Agreement shall be valid unless reduced to writing and executed as a deed by both parties.
- 8.3 Save where expressly stated, the Contracts (Rights of Third Parties) Act 1999 is excluded from applying to this Delivery Agreement and nothing herein, save where expressly stated, confers or purports to confer to any third party, any benefit or any right to enforce any term and/or condition of this Delivery Agreement.
This Delivery Agreement shall be governed by and construed and interpreted in accordance with English law and be subject to the jurisdiction of the courts of England and Wales.

This Delivery Agreement is executed as a deed and was delivered when it was dated.

Signed as a deed by **[INSERT NAME OF COMPANY]**)
acting by a Director and the)
Company Secretary/two Directors

.....
Director's name

.....
Director/Company Secretary²

² To reflect the corporate structure of the successful bidder

Signed as a deed by **[INSERT NAME OF
COMPANY]** acting by a Director and the)
Company Secretary/two Directors)

.....
Director's name

.....
Director/Company Secretary

Appendix 1

The Prices

- 1 The Consultant will be reimbursed in relation to Services on the basis of a fixed sum agreed between the Employer and the Consultant and confirmed in each accepted Project Confirmation ("Fee") and the Fee shall be deemed to be inclusive of all expenses, costs and disbursements but exclusive of VAT, which will be charged at the prevailing rate.
- 2 Each Fee is based on the following prices:

Discipline	RIBA Stage 0	RIBA Stage 1	RIBA Stage 2	Moratorium Period
Lead Consultant	[**] ³	[**]	[**]	[**]
Architect				
Structural Engineer				
Planning				
Landscaping				
MEP Engineer				
[***]				

Discipline	RIBA Stage 3	RIBA Stage 4	RIBA Stage 5	***Other***
Lead Consultant	[**] ⁴	[**]	[**]	[**]
Architect				
Structural Engineer				
Planning				
Landscaping				
MEP Engineer				
[***]				

- 3 The Fee shall be paid on an interim basis and in accordance with Annex 2 to each and any Project Confirmation. If no Fee payment schedule is included at Annex 2 to a Project Confirmation, the Consultant shall be entitled to be paid quarterly in respect of that Project Confirmation.
- 4 The Consultant shall submit to the Employer an application for payment or an invoice on the dates set out in the schedule of instalments referred to in paragraph 3 of this Appendix 1.
- 5 When giving the Employer an application for payment or an invoice, the Consultant shall also give the Employer any supporting documents and information that the Employer reasonably requires to enable the Employer to evaluate the application for payment or invoice. The application for payment or invoice and the supporting documents and information (if any) shall specify the sum that the Consultant considers

³ This will be a fixed fee

⁴ This will be a fixed fee based on a % current estimate of the Project Cost of [**]

will be due on the payment due date for that instalment of the Fee, and the basis on which that sum has been calculated.

- 6 The payment due date will be thirty days after the date on which the Employer receives the application for payment or invoice.
- 7 No later than five days after the payment due date, the Employer shall give notice to the Consultant of the sum, which may be zero, that the Employer considers was due on the payment due date in respect of that instalment and of the basis on which that sum has been calculated.
- 8 The final date for payment of a sum set out in an application for payment or an invoice will be twenty one days after the payment due date.
- 9 Subject to paragraph 11, and unless the Employer has given a notice under paragraph 10, the Employer shall pay the Consultant:
 - 9.1 the sum set out in the Employer's notice given under paragraph 7; or
 - 9.2 if the Employer has not given a notice under paragraph 7, the sum set out in the Consultant's application for payment or invoice given under paragraphs 4 and 5("Notified Sum"), on or before the final date for payment of the application for payment or invoice.
- 10 Not fewer than 2 working days before the final date for payment of the Notified Sum ("Prescribed Period"), the Employer may give the Consultant notice that it intends to pay less than the Notified Sum. The notice shall specify:
 - 10.1 the sum that the Employer considers is due on the date the notice is given; and
 - 10.2 the basis on which the sum has been calculated.
- 11 Notwithstanding paragraphs 9 and 10, and without prejudice to clause [13] of the Terms and Conditions, if the Consultant becomes Insolvent after the Prescribed Period (both as defined in the Terms and Conditions), the Employer need not pay the Consultant the Notified Sum.
- 12 The Consultant may charge interest at the rate of 2% above the Bank of England base rate from time to time in force on any sum due to it, which it has not received by the final date for payment. The Consultant agrees that this is a substantial contractual remedy for late payment for the purposes of the Late Payment of Commercial Debts (Interest) Act 1998.
- 13 If a fixed sum for any additional services is not agreed in accordance with clause [5.3] of the Terms and Conditions, subject to the prior written consent of the Employer, the Employer shall remunerate the Consultant for the additional services on the basis of the hourly rates set out below. The hourly rates include all costs, disbursements and expenses, but exclude VAT which will be charged at the prevailing rate.

Staff Grade	Hourly Rate (£)
-------------	-----------------

***	***
***	***
***	***

Appendix 2

Order

[To be typed on the letterhead of the Employer]

[Address of Consultant]

[date]

Dear []

Request for proposal to carry out [DISCIPLINE] services in relation to [SITE DESCRIPTION]

In accordance with the delivery agreement between us dated [] (the “**Delivery Agreement**”), we require from you a proposal to carry out services in connection with the scope, both as specified in Annex 1 of this Order. The programme for delivery of the services is as attached to Annex 2 of this Order; the relevant key project deliverables are specified in Annex 3 to this Order.

Please provide, pursuant to and in accordance with the provisions of clause 2.2 of the Delivery Agreement, your Proposal to us in response to this Order by [insert date].

Please ensure that your Proposal also addresses the following:

[ANY ADDITIONAL INFORMATION REQUIRED BY THE EMPLOYER]

Yours sincerely

For and on behalf of *[insert name of the Employer]*

Annex 1

Scope:

[description of relevant services package]

Services:

[***Include the Services, divided into separate parts***]

Annex 2
Programme

Annex 3

Key Project Deliverables

Appendix 3

Project Confirmation

To be typed on the Employer's headed notepaper

[Address of Consultant]

[date]

Dear []

Project Confirmation in relation to [insert description of scope of services] ("Scope")

Further to the delivery agreement between us dated [], our Order dated [], and your Proposal dated [], we confirm that, subject to paragraph 5 of this Project Confirmation, we would like to appoint you to carry out the services attached to this letter at Annex 1 (the "**Services**") in accordance with the terms of an "Appointment" (as defined in the Delivery Agreement) (the "**Appointment**") and the following additional terms:

- 1 you shall carry out the Services;
- 2 your fee shall be [] and shall be paid in accordance with Annex 2 and Appendix 1 of the Delivery Agreement;
- 3 the designated persons you will nominate to carry out the Services are identified at Annex 3;
- 4 you will carry out the Services to ensure you meet the Key Project Deliverables at Annex 4;
- 5 you will carry out the Services in accordance with the programme at Annex 5 provided that you shall not commence the Services set out at Part 2 of Annex 1 until you have received a Notice to Proceed;
- 6 the Notice to Proceed Longstop Date shall be [***] (as may be extended by us);
- 7 you will be required to deliver the collateral warranties set out in the Terms and Conditions to the Delivery Agreement;
- 8 *[you will be required to deliver a Parent Company Guarantee;]*
- 9 *[include project-specific amendments to the Terms and Conditions as Annex 6, otherwise delete that Annex]; and*
- 10 *[include further details that the Employer and the Consultant have agreed in respect of the Project – eg any 'Relevant Agreements' as Annex 7, otherwise delete that Annex].*

We agree that on confirmation of your agreement to this Project Confirmation, the terms and conditions set out in:

- 1 the Delivery Agreement;
- 2 this Project Confirmation;
- 3 the Terms and Conditions; and
- 4 the Collaboration Protocol,

shall constitute the Appointment under which you shall carry out, complete and perform the Services. In the event of any conflict between the documents referred to in this Project Confirmation, the order of precedence shall be:

- 1 the Delivery Agreement;
- 2 this Project Confirmation;
- 3 the Terms and Conditions; and
- 4 the Collaboration Protocol.

The following insurance obligations will apply:

Without prejudice to your obligations under the Delivery Agreement, the Terms and Conditions and/or at law or otherwise, you shall take out and maintain, until 12 years after the date of practical completion of the Works (as defined in the Terms and Conditions), with a well-established insurance company or underwriter of repute based in the UK, appropriate professional indemnity insurance with a limit of indemnity of not less than [to be updated on a project by project basis⁵] for each and every claim provided that such insurance continues to be available in the insurance market at reasonable premium rates and on reasonable terms.

Save where expressly stated in this Project Confirmation or elsewhere the Contracts (Rights of Third Parties) Act 1999 is excluded from applying to this Project Confirmation and nothing herein, save where expressly stated, confers or purports to confer to any third party, any benefit or any right to enforce any term and/or condition of this Project Confirmation or the Delivery Agreement.

This Project Confirmation shall be governed by and construed and interpreted in accordance with English law and be subject to the jurisdiction of the courts of England and Wales.

Yours sincerely.

For and on behalf of [Employer]

.....

We confirm our agreement to the terms of this Project Confirmation.

.....

For and on behalf of [Consultant]

Date.....

⁵ This is £5m (each and every claim) for RIBA Stages 0-2. For the remainder of the RIBA Stages, it will be £25m (each and every claim)

Annex 1

Part 1- Services

[***Include a 'tick list' of the relevant schedule of Services***]

Part 2 - Services subject to Notice to Proceed

[***Include a 'tick list' of the relevant schedule of Services***]

Annex 2

Fee Schedule

Date	Amount (£)	Cumulative Amount (£)

Annex 3

Designated Persons

[**]

Annex 4

Key Project Deliverables

[**]

Annex 5

Programme

[**]

Annex 6

Amendments to the Terms and Conditions

[**]

Annex 7

Further Agreed Details

[**]

Appendix 4
Terms and Conditions

1. Introduction

- 1.1. Where not defined in the Delivery Agreement in this Appointment the following words and expressions have the following meanings unless the context requires otherwise:

“BIM Documents” means the documents set out in Schedule 1 Part 1;

“BIM Requirements” means the requirements set out in Schedule 1 Part 2;

“Building Contract” means the contract or contracts entered into or to be entered into by the Employer and the Contractor for the design, carrying out and completion of the Works;

“CDM Regulations” means the Construction (Design and Management) Regulations 2015, including any amendment, variation or re-enactment, and the Health and Safety Executive’s guidance document “Managing health and safety in construction”;

“Confidential Information” means all confidential, non-public or proprietary information of either party, the Contractor or any Other Consultant

“Consultants’ Appointments” means the appointments entered into or to be entered into by the Employer and/or the Contractor and each of the Other Consultants in connection with the Project;

“Contractor” means the building contractor or contractors appointed or to be appointed by the Employer under the Building Contract and shall include the Contractor’s employees, agents, sub-contractors and suppliers;

“Delivery Agreement” means the delivery agreement entered into between the Employer and the Consultant to which these Terms and Conditions are appended;

“Designated Person” means the person nominated by the Consultant and identified in the relevant Project Confirmation and any replacement approved by the Employer in accordance with clause 6;

“Design Responsibility Matrix” means the design responsibility matrix setting out the allocation between the Contractor, the Consultant and the Other Consultants of responsibility for different elements of the Project’s design, as provided by or on behalf of the Employer to the Consultant from time to time including any updates to the same;

“Documents” means any and all activity schedules, bills of quantities, BIM Documents, brochures, budgets, CAD materials, calculations, data, design details, designs, diagrams, drawings, graphs, minutes, models, notes of meetings, photographs, plans, programmes, reports, schedules, sketches, specifications, surveys and other similar materials whether in hard copy, on computer disk, stored electronically on a computer or in a virtual “cloud”, in any other computer-generated format or on any magnetic or optical storage medium prepared by or on behalf of the Consultant (whether in existence or to be created) in connection with the Works and/or the Project;

“Employer’s Representative” means such person as may be notified to fulfil that role to the Consultant in writing by the Employer;

“Fee” means the sum or sums set out in a Project Confirmation under the Delivery Agreement;

“Funder” means any persons who are to provide funding for the whole or part of the Project or otherwise secured against the Site whether before or after the Project is completed;

A party is **“Insolvent”** when in the case of:

- (a) a company:
 - (i) it is deemed unable to pay its debts within the meaning of sections 123 or 268 of the Insolvency Act 1986 (**“Act”**);
 - (ii) it enters administration within the meaning of Schedule B1 to the Act;
 - (iii) on the appointment of an administrative receiver or a receiver or manager of its property under Chapter I of Part III of the Act, or the appointment of a receiver under Chapter II of Part III of the Act;
 - (iv) on the passing of a resolution for voluntary winding-up without a declaration of solvency under section 89 of the Act; or
 - (v) on the making of a winding-up order under Part IV or V of the Act;
- (b) a partnership:
 - (i) any partner is the subject of any individual arrangement or any other event or proceedings referred to in clauses (a) to (d) in the definition of **“Insolvent”**;
 - (ii) on the making of a winding-up order against it under any provision of the Act as applied by an order under section 420 of the Act; or
 - (iii) sequestration is awarded on the estate of the partnership under section 12 of the Bankruptcy (Scotland) Act 1985 or the partnership grants a trust deed for its creditors;
- (c) an individual:
 - (i) he is deemed either unable to pay his debts or as having no reasonable prospect of doing so, in either case, within the meaning of section 268 of the Act;
 - (ii) on the making of a bankruptcy order against him under Part IX of the Act; or
 - (iii) on the sequestration of his estate under the Bankruptcy (Scotland) Act 1985 or when he grants a trust deed for his creditors; and
- (d) any party:

- (i) it suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts;
- (ii) it commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors;
- (iii) it enters into an arrangement, compromise or composition in satisfaction of its debts;
- (iv) a person becomes entitled to appoint a receiver over its assets or a receiver is appointed over its assets; or
- (v) it suspends or ceases, or threatens to suspend or cease, to carry on all or a substantial part of its business; and

each of clauses (a) to (d) in the definition of “Insolvent” includes also any analogous arrangement, event or proceedings in any other jurisdiction;

“Key Performance Indicators” means the indicators (if any) set out in the relevant Project Confirmation;

“Other Consultants” means any other consultants appointed in connection with the Project and shall include those other consultants’ employees, agents and sub-consultants;

“Programme” means the programme set out in the relevant Project Confirmation, as may be amended from time to time by the Employer;

“Prohibited Act” means:

- (a) offering, giving, promising or agreeing to give any officer or employee of the Employer any gift or consideration of any kind as an inducement or reward for doing or not doing, or for having done or not having done, any act in relation to the obtaining or performance of this or any other agreement with the Employer, or for showing or not showing favour or disfavour to any person in relation to this or any other agreement with the Employer;
- (b) in connection with the Project, paying or agreeing to pay any commission other than a payment, particulars of which (including the terms and conditions of the agreement for its payment) have been disclosed in writing to the Employer; and
- (c) requesting, agreeing to receive or accepting a financial or other advantage from any person in relation to the performance or award of this or any other agreement with the Employer, or any agreement with another person, relating to the Project;

“Purchaser” means any persons who are purchasing the freehold or a long leasehold of some or all of the Project and/or the Site;

“Relevant Agreement” means the agreement entered into by the Employer and a third party and which is notified by the Employer under the relevant Project Confirmation;

“Services” means the services set out in the relevant Project Confirmation;

“Statutory Requirements” means:

- (a) all planning and/or other permissions, consents, approvals, permits, licences and certificates which are necessary lawfully to design, construct, complete, commission, maintain and use the Works;
- (b) any statute, regulation or subordinate legislation, the common law and any treaty or European Union law or British law which relates to the protection of the environment or health and safety whether administrative, civil or criminal;
- (c) any international statute, regulation, treaty, law or subordinate legislation applicable to the Consultant’s discipline or the Project of which the Consultant ought reasonably to comply having regard to the extent, nature, scope, type and complexity of the Project and its intended use;
- (d) any statute, statutory instrument, regulation, rule or order made under any statute or directive having the force of law which affects the Works or the performance of any of the obligations under this Appointment;
- (e) any regulation or bye-law of any local authority, statutory undertaker or similar body or organisation which has any jurisdiction with regard to the Works or with whose systems the Works are, or are to be, connected, including any statutory provisions and any decision of a relevant authority under them which controls the right to develop the Site; and
- (f) the consents of all persons having rights or interests in or over the Works or the Site who by the lawful exercise of their powers in the absence of such consents could delay or disrupt the carrying out or progress of the Works or the use or enjoyment of the Site;

“Tenant” means any persons who are to take a lease of some or all of the Project and/or the Site; and

“Works” means the design, construction, completion and commissioning of the Project.

- 1.2. Words referring to the singular only shall include the plural and vice versa and, where the context requires, words describing persons shall include companies, firms, institutions and other entities.
- 1.3. The headings of the clauses in this Appointment shall not affect its interpretation.
- 1.4. In the event of any conflict between the clauses of this Appointment and the Schedules to it and/or the documents attached to it, the clauses of this Appointment shall prevail.
- 1.5. Reference in this Appointment to any act of Parliament, statute, statutory instrument, code of practice or guidance shall refer to and include any amendment to or consolidation of them from time to time and for the time being in force.

2. Appointment

- 2.1. Where the Employer issues a Project Confirmation in accordance with the terms of the Delivery Agreement the parties agree that the Employer shall be deemed to appoint the Consultant to provide, and the Consultant shall provide, the Services fully

and faithfully in accordance with this Appointment, the Delivery Agreement and the Project Confirmation.

- 2.2. In the event of any conflict between the documents referred to in clause 2.1, the order of precedence shall be:
 - 2.2.1. the Delivery Agreement
 - 2.2.2. the relevant Project Confirmation; and
 - 2.2.3. the Agreement.
- 2.3. The Employer and the Consultant agree that the Consultant shall comply with its obligations under, and shall perform the Services in accordance with, this Appointment. At the prior written request of the Employer, the Consultant shall perform reasonable additional services relating to the Project in accordance with this Appointment.
- 2.4. The Consultant's appointment shall commence from the date of this Appointment or from the date on which the Consultant began to perform the Services, or any additional services, whichever is the earlier, and this Appointment shall be deemed to apply to the performance by the Consultant of the Services and any additional services from the date of commencement of the Consultant's appointment.

3. Obligations

- 3.1. The Consultant undertakes and warrants to the Employer that:
 - 3.1.1. the Consultant has used and shall use, in the performance of the Services, all the reasonable skill, care and diligence and the best up-to-date practice to be expected of a fully qualified and competent applicable consultant experienced in designing and performing services for projects of a similar size, scope, nature, complexity and timescale to the Project;
 - 3.1.2. consistent with the Services, the Consultant has used and shall use the level of skill, care and diligence referred to in clause 3.1.1, to ensure that the Project complies with the Statutory Requirements;
 - 3.1.3. the Consultant is competent, has the skill, knowledge, expertise and organisational capabilities, and shall allocate sufficient resources to comply with its obligations under the CDM Regulations including but not limited to acting in the role of principal designer under the CDM Regulations (where relevant);
 - 3.1.4. the Consultant shall comply with the BIM Requirements; and
 - 3.1.5. the Consultant shall prepare the Documents for the elements of the Project for which the Consultant is responsible in accordance with the Programme or, if there is no programme, in sufficient time to assist the efficient progress of the Project.
- 3.2. The Consultant undertakes and warrants to the Employer that (unless otherwise instructed or authorised by or on behalf of the Employer):
 - 3.2.1. the Consultant has not specified, selected and/or approved for use and shall not specify, select and/or approve for use; and

3.2.2. consistent with the Services, the Consultant has used and shall use the level of skill, care and diligence referred to in clause 3.1.1 to ensure that there shall not be used in the Project:

3.2.2.1. any material, substance, building practice or technique which is:

- (a) prohibited by this Appointment;
- (b) not in accordance with any relevant British Standard, Eurocode, code of practice, best up-to-date building practice or agrément certificate issued by the British Board of Agrément;
- (c) not in accordance with the guidance and comment contained in the British Council for Offices' publication: "Good Practice in the Selection of Construction Materials 2011"; or
- (d) generally known or reasonably suspected within the Consultant's profession or the construction industry generally at the time of specification, selection or approval for use (as the case may be) to:
 - (i) be deleterious;
 - (ii) be harmful to the health or safety of any person;
 - (iii) threaten the structural stability, physical integrity or performance of the Project or any part or component of the Project; or
 - (iv) reduce the normal life-expectancy of the Project or any part or component of the Project.

3.2.3. If in the Consultant's professional opinion any material, substance, building practice or technique is not compliant with clauses 3.2.2.1(b) or (c) above but is otherwise compliant with analogous international standards and clause 3.2.2.1(d), the Consultant may request (but the Employer shall not be obliged to grant) authorisation for its use. If so granted, such grant shall satisfy the exclusion in the first two lines of clause 3.2.

3.3. The Consultant shall comply promptly with the Employer's reasonable instructions in relation to this Appointment.

3.4. The Consultant shall use the level of skill, care and diligence referred to in clause 3.1.1 to comply with the Programme. The Consultant shall use this level of skill, care and diligence to ensure that, insofar as by performing the Services it is able to do so, the Project is completed within any other reasonable time and financial limits of which the Employer may notify the Consultant.

3.5. In complying with this Appointment and in performing the Services, the Consultant shall take into account the obligations of the Employer under any Relevant Agreement (where applicable), the Building Contract, the Consultants' Appointments and any other contract entered into by the Employer in respect of the Project (provided that copies of these, or the relevant parts of them, shall have been made available to the Consultant to inspect). The Consultant shall use the level of skill, care and diligence referred to in clause 3.1.1 to ensure that no act, failure to act or default of the Consultant shall constitute, cause or contribute to any breach by the Employer of any

of the Employer's obligations under the Relevant Agreement (if any), the Building Contract, the Consultants' Appointments or any other contract.

- 3.6. When requested by the Employer to do so, the Consultant shall provide the information the Employer may reasonably require in the form requested by it to any other person with whom the Employer enters into an agreement and/or arrangement in connection with the Project.
- 3.7. In performing the Services, the Consultant shall comply with, and give all notices required by, the Statutory Requirements and, using the level of skill, care and diligence referred to in clause 3.1.1, shall advise the Employer of its duties and obligations under them.
- 3.8. If the Consultant is prevented from, or delayed in, the performance of the whole or any part of the Services for any reason, the Consultant shall notify the Employer, the Other Consultants and the Contractor of this as soon as possible. The Consultant shall use its best endeavours to resume and expedite the performance of the Services in accordance with this Appointment so as to complete the Services in accordance with the Programme or, if there is no Programme, so as to make up the time lost because of the prevention or delay and/or within any other reasonable time limits of which the Employer may notify the Consultant.
- 3.9. The Consultant shall at all times:
 - 3.9.1. co-operate fully with the Employer, the Other Consultants and the Contractor;
 - 3.9.2. as soon as possible notify the Employer, the Other Consultants and the Contractor of all relevant issues relating to the Services, the Works or the Project; and
 - 3.9.3. carry out the Services with due regard, in contemplation of and so as to comply in full with the Design Responsibility Matrix.
- 3.10. The parties acknowledge and the Consultant accepts that from time to time additional Project design development data ("**Design Development Data**") may become available to the Employer from the Contractor, any Other Consultant or otherwise, necessitating a change to the design of the Works. The Consultant acknowledges that any additional work resulting from the provision to it of any such Design Development Data shall not constitute additional services to the extent reasonably necessary in the best interests of the Project.

4. Key Performance Indicators

- 4.1. From the date of this Appointment until completion of the Services, the Consultant shall report to the Employer's Representative its performance against each of the Key Performance Indicators. Reports are to be provided in accordance with the relevant Project Confirmation, or if no intervals are specified, on a monthly basis.
- 4.2. If the Consultant's forecast final measurement against the Key Performance Indicator will not achieve a target set out in the relevant Project Confirmation (if applicable) it shall submit to the Employer's Representative its proposals for improving performance.
- 4.3. The Consultant shall be paid the amount stated in the relevant Project Confirmation (if applicable) if the target stated for a Key Performance Indicator is improved upon or

achieved. Payment of the amount is due when the target has been improved upon or achieved.

5. Fee

- 5.1. In consideration of the Consultant complying with this Appointment and performing the Services, the Employer shall pay the Consultant the Fee in accordance with Appendix 2 and the relevant Project Confirmation.
- 5.2. The Employer shall pay to the Consultant any Value Added Tax properly chargeable to the Employer in respect of the Services.
- 5.3. The Fee shall be the Consultant's entire remuneration for complying with this Appointment and for performing the Services under this Appointment.
- 5.4. If the Employer requests the Consultant to perform additional services, the Employer shall remunerate the Consultant for the additional services on the basis of a fixed sum which is to be agreed by the Employer and the Consultant before the additional services are performed. The fixed sum shall be calculated by reference to the Prices and the rates and prices set out in the Delivery Agreement and/or relevant Project Confirmation. If a fixed sum is not agreed, subject to the prior written consent of the Employer, the Employer shall remunerate the Consultant for the additional services on the basis of the hourly rates set out in the Delivery Agreement.
- 5.5. The Consultant shall not be entitled to remuneration for any additional services it performs, or to reimbursement of any costs it incurs, in so far as these arise from the Consultant's failure to comply with this Appointment.
- 5.6. If the Consultant is required to carry out substantial additional work in relation to the Project by reason of any material alteration or material modification to the Project by reason of any change of law or Statutory Requirements affecting the Project then, to the extent the same shall not have been occasioned by negligence, omission or default of the Consultant, the Employer shall pay to the Consultant such fair and reasonable additional fees and expenses commensurate with the additional work performed by the Consultant (such fees and expenses to be agreed in writing in advance unless otherwise agreed by the Employer).
- 5.7. If the Employer instructs the Consultant to perform fewer than all the Services or only part of any Service, the Employer may reduce the Fee proportionately.
- 5.8. The Employer may pay less than the whole or part of any instalment referred to in this Appointment if in its reasonable opinion the Employer has a claim against the Consultant in respect of any negligence, default or non-performance under this Appointment.

6. Personnel

- 6.1. The Designated Persons specified in any Project Confirmation shall direct, control, manage and deliver the overall provision of the Services by the Consultant.
- 6.2. The Consultant shall identify in writing a Designated Person who shall have authority to receive and act on any instructions or directions given by the Employer and shall be responsible for maintaining direct and regular contact with the Employer.

- 6.3. The Consultant shall not replace any Designated Person without prior consultation with and written consent from the Employer.
- 6.4. The Employer may at any time request the removal and replacement of any Deputy Designated Person in which event the Consultant shall remove that person and nominate a replacement for the Employer's approval. If the Employer, acting reasonably, does not approve the Consultant's nomination this process shall be repeated until agreement is reached.
- 6.5. If any Designated Person is removed and/or replaced from a Project, the Consultant shall agree with the Employer a handover plan for the replacement and the Consultant shall provide and comply with such plan at the Consultant's cost.
- 6.6. The nominated Designated Person referred to in clause 6.2 shall each have full authority to act on behalf of the Consultant for all purposes in connection with the Appointment and the Employer shall be entitled to rely on such authority for all purposes.
- 6.7. The Consultant shall be responsible for ensuring that all staff who are or may at any time undertake work in relation to this Appointment have the appropriate qualifications and/or experience and are properly supervised.
- 6.8. The Consultant's Personnel shall be appropriately qualified, skilled and experienced in their respective trades or occupations. The Employer may require the Consultant to remove (or cause to be removed) any person employed on the Project who:
- 6.8.1. persists in any misconduct or lack of care,
 - 6.8.2. carries out duties incompetently or negligently,
 - 6.8.3. fails to conform with any provisions of the Appointment, or
 - 6.8.4. persists in any conduct which is prejudicial to safety, health, or the protection of the environment.

7. Collateral warranties, novation, parent company guarantee

- 7.1. At the Employer's request, whether before or after the completion of the Services or the termination of the Consultant's appointment under this Appointment, the Consultant shall execute and deliver to the Employer within 14 days of the request a deed of collateral warranty:
- 7.1.1. in the form set out in Schedule 4 in favour of any Funder;
 - 7.1.2. in the form set out in Schedule 5 in favour of any Purchaser; and
 - 7.1.3. in the form set out in Schedule 4 or Schedule 5 as appropriate, in favour of any other person with an interest in the whole or part of the Project and/or the Site,
- and, where required, each deed of collateral warranty shall be amended to refer to the Site rather than the Project, and shall include any other amendments that the Employer reasonably requires.

- 7.2. At the Employer's request the Consultant shall execute and deliver to the Employer a parent company guarantee in the form set out in Appendix 5 to the Delivery Agreement duly executed by the Employer and the Consultant's parent company.
- 7.3. The Consultant shall, if required by the Employer at any time after the date of this Appointment, enter into a novation of the Appointment to:
- 7.3.1. a holding company, subsidiary or associated company of the Employer; or
- 7.3.2. such other person as the Employer may specify;
- (the "Employer Novation Agreement") provided that the Consultant shall not be obliged to enter into a novation with any person who shall increase the Consultant's obligations, liabilities, risk or restrict any of the Consultant's rights in connection with the Appointment.
- 7.4. Each party agrees to execute such documentation as may be necessary to give effect to the Employer Novation Agreement.
- 7.5. If the Consultant fails to execute and deliver any documentation referred to in clause 7.4 above within 14 days of the Employer's written request to do so then the Employer may execute such documentation on behalf of the Consultant and for such purpose the Consultant hereby appoints the Employer as its true and lawful attorney for the purpose of executing and perfecting any such documentation and the Consultant agrees to ratify and confirm whatever the Client does by virtue of this power of attorney and agrees that this power is irrevocable pursuant to Section 4 of Powers of Attorney Act 1971.
- 7.6. Notwithstanding the provisions of clauses 7.3 to 7.5, and regardless of whether or not a novation has been effected under those clauses, at the Employer's request, whether before or after the completion of the Services or the termination of the Consultant's appointment under this Appointment, the Consultant shall execute and deliver to the Employer within seven days of the request:
- 7.6.1. a deed of novation novating the Appointment to the Contractor, in the form set out in Schedule 2; and
- 7.6.2. a post-novation deed of collateral warranty in the Employer's favour, in the form set out in Schedule 3,
- and the deed of novation and the deed of collateral warranty shall include any amendments that the Employer reasonably requires.

8. Documents

- 8.1. The Consultant grants to the Employer an irrevocable, royalty-free and non-exclusive licence, such licence to remain in full force and effect notwithstanding the completion of the Services or the termination of the Consultant's appointment under this Appointment, to copy and use the Documents and to reproduce the designs and contents of them for:
- 8.1.1. any purpose relating to the Project and/or the Employer's interest in the Project including, but not limited to, the advertisement, alteration, building information modelling, completion, construction, demolition, design, development, disposal, fitting-out, funding, letting, maintenance, modification, promotion, reconstruction,

refurbishment, reinstatement, repair, sale and use of the Project and/or the Employer's interest in the Project; and

- 8.1.2. the extension of the Works or the Project, so that the Employer can interface any extension of the Works or the Project with the existing Works or Project, but the licence shall not include a licence to reproduce the designs in the Documents for any extension of the Works or the Project.
- 8.2. The Employer shall be entitled to grant sub-licences under the Employer's licence and both the Employer's licence and any sub-licences shall be transferable to others.
- 8.3. The Consultant undertakes and warrants that it shall procure that each individual author of the Documents, on or before practical completion of the Works or the Project, signs a waiver in respect of the Documents prepared by the author, unconditionally and irrevocably waiving all moral rights to which the author may now or in the future be entitled under the Copyright, Designs and Patents Act 1988 and all similar legislation in force from time to time anywhere in the world. This waiver shall be made in favour of the Employer and it shall include any sub-licensees and assignees under clause 8.2 any assignees under clause 11, any successors in title to the copyright in the design under this Appointment and any successors in title to the Employer's business.
- 8.4. Notwithstanding the completion of the Services or the termination of the Consultant's appointment under this Appointment, the Consultant shall give to the Employer any paper copies and electronic copies of the Documents that the Employer reasonably requests. The Consultant shall give these copies to the Employer within 7 days of any request, for which the Employer shall pay the Consultant's reasonable copying costs. The Consultant shall provide any password, code or other data required to access, decrypt or reproduce any electronic copies of the Documents that the Consultant gives to the Employer.
- 8.5. The Consultant shall not be liable for any use of the Documents for any purpose other than the purpose they were prepared for.
- 8.6. The Consultant indemnifies the Employer from and against all claims, proceedings, damages, costs and expenses suffered or incurred by the Employer by reason of the Consultant infringing or being held to infringe any copyright or intellectual property rights in the performance of the Services.
- 8.7. The parties agree that the Employer's licence under clause 8.1 shall subsist regardless of the issue or non-issue of any further Project Confirmations.

8A. Collaboration

- 8A.1 The parties acknowledge that collaboration between the Employer, the Consultant, the Contractor and the Other Consultants is fundamental to the Project.
- 8A.2 The Consultant extends the licence granted to the Employer under clause 8.1 to the Contractor and the Other Consultants to the extent reasonably necessary for performance of their obligations and generally in respect of the Project.
- 8A.3 The Consultant acknowledges that the provisions of clause 9 apply in full to any Document or information provided to it directly or indirectly from the Contractor or any Other Consultant in connection with the Project.
- 8A.4 The Consultant shall:

- 8A.4.1 engage with and collaborate with the Contractor and Other Consultants to achieve the Employer's intention in connection with the Project, including without limitation in planning, programming, technical and other necessary discussions in relation to the Project from time to time;
- 8A.4.2 keep the Contractor and Other Consultants informed about its own progress in relation to the Project; and
- 8A.4.3 nominate a representative to act in connection with the collaboration provisions of this clause 8A and facilitate regular discussions between appropriate members of its personnel and those of the Contractor and Other Consultants in relation to the Project, including in relation to:
 - (i) performance and issues of concern in relation to the Project;
 - (ii) new developments and resource requirements;
 - (iii) compliance with deadlines; and
 - (iv) such other matters as may arise or be agreed from time to time;
- 8A.4.4 sign simultaneously with the execution of the Delivery Agreement execute and return to the Employer the Collaboration Protocol at Appendix 6 to the Delivery Agreement, confirming its agreement with its contents and its intention to be bound by it.
- 8A.5 The Consultant shall:
 - 8A.5.1 supply to the Contractor and Other Consultants information and assistance reasonably requested of it relating to the Project as is necessary to enable any such other party to perform its own obligations in relation to the Project;
 - 8A.5.2 give advice, information and opinion to the Contractor and Other Consultants when asked to do so by any such recipient or the Employer;
 - 8A.5.3 review documentation, including draft specifications or service descriptions or other technical documentation, for use when performing its obligations in relation to the Project (if any), as soon as reasonably practicable at the request of the other party, and notify it of any errors or incorrect assumptions made in any such documentation so far as it is aware; and
 - 8A.5.4 give early warning to the Employer and to the Contractor or any Other Consultant when it becomes aware of any matter relating to collaboration, information sharing, Document exchange or otherwise that could affect the achievement of its own or the Contractor's or Other Consultant's obligations in connection with the Project.
- 8A.8 The Consultant shall immediately give written notice to the Contractor or Other Consultants of any actual, threatened or suspected infringement of any party's intellectual property rights used in connection with the Project of which it becomes aware.
- 8A.9 The Employer undertakes to procure that any appointment of the Contractor and any Other Consultant will as far as reasonably necessary in the best interests of the Project contain provisions substantially equivalent to those set out in this clause 8A.

8B. Reliance

- 8B.1 The Employer shall use reasonable endeavours to procure a right of reliance in the Consultant's favour on any survey, report or other document relating to the Project or the Site ("**Survey**") supplied to it on or on behalf of the Employer insofar as the party which prepared any such Survey is willing and able to grant reliance to the Consultant.
- 8B.2 Other than in respect of a Survey as expressly referred to in clause 8B.1 above, the Consultant shall not be entitled to rely on any survey, report or other document supplied to it by or on behalf of the Employer regarding the Project or the Site.
- 8B.3 The Employer shall have no liability arising out of or in relation to any Survey or any other survey, report or document or from any representation or statement, whether negligently or otherwise made, contained in such survey, report or other document.

9. Confidentiality

- 9.1. The Consultant undertakes (and shall procure that its employees and personnel undertake) that it shall not at any time during this Appointment, and for a period of five years after termination of this Appointment, disclose to any third party any Confidential Information concerning the Employer, the Works, the Project, the Services, the results of the Services, business, affairs, customers, clients, research activities and plans, know how or suppliers of the Employer, except as permitted by clause 9.2.
- 9.2. The Consultant may disclose Confidential Information as may be required under law or court order only, having informed the Employer of the request to do so.
- 9.3. The Consultant shall not use any Confidential Information for any purpose other than to perform its obligations under this Appointment.

10. Action, instructions and authority

- 10.1. Without the prior written consent of the Employer or the Employer's Representative, the Consultant shall not incur any costs on behalf of the Employer or bind the Employer in any way.
- 10.2. In the event of an emergency which requires the Consultant to take action or issue instructions to others immediately, the Consultant shall be entitled to take action and issue instructions to others without the consent of the Employer or the Employer's Representative. In this event, the Consultant shall inform the Employer's Representative immediately that an emergency has arisen, explain the action it has taken and/or the instructions it has issued to deal with the emergency and advise the Employer's Representative of the nature and value of the resulting actions, services and/or works carried out.

11. Assignment and sub-contracting

- 11.1. The Employer may at any time create a security interest in this Appointment, whether by way of mortgage, charge, assignment or otherwise, in favour of a person who is to provide funding for the Project, without the consent of the Consultant.
- 11.2. The Employer may at any time assign or transfer all or any of its benefit under this Appointment without the consent of the Consultant.
- 11.3. The Consultant shall not assign or transfer any of its benefit or burden under this Appointment, or sub-contract or delegate any of its obligations under this Appointment, to any person without the prior written consent of the Employer. If the Employer gives consent, the Consultant shall remain liable for its obligations under

this Appointment notwithstanding any assignment, transfer, sub-contracting or delegation.

12. Insurance

- 12.1. Without prejudice to its obligations under this Appointment and/or at law or otherwise, the Consultant shall take out and maintain, until twelve years after the date of practical completion of the Project, with a well-established insurance company or underwriter of repute based in the UK, appropriate professional indemnity insurance with a limit of indemnity of not less than the amount set out in the Project Confirmation for each and every claim, provided that such insurance continues to be available in the insurance market at reasonable premium rates and on reasonable terms.
- 12.2. If insurers require the payment of any increased or additional premiums, or offer insurance on terms more onerous than those usually offered, as a result of the Consultant's claims record or other act, failure to act or circumstance particular to it, this shall be deemed to be within reasonable rates and terms.
- 12.3. Without the Employer's prior written consent, the Consultant shall not:
 - 12.3.1. settle or compromise any claim against the insurers that relates to a claim by the Employer against the Consultant; or
 - 12.3.2. by any act or omission lose or affect the Consultant's right to make, or to proceed with, any claim against the insurers that relates to a claim by the Employer against the Consultant.
- 12.4. As and when it is reasonably required to do so by the Employer, the Consultant shall make available for inspection by the Employer documentary evidence that the insurance is being maintained in accordance with this Appointment.
- 12.5. The Consultant shall inform the Employer immediately if this insurance ceases to be available to the Consultant at reasonable premium rates or on reasonable commercial terms. In this event:
 - 12.5.1. the Employer and the Consultant shall discuss and agree on the best means of protecting themselves; and
 - 12.5.2. the Employer may require the Consultant to take out and maintain insurance at the best premium rates and on the best commercial terms available to the Consultant. If the Employer exercises this right, subject to clause 12.2, it shall reimburse to the Consultant the difference between the premium paid and the premium that would have been reasonable.
- 12.6. If required by the terms of its insurance policy, the Consultant undertakes and warrants that:
 - 12.6.1. prior to the execution of this Appointment, it has:
 - 12.6.1.1. disclosed the contents of this Appointment to its insurers and brokers; and
 - 12.6.1.2. received confirmation from its insurers and brokers that the terms of this Appointment are covered by the terms of the insurance policy; and

- 12.6.1.3. it shall disclose the contents of this Appointment to its insurers and brokers when it renews its insurance.

13. Termination and suspension by Employer

- 13.1. Without prejudice to any other rights or remedies which the Employer may have, whether under this Appointment, the law or otherwise, by giving written notice to the Consultant at any time, the Employer may terminate the appointment of the Consultant under this Appointment with immediate effect.
- 13.2. Without prejudice to any other rights or remedies which the Employer may have, whether under this Appointment, the law or otherwise, by giving written notice to the Consultant at any time, the Employer may require the Consultant to suspend the performance of all or any of the Services with immediate effect. If the Employer has not required the Consultant to resume the performance of the suspended Services within 12 months from the date of the notice to suspend performance of them, either party may terminate the appointment of the Consultant under this Appointment with immediate effect by giving written notice to the other party.
- 13.3. If the Employer has required the Consultant to suspend the performance of all or any of the Services under clause 13.2, by giving written notice to the Consultant at any time within 12 months from the date of the notice to suspend performance, the Employer may require the Consultant to resume the performance of the suspended Services. In this event, the Consultant shall resume the performance of the suspended Services in accordance with this Appointment as soon as reasonably practicable, and any payment made under clause 15.2 shall be deemed to be a payment on account of any sum to be paid to the Consultant under this Appointment.

14. Termination and suspension by Consultant

- 14.1. If the Employer materially breaches its obligations under this Appointment and has not remedied the breach within 30 days, or such longer period as is reasonable, after receiving a written notice from the Consultant specifying the breach and requiring its remedy, the Consultant may terminate its appointment under this Appointment by giving a further 30 days' written notice to the Employer.
- 14.2. Provided that the Consultant does not become Insolvent, the Consultant may suspend the performance of all or any of the Services and its other obligations under this Appointment by giving at least 30 days' written notice to the Employer of its intention to do so stating the grounds on which it intends to suspend its performance, if the Employer:
- 14.2.1. does not pay in full to the Consultant any sum due to it under this Appointment by the final date for payment; and
- 14.2.2. has not given to the Consultant a notice complying with Appendix 2 paragraph 9 of the Delivery Agreement.
- 14.3. If the Consultant suspends the performance of all or any of the Services or its other obligations under this Appointment in accordance with clause 14.2, the Employer shall pay to the Consultant a reasonable sum in respect of the direct costs and expenses necessarily and properly incurred by the Consultant as a result of its suspension of its performance, and this payment shall be the Consultant's sole remedy for its suspension of its performance.

- 14.4. If for any reason, the Consultant's suspension of its performance in accordance with clause 14.2 continues for more than three months, or results in the termination of the Consultant's appointment under this Appointment, the Consultant shall comply with clause 15.1.

15. Consequences of termination and suspension

- 15.1. If the Consultant's appointment under this Appointment is terminated by either party under clauses 13.1, 13.2 or 14.1, or the performance of all or any of the Services is suspended under clause 13.2, the Consultant shall immediately bring to an end the performance of the Services in as economical and orderly a manner as possible, and the Consultant shall deliver to the Employer the Documents and all other documentation in the possession or under the control of the Consultant relating to the Services or this Appointment. The Consultant relinquishes any lien on the Documents and all other documentation to which it may be entitled otherwise.
- 15.2. If the Consultant's appointment is terminated under clauses 13.1, 13.2 or 14.1 or the performance of all or any of the Services is suspended under clause 13.2, subject to any abatement, deduction, set-off or withholding which the Employer is entitled to make whether under the terms of this Appointment, the law or otherwise, the Employer shall pay to the Consultant a fair and reasonable proportion of the Fee, equal to the proportion of the Services performed by the Consultant up to the date of the termination or suspension, less the amount of any payments of the Fee which the Employer has made previously to the Consultant. If the amount of any payments of the Fee made previously exceeds this fair and reasonable proportion, the Consultant shall pay the amount of this excess to the Employer within 14 days of the termination or suspension.
- 15.3. If the Consultant's appointment is terminated by either party under clauses 13.1, 13.2 or 14.1, the Employer shall pay to the Consultant a reasonable sum in respect of the direct costs and expenses necessarily and properly incurred by the Consultant as a result of the termination of its appointment, except insofar as the termination is due to any act, failure to act, breach of this Appointment, the Delivery Agreement, or of statutory duty or tort including, but not limited to, the negligence of the Consultant; and
- 15.4. The Parent Company Guarantee unenforceable or the Guarantor (as defined in the Parent Company Guarantee) is insolvent.
- 15.5. Any payment under clauses 15.2 or 15.3 shall be the Consultant's sole remedy for the termination of its appointment under this Appointment or the suspension of the performance of all or any of the Services under clause 13.2.
- 15.6. Notwithstanding any other provision of this Appointment, if the Consultant's appointment under this Appointment is terminated, or the performance of all or any of the Services or the Consultant's other obligations under this Appointment is suspended, the Employer shall not be liable to the Consultant for any direct or indirect loss of profit, loss of contract, loss of opportunity or for any indirect costs, expenses, liabilities or losses of any nature arising out of or in connection with the termination or suspension.
- 15.7. Subject to clauses 14.3, 15.5 and 15.6, any termination of the Consultant's appointment under this Appointment, or any suspension of the performance of all or any of the Services or the Consultant's other obligations under this Appointment, shall be without prejudice to the accrued rights and remedies of both parties in respect of

any act, failure to act, breach of this Appointment or of statutory duty or tort including, but not limited to, negligence of the other prior to the termination or suspension.

- 15.8. The provisions of this Appointment shall bind both parties insofar as, and for as long as, may be necessary to give effect to their respective rights and obligations under it.

16. Tort

- 16.1. Subject to clause 15, this Appointment is without prejudice to any rights or remedies which either party may have against the other in tort.

17. Bribery Act 2010

- 17.1. The Consultant undertakes and warrants that:

17.1.1. it has not committed any offence under the Bribery Act 2010 ("**Bribery Act**") or done any Prohibited Act; and

17.1.2. it has in place adequate procedures to prevent bribery and corruption as contemplated by the Bribery Act; and

17.1.3. it shall comply with the Modern Slavery Act 2015 and any anti-slavery policy of the Employer, and shall ensure that any of its sub-consultants shall so comply with the same.

- 17.2. If the Consultant, its employees, agents, sub-consultants, sub-contractors or suppliers, or anyone acting on its or their behalf or associated with it or them in accordance with the Bribery Act, has committed or commits any offence under the Bribery Act or has done or does any Prohibited Act, in relation to this Appointment or any other agreement with the Employer, with or without the Consultant's knowledge:

17.2.1. the Employer may:

17.2.1.1. terminate this Appointment and recover from the Consultant the amount of any loss arising from or connected with the termination;

17.2.1.2. recover from the Consultant the amount or value of any gift, consideration, commission or financial or other advantage concerned; and

17.2.1.3. recover from the Consultant any other loss or expense suffered as a consequence of the Consultant committing any offence under the Bribery Act or doing any Prohibited Act; and

17.2.2. any termination under clause 17.2.1 shall be without prejudice to any right or remedy that has already been accrued or subsequently accrues to the Employer.

- 17.3. The Consultant shall impose on any sub-consultants, sub-contractors and suppliers obligations equivalent to those imposed on it by this clause 17.

- 17.4. Notwithstanding clause 26, any dispute or difference relating to:

17.4.1. the interpretation of clauses 17.1, 17.2 or 17.3; or

17.4.2. the amount or value of any gift, consideration, commission or financial or other advantage,

shall be determined by the Employer in its absolute discretion and its decision shall be final and binding.

17.5. No assignment, transfer, sub-contracting or delegation shall:

17.5.1. modify, diminish, reduce or in any way affect the Consultant's liability under this Appointment or otherwise at law; or

17.5.2. increase the Fee or any expenses payable in accordance with clause 5 or otherwise under this Appointment.

18. Contracts (Rights of Third Parties) Act 1999

18.1. The Contracts (Rights of Third Parties) Act 1999 does not apply to this Appointment and nothing in it, unless stated expressly, confers or purports to confer on any third party any benefit or any right to enforce any of its terms or conditions.

19. Liability

19.1. Nothing in this Appointment shall exclude or limit the Consultant's liability for:

19.1.1. death or personal injury caused by its negligence; or

19.1.2. fraud or fraudulent misrepresentation.

20. Set-off

20.1. The Employer may at any time set off any liability of the Consultant to the Employer against any liability of the Employer to the Consultant, whether either liability:

20.1.1. exists or comes into existence;

20.1.2. is liquidated or unliquidated; or

20.1.3. arises under this Appointment or in any other way.

20.2. If the Employer exercises its right under clause 20.1, this shall not remove, limit or affect any other rights or remedies which the Employer may have either under or in connection with this Appointment or any other agreement or in any other way.

21. Complete agreement and variations

21.1. This Appointment contains the complete and entire agreement between the Employer and the Consultant relating to the Project and supersedes all other oral and written communications relating to the Project. The parties shall not be bound by, or be liable for, any inducement, promise, representation, statement or understanding not contained in this Appointment.

21.2. No changes or variations to this Appointment shall be valid unless they are recorded in writing and executed as a deed by both parties.

22. Non-waiver

22.1. No acknowledgement, admission, advice, approval, comment, confirmation, consent, direction, enquiry, guideline, indication of satisfaction, inspection, instruction or anything similar, given or made by or on behalf of the Employer, any of the Other

Consultants, the Contractor or any of their agents, or failure to give or make any of these, shall exclude, limit, modify, qualify or reduce the Consultant's obligations or liability under this Appointment.

- 22.2. Any forbearance, relaxation, indulgence or delay ("**indulgence**") of a party in exercising any right shall not be construed as a waiver of the right and shall not affect the ability of that party subsequently to exercise that right or to pursue any remedy, nor shall any indulgence constitute a waiver of any other right, whether against that party or any other person.

23. Severability

- 23.1. If any provision of this Appointment is declared to be unenforceable, invalid or illegal by the decision-maker in any dispute resolution process to which it is subject, that provision shall be severed from this Appointment and its unenforceability, invalidity or illegality shall not prejudice or affect the enforceability, validity or legality of the remaining provisions of this Appointment.

24. Costs and expenses

- 24.1. Each party shall be responsible for paying its own costs and expenses incurred in the preparation, negotiation, agreement, execution and completion of this Appointment.

25. Notices

- 25.1. Any written notice or communication given under this Appointment shall be given properly if it is delivered by hand or sent by Royal Mail special delivery to a party at its address at the beginning of this Appointment or another address which a party may specify by written notice to the other party from time to time.
- 25.2. A notice shall be deemed to have been received on the day of delivery if it is delivered by hand and on the second working day after the day of posting if it is sent by Royal Mail special delivery.

26. Governing law, dispute resolution and jurisdiction

- 26.1. This Appointment shall be governed by, and construed and interpreted in accordance with, English law.
- 26.2. Either party may refer any dispute or difference under this Appointment to adjudication by a person agreed between the parties or, if not agreed, appointed on the application of either party to the President or Vice-President of the Royal Institution of Chartered Surveyors in accordance with Part 1 of the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998, as amended by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011.
- 26.3. Subject to clause 26.2, the parties agree to submit any dispute or difference between them arising out of, or in connection with, this Appointment to the exclusive jurisdiction of the English courts, except for the purpose of enforcement proceedings in respect of any judgment or award of the English courts in another jurisdiction.

27. Limitation

- 27.1. Notwithstanding that the Project Confirmation may be executed under hand, either party may bring a claim, action or proceedings against the other after six years from the date of practical completion of the Works provided that no claim, action or proceedings may be issued or brought against the Consultant after twelve years from the date of practical completion of the Project unless such claim, action or proceedings were notified to the Consultant prior to such date.

Schedule 1

Part 1 BIM Documents

BIM Requirements

[BIM Protocol to be inserted here]

Schedule 2

Deed of Novation

DATED

[EMPLOYER] (1)

and

[CONSULTANT] (2)

and

[CONTRACTOR] (3)

**DEED OF NOVATION
for [name of Project]**

MILLS & REEVE

THIS NOVATION is made on

2017 **BETWEEN:**

- (1) **[EMPLOYER]** [(company number [insert number])] whose [registered] [principal] office is at [insert address] ("**Employer**" which expression shall include its successors in title and assigns); and
- (2) **[CONSULTANT]** [(company number [insert number])] whose [registered] [principal] office is at [insert address] ("**Consultant**"); and
- (3) **[CONTRACTOR]** [(company number [insert number])] whose [registered] [principal] office is at [insert address] ("**Contractor**").

BACKGROUND:

- (A) The Employer has entered into a contract with the Contractor dated [] ("**Agreement**") for the design, construction, completion and commissioning of [insert description] ("Project").
- (B) The Employer has entered into a contract with the Consultant dated [] ("**Appointment**") relating to the Project for the performance of the services described in the Appointment ("**Services**").
- (C) It is a condition of the Appointment and of the Agreement that the Consultant and the Contractor enter into this Novation with the Employer.

In consideration of the payment of £1 (a pound) by the Employer to both the Consultant and the Contractor (receipt of which both the Consultant and the Contractor acknowledge) **IT IS AGREED:**

2 Agreement to novation

- 2.1 The Employer, the Consultant and the Contractor agree that the Appointment shall be novated from the Employer and the Consultant to the Contractor and the Consultant by this Novation and simultaneously or immediately after that the Consultant shall enter into a deed of warranty (the "**Warranty Deed**") in favour of the Employer in the form attached at Schedule 1.

3 Effect of novation

- 3.1 The Employer, the Consultant and the Contractor agree that the Appointment shall be made, and shall be deemed to have been made, between the Contractor and the Consultant instead of between the Employer and the Consultant from the date of the Appointment, or from the date on which the Consultant began to perform the Services or any additional services, whichever is the earlier, for all purposes and in respect of all benefits, rights, obligations and liabilities under or in connection with the Appointment, whether they have been performed or are to be performed, and that the Appointment shall be read and construed accordingly.

4 Binding and compliance of Contractor

- 4.1 The Contractor undertakes and warrants that it shall be bound by the Appointment and comply with it as if it had been a party to the Appointment instead of the Employer, and that it shall comply with and accept the Employer's obligations and liabilities under the Appointment, in both cases from the date of the Appointment or from the date on which

the Consultant began to perform the Services or any additional services, whichever is the earlier.

5 Contractor's non-compliance

- 5.1 If the Contractor does not comply with clause 3.1, the Contractor shall indemnify the Employer for all costs, expenses, liabilities and losses that the Employer incurs or suffers under or in connection with the Appointment as a result of the Contractor's non-compliance.

6 Consultant's release of Employer

- 6.1 The Consultant discharges and releases the Employer from compliance with, and from claims, demands and liability under or in connection with, the Appointment and waives all rights it may have against the Employer under or in connection with the Appointment, and the Consultant accepts this liability from the Contractor instead of from the Employer.

7 Consultant's compliance

- 7.1 The Consultant undertakes and warrants to the Contractor that:
- 7.1.1 the Consultant has complied and shall comply with the Consultant's obligations under and in connection with the Appointment in accordance with it; and
 - 7.1.2 the Consultant has used and shall use, in the performance of the Services, all the reasonable skill, care and diligence and the best up-to-date practice to be expected of a fully qualified and competent [insert Consultant's discipline] experienced in [designing and] performing services for projects of a similar size, scope, nature, complexity and timescale to the Project.

8 Contractor's reliance on Consultant

- 8.1 The Contractor shall rely on the Consultant's compliance with the Consultant's obligations under and in connection with, and its performance of the Services in accordance with, the Appointment including, but not limited to, any designs prepared by or on behalf of the Consultant in connection with the Project.

9 Contractor's recovery from Consultant

- 9.1 The Contractor may recover from the Consultant any costs, expenses and losses that it incurs or suffers in so far as these result from any breach of the Appointment by the Consultant, notwithstanding that these costs, expenses and losses were not, and could not have been, incurred or suffered by the Employer, and notwithstanding that the acts and/or failures to act causing and/or contributing to the breach occurred before the date of this Novation.

10 Services for Employer's sole benefit

- 10.1 Notwithstanding any other provision of this Novation, the Employer, the Consultant and the Contractor agree that the Services set out in the Appendix to this Novation (the "**Retained Services**") shall continue to be for the sole benefit of the Employer and not the Contractor.

11 Changes to Appointment

- 11.1 The Contractor and the Consultant shall not change the Appointment or any benefits, rights, obligations or liabilities arising under or in connection with it in any way that would or might prejudice any interests of the Employer or any beneficiary of a warranty collateral to the Appointment given or to be given by the Consultant. Subject to this, the Contractor and the Consultant shall not change the Appointment or any benefits, rights, obligations or liabilities arising under or in connection with it, without the prior written consent of the Employer, which shall not be delayed or withheld unreasonably.

12 Conflict

- 12.1 In the event of any conflict between the terms and conditions of this Novation and the terms and conditions of the Appointment, the terms and conditions of this Novation shall have priority.

13 Contracts (Rights of Third Parties) Act 1999

- 13.1 The Contracts (Rights of Third Parties) Act 1999 does not apply to this Novation and nothing in it, unless stated expressly, confers or purports to confer on any third party any benefit or any right to enforce any of its terms or conditions.

14 Severability

- 14.1 If any provision of this Novation is declared to be unenforceable, invalid or illegal by the decision-maker in any dispute-resolution process to which it is subject, that provision shall be severed from this Novation and its unenforceability, invalidity or illegality shall not prejudice or affect the enforceability, validity or legality of the remaining provisions of this Novation.

15 Counterparts

- 15.1 This Novation may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by each party shall constitute a complete original of this Novation for all purposes.

16 Notices

- 16.1 Any written notice or communication given under this Novation shall be given properly if it is delivered by hand or sent by Royal Mail special delivery to a party at its address at the beginning of this Novation or another address which a party may specify by written notice to the other parties from time to time.
- 16.2 A notice shall be deemed to have been received on the day of delivery if it is delivered by hand and on the second working day after the day of posting if it is sent by Royal Mail special delivery.

17 Governing law, dispute resolution and jurisdiction

- 17.1 This Novation shall be governed by, and construed and interpreted in accordance with, English law.
- 17.2 The parties agree to submit any dispute or difference between them arising out of, or in connection with, this Novation to the exclusive jurisdiction of the English courts,

except for the purpose of enforcement proceedings in respect of any judgment or award of the English courts in another jurisdiction.

18 Execution as a deed

This Novation is executed as a deed and it was delivered when it was dated.

[insert execution blocks for employer, consultant and contractor]

Appendix

Retained Services

Schedule 1

Deed of Warranty to Employer after Novation

DATED 2017

[EMPLOYER] (1)

and

[CONSULTANT] (2)

and

[CONTRACTOR] (3)

DEED OF WARRANTY
for [name of Project]

MILLS & REEVE

THIS WARRANTY is made on

2017 **BETWEEN:**

- (1) **[EMPLOYER]** [(company number [insert number])] whose [registered] [principal] office is at [insert address] ("**Beneficiary**" which expression shall include its successors in title and assigns);
- (2) **[CONSULTANT]** [(company number [insert number])] whose [registered] [principal] office is at [insert address] ("**Consultant**"); and
- (3) **[CONTRACTOR]** [(company number [insert number])] whose [registered] [principal] office is at [insert address] ("**Contractor**").

BACKGROUND:

- (A) The Beneficiary has entered into a contract with the Contractor dated [] ("**Agreement**") relating to [insert description] ("**Project**") for the design, construction, completion and commissioning of the Project ("**Works**").
- (B) The Beneficiary has entered into a contract with the Consultant dated [] ("**Appointment**") relating to the Project for the performance of the services described in the Appointment ("**Services**").
- (C) The Beneficiary, the Consultant and the Contractor have entered into a contract dated [] novating the Appointment from the Beneficiary and the Consultant to the Contractor and the Consultant.
- (D) It is a condition of the Appointment and of the Agreement that the Consultant gives, and that the Contractor is a party to, this Warranty to the Beneficiary.

In consideration of the payment of £1 (a pound) by the Beneficiary to the Consultant (receipt of which the Consultant acknowledges) **IT IS AGREED:**

1 Services

1.1 The Consultant undertakes and warrants to the Beneficiary that:

- 1.1.1 the Consultant has complied and shall comply with the Consultant's obligations under and in connection with the Appointment in accordance with it; and
- 1.1.2 the Consultant has used and shall use, in the performance of the Services (including the Retained Services listed in the appendix to the Novation Agreement), all the reasonable skill, care and diligence and the best up-to-date practice to be expected of a fully qualified and competent [insert Consultant's discipline] experienced in [designing and] performing services for projects of a similar size, scope, nature, complexity and timescale to the Project.

2 Materials and building practices

2.1 The Consultant undertakes and warrants to the Beneficiary that (unless otherwise instructed or authorised by or on behalf of the Beneficiary):

- 2.1.1 the Consultant has not specified, selected and/or approved for use and shall not specify, select and/or approve for use; and

- 2.1.2 consistent with the Services, the Consultant has used and shall use the level of skill, care and diligence referred to in clause 1.1.2 to ensure that there shall not be used in the Project any material, substance, building practice or technique which is:
- (A) prohibited by the Appointment;
 - (B) not in accordance with any relevant British Standard, Eurocode, code of practice, best up-to-date building practice or agrément certificate issued by the British Board of Agrément;
 - (C) not in accordance with the guidance and comment contained in the British Council for Offices' publication: "Good Practice in the Selection of Construction Materials 2011"; or
 - (D) generally known or reasonably suspected within the Consultant's profession at the time of specification, selection, approval or use (as the case may be) to:
 - 1) be deleterious;
 - 2) be harmful to the health or safety of any person;
 - 3) threaten the structural stability, physical integrity or performance of the Project or any part or component of the Project; or
 - 4) reduce the normal life-expectancy of the Project or any part or component of the Project.

3 Documents

- 3.1 For the purposes of this Warranty, "Documents" means any and all activity schedules, bills of quantities, BIM Documents (as defined in the Appointment), brochures, budgets, CAD materials, calculations, data, design details, designs, diagrams, drawings, graphs, minutes, models, notes of meetings, photographs, plans, programmes, reports, schedules, sketches, specifications, surveys and other similar materials whether in hard copy, on computer disk, stored electronically on a computer or in a virtual "cloud", in any other computer-generated format or on any magnetic or optical storage medium prepared by or on behalf of the Consultant (whether in existence or to be created) in connection with the Works and/or the Project.
- 3.2 The Consultant grants to the Beneficiary an irrevocable, royalty-free and non-exclusive licence, such licence to remain in full force and effect notwithstanding the completion of the Services or the termination of the Consultant's engagement under the Appointment, to copy and use the Documents and to reproduce the designs and contents of them for:
- 3.2.1 any purpose relating to the Project and/or the Beneficiary's interest in the Project including, but not limited to, the advertisement, alteration, building information modelling, completion, construction, demolition, design, development, disposal, fitting-out, funding, letting, maintenance, modification, promotion, reconstruction, refurbishment, reinstatement,

repair, sale and use of the Project and/or the Beneficiary's interest in the Project; and

- 3.2.2 the extension of the Works or the Project, so that the Beneficiary can interface any extension of the Works or the Project with the existing Works or Project, but the licence shall not include a licence to reproduce the designs in the Documents for any extension of the Works or the Project.
- 3.3 The Beneficiary shall be entitled to grant sub-licences under the Beneficiary's licence and both the Beneficiary's licence and any sub-licences shall be transferable to others.
- 3.4 The Consultant undertakes and warrants that it shall procure that each individual author of the Documents, on or before practical completion of the Works or the Project, signs a waiver in respect of the Documents prepared by the author, unconditionally and irrevocably waiving all moral rights to which the author may now or in the future be entitled under the Copyright, Designs and Patents Act 1988 and all similar legislation in force from time to time anywhere in the world. This waiver shall be made in favour of the Beneficiary and it shall include any sub-licensees and assignees under clause 3.3, any assignees under clause 4, any successors in title to the copyright in the design under the Appointment and any successors in title to the Beneficiary's business.
- 3.5 Notwithstanding the completion of the Services or the termination of the Consultant's engagement under the Appointment, the Consultant shall give to the Beneficiary any paper copies and electronic copies of the Documents that the Beneficiary reasonably requests. The Consultant shall give these copies to the Beneficiary within seven days of any request, and the Beneficiary shall pay the Consultant's reasonable copying costs. The Consultant shall provide any password, code or other data required to access, decrypt or reproduce any electronic copies of the Documents that the Consultant gives to the Beneficiary.
- 3.6 The Consultant shall not be liable for any use of the Documents for any purpose which was not within the contemplation of the Consultant at the time the same are or were prepared.

4 Assignment

- 4.1 The Beneficiary may at any time assign or transfer all or any of its benefit under this Warranty without the consent of the Consultant to:
 - 4.1.1 a mortgagee of the Beneficiary; or
 - 4.1.2 any holding, subsidiary or associated company of the Beneficiary within the meaning of section 1159 Companies Act 2006 and/or section 435 Insolvency Act 1986, including any such holding, subsidiary or associated company which becomes a legal entity and/or is incorporated after the date of this Warranty.
- 4.2 The Beneficiary may at any time assign or transfer all or any of its benefit under this Warranty to any person not referred to in clause 4.1 without the consent of the Consultant on two occasions only. The consent of the Consultant, which shall not be delayed or withheld unreasonably, shall be required for any further assignments or transfers.

5 Insurance

- 5.1 Subject to clause 5.2, and provided that it is available at reasonable premium rates and on reasonable commercial terms, the Consultant shall take out and maintain professional indemnity insurance from the date of the Consultant's engagement under the Appointment until the date that is 12 years after the date of practical completion of the Project:
- 5.1.1 with a well-established insurance company or underwriter of good repute based in the United Kingdom;
 - 5.1.2 with a limit of indemnity of not less than £10million pounds
 - 5.1.3 for each and every claim or series of claims arising out of any one event, and
 - 5.1.4 on terms that:
 - (i) do not require the Consultant to discharge any liability before being entitled to recover from the insurers; and
 - (ii) would not adversely affect the rights of any person to recover from the insurers under the Third Parties (Rights Against Insurers) Act 2010.
- 5.2 If insurers require the payment of any increased or additional premiums, or offer insurance on terms more onerous than those usually offered, as a result of the Consultant's claims record or any other act, failure to act or circumstance particular to it, this shall be deemed to be within reasonable rates and terms.
- 5.3 Without the Beneficiary's prior written consent, the Consultant shall not:
- 5.3.1 settle or compromise any claim against the insurers that relates to a claim by the Beneficiary against the Consultant; or
 - 5.3.2 by any act or omission lose or affect the Consultant's right to make, or to proceed with, any claim against the insurers that relates to a claim by the Beneficiary against the Consultant.
- 5.4 As and when it is reasonably required to do so by the Beneficiary, the Consultant shall make available for inspection by the Beneficiary documentary evidence that the insurance is being maintained in accordance with this Warranty.
- 5.5 Subject to clause 5.2, the Consultant shall inform the Beneficiary immediately if this insurance ceases to be available to the Consultant at reasonable premium rates or on reasonable commercial terms. In this event:
- 5.5.1 the Beneficiary and the Consultant shall discuss and agree on the best means of protecting themselves; and
 - 5.5.2 the Beneficiary may require the Consultant to take out and maintain insurance at the best premium rates and on the best commercial terms available to the Consultant. If the Beneficiary exercises this right, subject to clause 5.2, it shall reimburse to the Consultant the difference between the premium paid and the premium that would have been reasonable.

5.6 If required by the terms of its insurance policy, the Consultant undertakes and warrants that:

5.6.1 prior to the execution of this Warranty, it has:

- (i) disclosed the contents of this Warranty to its insurers and brokers; and
- (ii) received confirmation from its insurers and brokers that the terms of this Warranty are covered by the terms of the insurance policy; and
- (iii) it shall disclose the contents of this Warranty to its insurers and brokers when it renews its insurance.

6 Termination and suspension by Consultant

6.1 For the purposes of this Warranty, "Another Person" means the Beneficiary's nominee or an administrator, an administrative receiver or a receiver appointed by the Beneficiary.

6.2 The Consultant shall not exercise any right which the Consultant has to rescind or terminate the Appointment or its engagement under the Appointment, or to suspend or discontinue the Services, unless the Consultant has given at least 31 days' prior written notice to the Contractor and the Beneficiary specifying:

6.2.1 the breach of the Appointment which the Consultant considers entitles it to rescind or terminate the Appointment or its engagement under the Appointment, or to suspend or discontinue the Services; and

6.2.2 full details of any amounts owed by and due from the Contractor to the Consultant under the Appointment for the last three outstanding invoices covering the three invoicing periods before that in which the notice is given.

6.3 If, within 31 days of receipt of a notice under clause 6.2, the Beneficiary notifies the Consultant that it or Another Person wishes to enter into a new agreement with the Consultant on the same terms and conditions as the Appointment to complete the Consultant's obligations under the Appointment in accordance with it:

6.3.1 the Consultant shall enter into a new agreement with the Beneficiary or Another Person subject to clause 6.4, but otherwise on the same terms and conditions as the Appointment, and in this event the Appointment shall terminate but, subject to clause 6.3.2, without prejudice to the accrued rights of the parties;

6.3.2 if the Appointment is terminated in accordance with clause 6.3.1, the Consultant shall not have a claim against the Contractor arising solely out of the termination; and

6.3.3 subject to clause 6.2, if the Appointment has been terminated in accordance with clause 6.3.1, pending entry into the new agreement, the Consultant shall comply with the instructions of the Beneficiary (or Another Person) under the Appointment as if it had not been terminated, and the Beneficiary shall pay (or shall procure that Another Person shall pay) to the Consultant all sums owed and due to it for the Services it has performed pursuant to those instructions.

- 6.4 The Beneficiary shall be liable (or shall procure that Another Person shall be liable) under the new agreement to pay the Consultant for the Services it performs from the date of the new agreement, but it shall have no other liability in respect of the Appointment except that the Beneficiary shall pay (or shall procure that Another Person shall pay) to the Consultant:
- 6.4.1 any amounts referred to in clause 6.2.2 and detailed in the notice given under clause 6.2; and
 - 6.4.2 any amounts accrued and unpaid that are owned by and due from the Contractor to the Consultant for the period from the date of the last invoice referred to in clause 6.2.2 until the date of the new agreement.
- 6.5 If the breach of the Appointment referred to in clause 6.2.1 has been remedied and the Consultant has withdrawn unreservedly the notice it gave under clause 6.2 without making any claim against the Contractor, the rights of the Consultant and the Beneficiary to enter into (and the right of the Beneficiary to appoint Another Person to enter into) a new agreement shall cease.
- 6.6 If the Consultant has given rights relating to the Appointment similar to those in clause 6 to more than one person, and more than one person notifies the Consultant that it wishes to enter into a new agreement with the Consultant in accordance with those rights, the order of priority shall be (with the highest priority first and the lowest last):
- 6.6.1 a notice served by a funder;
 - 6.6.2 a notice served by the Beneficiary;
 - 6.6.3 a notice served by any other beneficiary; and
 - 6.6.4 all notices that the Consultant receives shall take effect in accordance with this order of priority.

7 Termination of the Agreement

- 7.1 If the Beneficiary gives written notice to the Contractor and the Consultant that the Agreement has been rescinded or terminated, at any time within 31 days of giving the notice, the Beneficiary may either:
- 7.1.1 comply with the obligations of the Contractor under the Appointment and, in this event, the Consultant shall comply with its obligations and perform the Services under the Appointment, and the Beneficiary shall comply with the obligations of the Contractor under the Appointment, as though the Beneficiary was and always had been the employer under the Appointment in the place of the Contractor; or
 - 7.1.2 enter into (or appoint Another Person to enter into), and require the Consultant to enter into, a new agreement as if clauses 6.1 to 6.3 applied and references in clause 6.3 to the notice under clause 6.2 were references to the notice under clause 7.1, and the provisions of clauses 6.1 to 6.6 shall apply as appropriate.
- 7.2 After it has received the notice given under clause 7.1, the Consultant shall comply with the instructions of the Beneficiary (or Another Person), and the Consultant shall

enter into a new agreement at the Beneficiary's written request as described in clause 7.1.2.

7.3 The Consultant may treat the Beneficiary's notice under clause 7.1 that the Agreement has been rescinded or terminated as sufficient evidence that this has happened.

7.4 The Contractor shall not have a claim against the Consultant arising solely out of the Consultant's compliance with the instructions of the Beneficiary (or Another Person) in accordance with clause 7.

8 Conflict

8.1 In the event of any conflict between the terms and conditions of this Warranty and the terms and conditions of the Appointment, the terms and conditions of this Warranty shall have priority.

9 Limitation

9.1 In any action, claim or proceedings brought against the Consultant by the Beneficiary, the Consultant may rely on the same limitations as are in the Appointment and raise the equivalent rights in defence of liability as it would have if the Beneficiary were named as joint employer in the Appointment, provided that the Consultant shall not be entitled to raise in defence rights of abatement, set-off or counterclaim or raise a defence that a loss suffered by the Beneficiary is of a different kind or type from that which would have been suffered by the Contractor.

10 Contracts (Rights of Third Parties) Act 1999

10.1 The Contracts (Rights of Third Parties) Act 1999 does not apply to this Warranty and nothing in it, unless stated expressly, confers or purports to confer on any third party any benefit or any right to enforce any of its terms or conditions.

11 Non-waiver

11.1 No acknowledgement, admission, advice, approval, comment, confirmation, consent, direction, enquiry, guideline, indication of satisfaction, inspection, instruction or anything similar, given or made by or on behalf of the Beneficiary, the Employer, any of the Other Consultants (as defined in the Appointment), the Contractor or any of their agents, or failure to give or make any of these, shall exclude, limit, modify, qualify or reduce the Consultant's obligations or liability under the Appointment or this Warranty.

11.2 Any forbearance, relaxation, indulgence or delay ("indulgence") of a party in exercising any right shall not be construed as a waiver of the right and shall not affect the ability of that party subsequently to exercise that right or to pursue any remedy, nor shall any indulgence constitute a waiver of any other right, whether against that party or any other person.

12 Severability

12.1 If any provision of this Warranty is declared to be unenforceable, invalid or illegal by the decision-maker in any dispute-resolution process to which it is subject, that provision shall be severed from this Warranty and its unenforceability, invalidity or illegality shall not prejudice or affect the enforceability, validity or legality of the remaining provisions of this Warranty.

13 Counterparts

- 13.1 This Warranty may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by each party shall constitute a complete original of this Warranty for all purposes.

14 Notices

- 14.1 Any written notice or communication given under this Warranty shall be given properly if it is delivered by hand or sent by Royal Mail special delivery to a party at its address at the beginning of this Warranty or another address which a party may specify by written notice to the other parties from time to time.
- 14.2 A notice shall be deemed to have been received on the day of delivery if it is delivered by hand and on the second working day after the day of posting if it is sent by Royal Mail special delivery.

15 Governing law, dispute resolution and jurisdiction

- 15.1 This Warranty shall be governed by, and construed and interpreted in accordance with, English law.
- 15.2 The parties agree to submit any dispute or difference between them arising out of, or in connection with, this Warranty to the exclusive jurisdiction of the English courts, except for the purpose of enforcement proceedings in respect of any judgment or award of the English courts in another jurisdiction.

16 Execution as a deed

- 16.1 This Warranty is executed as a deed and it was delivered when it was dated.

[insert relevant execution blocks]

Schedule 3

Deed of Warranty to Funder

DATED _____

[FUNDER] (1)

and

[CONSULTANT] (2)

and

[EMPLOYER] (3)

**DEED OF WARRANTY
for [name of Project]**

MILLS & REEVE

THIS WARRANTY is made on

2017 **BETWEEN:**

- (1) **[FUNDER]** [(company number [insert number])] whose [registered][principal] office is at [insert address] ("**Beneficiary**" which expression shall include its successors in title and assigns); and
- (2) **[CONSULTANT]** [(company number [insert number])] whose [registered] [principal] office is at [insert address] ("**Consultant**"); and
- (3) **[EMPLOYER]** [(company number [insert number])] whose [registered] [principal] office is at [insert address] ("**Employer**" which expression shall include its successors in title and assigns).

BACKGROUND:

- (A) The Beneficiary has entered or shall enter into a contract with the Employer ("**Agreement**") for the provision of funding for [insert description] ("**Project**").
- (B) The Employer has entered or shall enter into a contract or contracts with a contractor or contractors for the design, construction, completion and commissioning of the Project ("**Works**").
- (C) The Employer has entered into a contract with the Consultant dated [] ("**Appointment**") relating to the Project for the performance of the services described in the Appointment ("**Services**").
- (D) It is a condition of the Appointment that the Consultant gives this Warranty to the Beneficiary.

In consideration of the payment of £1 (a pound) by the Beneficiary to the Consultant (receipt of which the Consultant acknowledges) **IT IS AGREED:**

1 Services

1.1 The Consultant undertakes and warrants to the Beneficiary that:

- 1.1.1 the Consultant has complied and shall comply with the Consultant's obligations under and in connection with the Appointment in accordance with it; and
- 1.1.2 the Consultant has used and shall use, in the performance of the Services, all the reasonable skill, care and diligence and the best up-to-date practice to be expected of a fully qualified and competent [insert Consultant's discipline] experienced in [designing and] performing services for projects of a similar size, scope, nature, complexity and timescale to the Project.

2 Materials and building practices

2.1 The Consultant undertakes and warrants to the Beneficiary that (unless otherwise instructed or authorised by or on behalf of the Employer):

- 2.1.1 the Consultant has not specified, selected and/or approved and shall not specify, select and/or approve for use; and

2.1.2 consistent with the Services, the Consultant has used and shall use the level of skill, care and diligence referred to in clause 1.1.2 to ensure that there shall not be used in the Project:

- (i) any material, substance, building practice or technique which is:
 - (A) prohibited by the Appointment;
 - (B) not in accordance with any relevant British Standard, Eurocode, code of practice, best up-to-date building practice or agrément certificate issued by the British Board of Agrément;
 - (C) not in accordance with the guidance and comment contained in the British Council for Offices' publication: "Good Practice in the Selection of Construction Materials 2011"; or
 - (D) generally known or reasonably suspected within the Consultant's profession at the time of specification, selection, approval or use (as the case may be) to:
 - 1) be deleterious;
 - 2) be harmful to the health or safety of any person;
 - 3) threaten the structural stability, physical integrity or performance of the Project or any part or component of the Project; or
 - 4) reduce the normal life-expectancy of the Project or any part or component of the Project.

3 Documents

3.1 For the purposes of this Warranty, "Documents" means any and all activity schedules, bills of quantities, BIM Documents (as defined in the Appointment), brochures, budgets, CAD materials, calculations, data, design details, designs, diagrams, drawings, graphs, minutes, models, notes of meetings, photographs, plans, programmes, reports, schedules, sketches, specifications, surveys and other similar materials whether in hard copy, on computer disk, stored electronically on a computer or in a virtual "cloud", in any other computer-generated format or on any magnetic or optical storage medium prepared by or on behalf of the Consultant (whether in existence or to be created) in connection with the Works and/or the Project.

3.2 The Consultant grants to the Beneficiary an irrevocable, royalty-free and non-exclusive licence, such licence to remain in full force and effect notwithstanding the completion of the Services or the termination of the Consultant's engagement under the Appointment, to copy and use the Documents and to reproduce the designs and contents of them for:

3.2.1 any purpose relating to the Project and/or the Beneficiary's interest in the Project including, but not limited to, the advertisement, alteration, building

information modelling, completion, construction, demolition, design, development, disposal, fitting-out, funding, letting, maintenance, modification, promotion, reconstruction, refurbishment, reinstatement, repair, sale and use of the Project and/or the Beneficiary's interest in the Project; and

- 3.2.2 the extension of the Works or the Project, so that the Beneficiary can interface any extension of the Works or the Project with the existing Works or Project, but the licence shall not include a licence to reproduce the designs in the Documents for any extension of the Works or the Project.
- 3.3 The Beneficiary shall be entitled to grant sub-licences under the Beneficiary's licence and both the Beneficiary's licence and any sub-licences shall be transferable to others.
- 3.4 The Consultant undertakes and warrants that it shall procure that each individual author of the Documents, on or before practical completion of the Works or the Project, signs a waiver in respect of the Documents prepared by the author, unconditionally and irrevocably waiving all moral rights to which the author may now or in the future be entitled under the Copyright, Designs and Patents Act 1988 and all similar legislation in force from time to time anywhere in the world. This waiver shall be made in favour of the Beneficiary and it shall include any sub-licensees and assignees under clause 3.3, any assignees under clause 4, any successors in title to the copyright in the design under the Appointment and any successors in title to the Beneficiary's business.
- 3.5 Notwithstanding the completion of the Services or the termination of the Consultant's engagement under the Appointment, the Consultant shall give to the Beneficiary any paper copies and electronic copies of the Documents that the Beneficiary reasonably requests. The Consultant shall give these copies to the Beneficiary within seven days of any request, and the Beneficiary shall pay the Consultant's reasonable copying costs. The Consultant shall provide any password, code or other data required to access, decrypt or reproduce any electronic copies of the Documents that the Consultant gives to the Beneficiary.
- 3.6 The Consultant shall not be liable for any use of the Documents for any purpose other than the purpose they were prepared for.
- 3.7 The Consultant hereby indemnifies the Beneficiary against any and all claims, proceedings, damages, costs and expenses suffered or incurred by the Beneficiary due to any infringement by the Contractor of any copyright or other intellectual property rights in connection with the Project.

4 Assignment

- 4.1 The Beneficiary may at any time assign or transfer all or any of its benefit under this Warranty without the consent of the Consultant to:
 - 4.1.1 a mortgagee of the Beneficiary; or
 - 4.1.2 any holding, subsidiary or associated company of the Beneficiary within the meaning of section 1159 Companies Act 2006 and/or section 435 Insolvency Act 1986, including any such holding, subsidiary or associated

company which becomes a legal entity and/or is incorporated after the date of this Warranty.

- 4.2 The Beneficiary may at any time assign or transfer all or any of its benefit under this Warranty to any person not referred to in clause 4.1 without the consent of the Consultant on two occasions only. The consent of the Consultant, which shall not be delayed or withheld unreasonably, shall be required for any further assignments or transfers.

5 Insurance

- 5.1 Subject to clause 5.2, and provided that it is available at reasonable premium rates and on reasonable commercial terms, the Consultant shall take out and maintain professional indemnity insurance from the date of the Consultant's engagement under the Appointment until the date that is 12 years after the date of practical completion of the Project:

5.1.1 with a well-established insurance company or underwriter of good repute based in the United Kingdom;

5.1.2 with a limit of indemnity of not less than £10million pounds for each and every claim or series of claims arising out of any one event, and

5.1.3 on terms that:

- (i) do not require the Consultant to discharge any liability before being entitled to recover from the insurers; and
- (ii) would not adversely affect the rights of any person to recover from the insurers under the Third Parties (Rights Against Insurers) Act 2010.

- 5.2 If insurers require the payment of any increased or additional premiums, or offer insurance on terms more onerous than those usually offered, as a result of the Consultant's claims record or other act, failure to act or circumstance particular to it, this shall be deemed to be within reasonable rates and terms.

- 5.3 Without the Beneficiary's prior written consent, the Consultant shall not:

5.3.1 settle or compromise any claim against the insurers that relates to a claim by the Beneficiary against the Consultant; or

5.3.2 by any act or omission lose or affect the Consultant's right to make, or to proceed with, any claim against the insurers that relates to a claim by the Beneficiary against the Consultant.

- 5.4 As and when it is reasonably required to do so by the Beneficiary, the Consultant shall make available for inspection by the Beneficiary documentary evidence that the insurance is being maintained in accordance with this Warranty.

- 5.5 Subject to clause 5.2, the Consultant shall inform the Beneficiary immediately if this insurance ceases to be available to the Consultant at reasonable premium rates or on reasonable commercial terms. In this event:

- 5.5.1 the Beneficiary and the Consultant shall discuss and agree on the best means of protecting themselves; and
- 5.5.2 the Beneficiary may require the Consultant to take out and maintain insurance at the best premium rates and on the best commercial terms available to the Consultant. If the Beneficiary exercises this right, subject to clause 5.2, it shall reimburse to the Consultant the difference between the premium paid and the premium that would have been reasonable.
- 5.6 If required by the terms of its insurance policy, the Consultant undertakes and warrants that:
 - 5.6.1 prior to the execution of this Warranty, it has:
 - (i) disclosed the contents of this Warranty to its insurers and brokers; and
 - (ii) received confirmation from its insurers and brokers that the terms of this Warranty are covered by the terms of the insurance policy; and
 - (iii) it shall disclose the contents of this Warranty to its insurers and brokers when it renews its insurance.

6 Termination and suspension by Consultant

- 6.1 For the purposes of this Warranty, "Another Person" means the Beneficiary's nominee or an administrator, an administrative receiver or a receiver appointed by the Beneficiary.
- 6.2 The Consultant shall not exercise any right which the Consultant has to rescind or terminate the Appointment or its engagement under the Appointment, or to suspend or discontinue the Services, unless the Consultant has given at least 31 days' prior written notice to the Employer and the Beneficiary specifying:
 - 6.2.1 the breach of the Appointment which the Consultant considers entitles it to rescind or terminate the Appointment or its engagement under the Appointment, or to suspend or discontinue the Services; and
 - 6.2.2 full details of any amounts owed by and due from the Employer to the Consultant under the Appointment for the last three outstanding invoices covering the three invoicing periods before that in which the notice is given.
- 6.3 If, within 31 days of receipt of a notice under clause 6.2, the Beneficiary notifies the Consultant that it or Another Person wishes to enter into a new agreement with the Consultant on the same terms and conditions as the Appointment to complete the Consultant's obligations under the Appointment in accordance with it:
 - 6.3.1 the Consultant shall enter into a new agreement with the Beneficiary or Another Person subject to clause 6.4, but otherwise on the same terms and conditions as the Appointment, and in this event the Appointment shall terminate but, subject to clause 6.3.2, without prejudice to the accrued rights of the parties;

- 6.3.2 if the Appointment is terminated in accordance with clause 6.3.1, the Consultant shall not have a claim against the Employer arising solely out of the termination; and
- 6.3.3 subject to clause 6.2, if the Appointment has been terminated in accordance with clause 6.3.1, pending entry into the new agreement, the Consultant shall comply with the instructions of the Beneficiary (or Another Person) under the Appointment as if it had not been terminated, and the Beneficiary shall pay (or shall procure that Another Person shall pay) to the Consultant all sums owed and due to it for the Services it has performed pursuant to those instructions.
- 6.4 The Beneficiary shall be liable (or shall procure that Another Person shall be liable) under the new agreement to pay the Consultant for the Services it performs from the date of the new agreement, but it shall have no other liability in respect of the Appointment except that the Beneficiary shall pay (or shall procure that Another Person shall pay) to the Consultant:
- 6.4.1 any amounts referred to in clause 6.2.2 and detailed in the notice given under clause 6.2; and
- 6.4.2 any amounts accrued and unpaid that are owed by and due from the Employer to the Consultant for the period from the date of the last invoice referred to in clause 6.2.2 until the date of the new agreement.
- 6.5 If the breach of the Appointment referred to in clause 6.2.1 has been remedied and the Consultant has withdrawn unreservedly the notice it gave under clause 6.2 without making any claim against the Employer, the rights of the Consultant and the Beneficiary to enter into (and the right of the Beneficiary to appoint Another Person to enter into) a new agreement shall cease.
- 6.6 If the Consultant has given rights relating to the Appointment similar to those in clause 6 to more than one person, and more than one person notifies the Consultant that it wishes to enter into a new agreement with the Consultant in accordance with those rights, the order of priority shall be (with the highest priority first and the lowest last):
- 6.6.1 a notice served by the Beneficiary;
- 6.6.2 a notice served by the Employer; and
- 6.6.3 a notice served by any other beneficiary;

all notices that the Consultant receives shall take effect in accordance with this order of priority.

7 Termination of the Agreement

- 7.1 If the Beneficiary gives written notice to the Employer and the Consultant that the Agreement has been rescinded or terminated, at any time within 31 days of giving the notice, the Beneficiary may either:
- 7.1.1 comply with the obligations of the Employer under the Appointment and, in this event, the Consultant shall comply with its obligations and perform the

Services under the Appointment, and the Beneficiary shall comply with the obligations of the Employer under the Appointment, as though the Beneficiary was and always had been the employer under the Appointment in the place of the Employer; or

- 7.1.2 enter into (or appoint Another Person to enter into), and require the Consultant to enter into, a new agreement as if clauses 6.1 to 6.3 applied and references in clause 6.3 to the notice under clause 6.2 were references to the notice under clause 7.1, and the provisions of clauses 6.1 to 6.6 shall apply as appropriate.
- 7.2 After it has received the notice given under clause 7.1, the Consultant shall comply with the instructions of the Beneficiary (or Another Person), and the Consultant shall enter into a new agreement at the Beneficiary's written request as described in clause 7.1.2.
- 7.3 The Consultant may treat the Beneficiary's notice under clause 7.1 that the Agreement has been rescinded or terminated as sufficient evidence that this has happened.
- 7.4 The Employer shall not have a claim against the Consultant arising solely out of the Consultant's compliance with the instructions of the Beneficiary (or Another Person) in accordance with clause 7.

8 Conflict

- 8.1 In the event of any conflict between the terms and conditions of this Warranty and the terms and conditions of the Appointment, the terms and conditions of this Warranty shall have priority.

9 Limitation

- 9.1 In any action, claim or proceedings brought against the Consultant by the Beneficiary, the Consultant may rely on the same limitations as are in the Appointment and raise the equivalent rights in defence of liability as it would have if the Beneficiary were named as joint employer in the Appointment, provided that the Consultant shall not be entitled to raise in defence rights of abatement, set-off or counterclaim or raise a defence that a loss suffered by the Beneficiary is of a different kind or type from that which would have been suffered by the Employer.

10 Contracts (Rights of Third Parties) Act 1999

- 10.1 The Contracts (Rights of Third Parties) Act 1999 does not apply to this Warranty and nothing in it, unless stated expressly, confers or purports to confer on any third party any benefit or any right to enforce any of its terms or conditions.

11 Non-waiver

- 11.1 No acknowledgement, admission, advice, approval, comment, confirmation, consent, direction, enquiry, guideline, indication of satisfaction, inspection, instruction or anything similar, given or made by or on behalf of the Beneficiary, the Employer, any of the Other Consultants (as defined in the Appointment), the Contractor or any of their agents, or failure to give or make any of these, shall exclude, limit, modify, qualify or reduce the Consultant's obligations or liability under the Appointment or this Warranty.

- 11.2 Any forbearance, relaxation, indulgence or delay (“indulgence”) of a party in exercising any right shall not be construed as a waiver of the right and shall not affect the ability of that party subsequently to exercise that right or to pursue any remedy, nor shall any indulgence constitute a waiver of any other right, whether against that party or any other person.

12 Severability

- 12.1 If any provision of this Warranty is declared to be unenforceable, invalid or illegal by the decision-maker in any dispute-resolution process to which it is subject, that provision shall be severed from this Warranty and its unenforceability, invalidity or illegality shall not prejudice or affect the enforceability, validity or legality of the remaining provisions of this Warranty.

13 Counterparts

- 13.1 This Warranty may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by each party shall constitute a complete original of this Warranty for all purposes.

14 Notices

- 14.1 Any written notice or communication given under this Warranty shall be given properly if it is delivered by hand or sent by Royal Mail special delivery to a party at its address at the beginning of this Warranty or another address which a party may specify by written notice to the other parties from time to time.
- 14.2 A notice shall be deemed to have been received on the day of delivery if it is delivered by hand and on the second working day after the day of posting if it is sent by Royal Mail special delivery.

15 Governing law, dispute resolution and jurisdiction

- 15.1 This Warranty shall be governed by, and construed and interpreted in accordance with, English law.
- 15.2 The parties agree to submit any dispute or difference between them arising out of, or in connection with, this Warranty to the exclusive jurisdiction of the English courts, except for the purpose of enforcement proceedings in respect of any judgment or award of the English courts in another jurisdiction.

16 Execution as a deed

- 16.1 This Warranty is executed as a deed and it was delivered when it was dated.

[insert relevant execution blocks]

Schedule 4

Deed of Warranty to Purchaser/Tenant/ Other Interested Party

DATED _____

**[PURCHASER] [TENANT] [OTHER (1)
INTERESTED PARTY]**

and

[CONSULTANT] (2)

**DEED OF WARRANTY
for [name of Project]**

MILLS & REEVE

THIS WARRANTY is made on

2017 **BETWEEN:**

- (1) **[PURCHASER] [TENANT] [OTHER INTERESTED PARTY]** [(company number [insert number])] whose [registered] [principal] office is at [insert address] ("**Beneficiary**" which expression shall include its successors in title and assigns); and
- (2) **[CONSULTANT]** [(company number [insert number])] whose [registered] [principal] office is at [insert address] ("**Consultant**").

BACKGROUND:

- (A) The Beneficiary has entered or shall enter into a contract with [insert person] ("**Employer**") for the [purchase] [lease] of the whole or part of [insert description] ("**Project**").
- (B) The Employer has entered or shall enter into a contract or contracts with a contractor or contractors for the design, construction, completion and commissioning of the Project ("**Works**").
- (C) The Employer has entered into a contract with the Consultant dated [] ("**Appointment**") relating to the Project for the performance of the services described in the Appointment ("**Services**").
- (D) It is a condition of the Appointment that the Consultant gives this Warranty to the Beneficiary.

In consideration of the payment of £1 (a pound) by the Beneficiary to the Consultant (receipt of which the Consultant acknowledges) **IT IS AGREED:**

1 Services

1.1 The Consultant undertakes and warrants to the Beneficiary that:

- 1.1.1 the Consultant has complied and shall comply with the Consultant's obligations under and in connection with the Appointment in accordance with it; and
- 1.1.2 the Consultant has used and shall use, in the performance of the Services, all the reasonable skill, care and diligence and the best up-to-date practice to be expected of a fully qualified and competent [insert Consultant's discipline] experienced in [designing and] performing services for projects of a similar size, scope, nature, complexity and timescale to the Project.

2 Materials and building practices

2.1 The Consultant undertakes and warrants to the Beneficiary that (unless otherwise instructed or authorised by or on behalf of the Employer):

- 2.1.1 the Consultant has not specified, selected and/or approved and shall not specify, select and/or approve for use; and

2.1.2 consistent with the Services, the Consultant has used and shall use the level of skill, care and diligence referred to in clause 1.1.2 to ensure that there shall not be used in the Project:

- (i) any material, substance, building practice or technique which is:
 - (A) prohibited by the Appointment;
 - (B) not in accordance with any relevant British Standard, Eurocode, code of practice, best up-to-date building practice or agrément certificate issued by the British Board of Agrément;
 - (C) not in accordance with the guidance and comment contained in the British Council for Offices' publication: "Good Practice in the Selection of Construction Materials 2011"; or
 - (D) generally known or reasonably suspected within the Consultant's profession at the time of specification, selection, approval or use (as the case may be) to:
 - 1) be deleterious;
 - 2) be harmful to the health or safety of any person;
 - 3) threaten the structural stability, physical integrity or performance of the Project or any part or component of the Project; or
 - 4) reduce the normal life-expectancy of the Project or any part or component of the Project.

3 Documents

3.1 For the purposes of this Warranty, "Documents" means any and all activity schedules, bills of quantities, BIM Documents (as defined in the Appointment), brochures, budgets, CAD materials, calculations, data, design details, designs, diagrams, drawings, graphs, minutes, models, notes of meetings, photographs, plans, programmes, reports, schedules, sketches, specifications, surveys and other similar materials whether in hard copy, on computer disk, stored electronically on a computer or in a virtual "cloud", in any other computer-generated format or on any magnetic or optical storage medium prepared by or on behalf of the Consultant (whether in existence or to be created) in connection with the Works and/or the Project.

3.2 The Consultant grants to the Beneficiary an irrevocable, royalty-free and non-exclusive licence, such licence to remain in full force and effect notwithstanding the completion of the Services or the termination of the Consultant's engagement under the Appointment, to copy and use the Documents and to reproduce the designs and contents of them for:

3.2.1 any purpose relating to the Project and/or the Beneficiary's interest in the Project including, but not limited to, the advertisement, alteration, building

information modelling, completion, construction, demolition, design, development, disposal, fitting-out, funding, letting, maintenance, modification, promotion, reconstruction, refurbishment, reinstatement, repair, sale and use of the Project and/or the Beneficiary's interest in the Project; and

- 3.2.2 the extension of the Works or the Project, so that the Beneficiary can interface any extension of the Works or the Project with the existing Works or Project, but the licence shall not include a licence to reproduce the designs in the Documents for any extension of the Works or the Project.
- 3.3 The Beneficiary shall be entitled to grant sub-licences under the Beneficiary's licence and both the Beneficiary's licence and any sub-licences shall be transferable to others.
- 3.4 The Consultant undertakes and warrants that it shall procure that each individual author of the Documents, on or before practical completion of the Works or the Project, signs a waiver in respect of the Documents prepared by the author, unconditionally and irrevocably waiving all moral rights to which the author may now or in the future be entitled under the Copyright, Designs and Patents Act 1988 and all similar legislation in force from time to time anywhere in the world. This waiver shall be made in favour of the Beneficiary and it shall include any sub-licensees and assignees under clause 3.3, any assignees under clause 4, any successors in title to the copyright in the design under the Appointment and any successors in title to the Beneficiary's business.
- 3.5 Notwithstanding the completion of the Services or the termination of the Consultant's engagement under the Appointment, the Consultant shall give to the Beneficiary any paper copies and electronic copies of the Documents that the Beneficiary reasonably requests. The Consultant shall give these copies to the Beneficiary within seven days of any request, and the Beneficiary shall pay the Consultant's reasonable copying costs. The Consultant shall provide any password, code or other data required to access, decrypt or reproduce any electronic copies of the Documents that the Consultant gives to the Beneficiary.
- 3.6 The Consultant shall not be liable for any use of the Documents for any purpose other than the purpose they were prepared for.
- 3.7 The Consultant hereby indemnifies the Beneficiary against any and all claims, proceedings, damages, costs and expenses suffered or incurred by the Beneficiary due to any infringement by the Contractor of any copyright or other intellectual property rights in connection with the Project.

4 Assignment

- 4.1 The Beneficiary may at any time assign or transfer all or any of its benefit under this Warranty without the consent of the Consultant to:
 - 4.1.1 a mortgagee of the Beneficiary; or
 - 4.1.2 any holding, subsidiary or associated company of the Beneficiary within the meaning of section 1159 Companies Act 2006 and/or section 435 Insolvency Act 1986, including any such holding, subsidiary or associated

company which becomes a legal entity and/or is incorporated after the date of this Warranty.

- 4.2 The Beneficiary may at any time assign or transfer all or any of its benefit under this Warranty to any person not referred to in clause 4.1 without the consent of the Consultant on two occasions only. The consent of the Consultant, which shall not be delayed or withheld unreasonably, shall be required for any further assignments or transfers.

5 Insurance

- 5.1 Subject to clause 5.2, and provided that it is available at reasonable premium rates and on reasonable commercial terms, the Consultant shall take out and maintain professional indemnity insurance from the date of the Consultant's engagement under the Appointment until the date that is 12 years after the date of practical completion of the Project:

5.1.1 with a well-established insurance company or underwriter of good repute based in the United Kingdom;

5.1.2 with a limit of indemnity of not less than £10million pounds for each and every claim or series of claims arising out of any one event, and

5.1.3 on terms that:

- (i) do not require the Consultant to discharge any liability before being entitled to recover from the insurers; and
- (ii) would not adversely affect the rights of any person to recover from the insurers under the Third Parties (Rights Against Insurers) Act 2010.

- 5.2 If insurers require the payment of any increased or additional premiums, or offer insurance on terms more onerous than those usually offered, as a result of the Consultant's claims record or other act, failure to act or circumstance particular to it, this shall be deemed to be within reasonable rates and terms.

- 5.3 Without the Beneficiary's prior written consent, the Consultant shall not:

5.3.1 settle or compromise any claim against the insurers that relates to a claim by the Beneficiary against the Consultant; or

5.3.2 by any act or omission lose or affect the Consultant's right to make, or to proceed with, any claim against the insurers that relates to a claim by the Beneficiary against the Consultant.

- 5.4 As and when it is reasonably required to do so by the Beneficiary, the Consultant shall make available for inspection by the Beneficiary documentary evidence that the insurance is being maintained in accordance with this Warranty.

- 5.5 Subject to clause 5.2, the Consultant shall inform the Beneficiary immediately if this insurance ceases to be available to the Consultant at reasonable premium rates or on reasonable commercial terms. In this event:

- 5.5.1 the Beneficiary and the Consultant shall discuss and agree on the best means of protecting themselves; and
- 5.5.2 the Beneficiary may require the Consultant to take out and maintain insurance at the best premium rates and on the best commercial terms available to the Consultant. If the Beneficiary exercises this right, subject to clause 5.2, it shall reimburse to the Consultant the difference between the premium paid and the premium that would have been reasonable.
- 5.6 If required by the terms of its insurance policy, the Consultant undertakes and warrants that:
 - 5.6.1 prior to the execution of this Warranty, it has:
 - 5.6.2 disclosed the contents of this Warranty to its insurers and brokers; and
 - 5.6.3 received confirmation from its insurers and brokers that the terms of this Warranty are covered by the terms of the insurance policy; and
 - 5.6.4 it shall disclose the contents of this Warranty to its insurers and brokers when it renews its insurance.

6 Conflict

- 6.1 In the event of any conflict between the terms and conditions of this Warranty and the terms and conditions of the Appointment, the terms and conditions of this Warranty shall have priority.

7 Limitation

- 7.1 In any action, claim or proceedings brought against the Consultant by the Beneficiary, the Consultant may rely on the same limitations as are in the Appointment and raise the equivalent rights in defence of liability as it would have if the Beneficiary were named as joint employer in the Appointment, provided that the Consultant shall not be entitled to raise in defence rights of abatement, set-off or counterclaim or raise a defence that a loss suffered by the Beneficiary is of a different kind or type from that which would have been suffered by the Employer.

8 Contracts (Rights of Third Parties) Act 1999

- 8.1 The Contracts (Rights of Third Parties) Act 1999 does not apply to this Warranty and nothing in it, unless stated expressly, confers or purports to confer on any third party any benefit or any right to enforce any of its terms or conditions.

9 Non-waiver

- 9.1 No acknowledgement, admission, advice, approval, comment, confirmation, consent, direction, enquiry, guideline, indication of satisfaction, inspection, instruction or anything similar, given or made by or on behalf of the Beneficiary, the Employer, any of the Other Consultants (as defined in the Appointment), the Contractor or any of their agents, or failure to give or make any of these, shall exclude, limit, modify, qualify or reduce the Consultant's obligations or liability under the Appointment or this Warranty.

- 9.2 Any forbearance, relaxation, indulgence or delay (“indulgence”) of a party in exercising any right shall not be construed as a waiver of the right and shall not affect the ability of that party subsequently to exercise that right or to pursue any remedy, nor shall any indulgence constitute a waiver of any other right, whether against that party or any other person.

10 Severability

- 10.1 If any provision of this Warranty is declared to be unenforceable, invalid or illegal by the decision-maker in any dispute-resolution process to which it is subject, that provision shall be severed from this Warranty and its unenforceability, invalidity or illegality shall not prejudice or affect the enforceability, validity or legality of the remaining provisions of this Warranty.

11 Counterparts

- 11.1 This Warranty may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by each party shall constitute a complete original of this Warranty for all purposes.

12 Notices

- 12.1 Any written notice or communication given under this Warranty shall be given properly if it is delivered by hand or sent by Royal Mail special delivery to a party at its address at the beginning of this Warranty or another address which a party may specify by written notice to the other party from time to time.
- 12.2 A notice shall be deemed to have been received on the day of delivery if it is delivered by hand and on the second working day after the day of posting if it is sent by Royal Mail special delivery.

13 Governing law, dispute resolution and jurisdiction

- 13.1 This Warranty shall be governed by, and construed and interpreted in accordance with, English law.
- 13.2 The parties agree to submit any dispute or difference between them arising out of, or in connection with, this Warranty to the exclusive jurisdiction of the English courts, except for the purpose of enforcement proceedings in respect of any judgment or award of the English courts in another jurisdiction.

14 Execution as a deed

- 14.1 This Warranty is executed as a deed and it was delivered when it was dated.

[insert relevant execution blocks]

Appendix 5

Parent Company Guarantee

Draft [Date]
[Matter/file reference]
223599904_2

DATED _____ **201[*]**

GUARANTOR (1)

and

BENEFICIARY (2)

PARENT COMPANY GUARANTEE

relating to
[short description of project]

THIS GUARANTEE is made on

201[*]

BETWEEN:

- (1) [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] ("**Guarantor**");
- (2) [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] ("**Beneficiary**").

WHEREAS:

- (A) The Beneficiary has entered into the Contract with the Consultant.
- (B) The Beneficiary requires the Consultant to provide a guarantee, substantially in the form of this Guarantee, to the Beneficiary.
- (C) The Guarantor has agreed to guarantee the due performance of the Contract by the Consultant.
- (D) It is the intention of the parties that this document be executed as a deed.

IT IS AGREED:

1 Definitions and interpretation

1.1 The following definitions apply in this Guarantee:

- 1.1.1 "**Business Day**" means a day other than a Saturday, Sunday or public holiday in England when banks in London are open for business;
- 1.1.2 "**Contract**" means an agreement dated [DATE] between the Beneficiary and the Consultant including all amendments to, variations of or supplements to it from time to time in force; and
- 1.1.3 "**Consultant**" means [INSERT NAME].

1.2 Unless the context otherwise requires:

- 1.2.1 clause headings shall not affect the interpretation of this Guarantee;
- 1.2.2 a "**person**" includes a natural person, corporate or unincorporated body (whether or not having separate legal personality) and that person's personal representatives, successors and permitted assigns;

- 1.2.3 words in the singular shall include the plural and in the plural shall include the singular;
- 1.2.4 a reference to one gender shall include a reference to the other genders;
- 1.2.5 a reference to any party shall include that party's personal representatives, successors and permitted assigns;
- 1.2.6 any obligation on a party not to do something includes an obligation not to agree to that thing being done;
- 1.2.7 a reference to "**writing**" or "**written**" includes fax;
- 1.2.8 a reference to this Guarantee or to any other deed, agreement or document referred to in this Guarantee is a reference to this Guarantee, such other deed, agreement or document as varied or novated (in each case, other than in breach of the provisions of this Guarantee) from time to time; and
- 1.2.9 any words following the terms "including", "include", "in particular", "for example" or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.

2 Guarantee and Indemnity

- 2.1 The Guarantor as primary obligor guarantees to the Beneficiary the due and punctual observance and performance by the Consultant of each and all of the obligations, representations, warranties, duties and undertakings of the Contractor under and/or pursuant to the Contract.
- 2.2 If the Consultant fails to observe or perform any of its obligations, representations, warranties, duties and undertakings under and/or pursuant to the Contract or if the Beneficiary terminates the Contractor's employment under clauses **[insert clauses relating to Consultant default and insolvency]** of the Contract, the Guarantor shall, as a separate and independent obligation, indemnify the Beneficiary against, and pay on demand, all loss, debt, damage, interest, cost and expense which the Beneficiary may incur by reason of such failure and/or termination provided that the Guarantor's liability shall be no greater than the Consultant's liability under and/or pursuant to the Contract.
- 2.3 The Guarantor shall, as a separate and independent obligation, indemnify the Beneficiary against, and pay on demand, all loss, debt, damage, interest, cost and expense which the Beneficiary may incur if any obligation guaranteed by the Guarantor is or becomes totally or partially unenforceable, invalid or illegal as if the obligation guaranteed had not become unenforceable, invalid or illegal provided that the Guarantor's liability shall be no greater than the Consultant's liability would have been if the obligation guaranteed had not become unenforceable, invalid or illegal.

3 Beneficiary's protections

- 3.1 The Guarantor agrees that its obligations under this Guarantee are in addition to and independent of any other security which the Beneficiary may hold in respect of the Consultant's obligations under the Contract and may be enforced against the Guarantor without first having recourse to any such other security.
- 3.2 The liability of the Guarantor shall not in any way be released under this Guarantee by any act, omission, matter or other thing whereby, in absence of this provision, the Guarantor would or might be released in whole or in part from liability under this Guarantee including, without limitation and whether or not known to the Guarantor:
- 3.2.1 any arrangement made between the Consultant and the Beneficiary;
 - 3.2.2 any alteration in the obligations undertaken by the Consultant whether by way of any modification, amendment, supplement or variation referred to in clause 6 or otherwise;
 - 3.2.3 any indulgence, waiver, consent or forbearance by the Beneficiary whether as to payment, time, performance or otherwise;
 - 3.2.4 any additional or advanced payment to the Consultant;
 - 3.2.5 any compromise of any dispute with the Consultant;
 - 3.2.6 any failure of supervision to detect or prevent any fault of the Consultant;
 - 3.2.7 any assignment of the benefit of the Contract;
 - 3.2.8 the taking, variation, renewal or release of, the enforcement or neglect to perfect or enforce any right, guarantee, remedy or security from or against the Consultant or any other person;
 - 3.2.9 any unenforceability, illegality or invalidity of any of the provisions of the Contract or any of the Consultant's obligations under the Contract, so that this Guarantee shall be construed as if there were no such unenforceability, illegality or invalidity;
 - 3.2.10 any legal limitation, disability, incapacity or other circumstances relating to the Consultant, or any other person; and/or
 - 3.2.11 the dissolution, amalgamation, reconstruction, reorganisation, change in status, function, control or ownership, insolvency, liquidation or the appointment of an administrator or receiver of the Consultant or any other person.

4 Limitation

- 4.1 The Beneficiary may not start proceedings against the Guarantor under this Guarantee in respect of any claim if any proceedings against the Consultant in respect of that claim would be statute-barred.

5 Conclusive liability and extent of liability

- 5.1 For the purposes of this Guarantee, any judgment, award (whether interim or final) or adjudicator's decision against the Consultant in favour of the Beneficiary under or in connection with the Contract shall be conclusive evidence of any liability of the Consultant to which that judgment, award or decision relates.

6 Changes to the Contract

- 6.1 The Guarantor authorises the Consultant and the Beneficiary to make any modification, amendment, supplement or variation to the Contract, the due and punctual observance and performance of which addendum and variation shall be likewise guaranteed by the Guarantor in accordance with this Guarantee and shall in no way discharge or lessen the liability of the Guarantor under this Guarantee.

7 No obligation to pursue the Consultant

- 7.1 The Beneficiary shall not be obliged, before enforcing this Guarantee, to take any action in any court or arbitral proceedings against the Consultant, to make any claim against or any demand of the Consultant, to enforce any other security held by it in respect of the obligations of the Consultant under the Contract or to exercise, levy or enforce any distress, diligence or other process of execution against the Consultant.

8 Continuing Guarantee

- 8.1 This Guarantee is a continuing guarantee and shall remain in full force and effect (notwithstanding any intermediate satisfaction by the Consultant, the Guarantor or any other person) until all obligations, warranties, duties and undertakings now or hereafter to be carried out or performed by the Consultant under the Contract have been satisfied or performed in full and is not revocable.

9 Security and Subrogation

- 9.1 Until all amounts which may be or become payable under the Contract or this Guarantee have been irrevocably paid in full, the Guarantor shall not as a result of this Guarantee or any payment or performance under this Guarantee be subrogated to any right or security of the Beneficiary or claim or prove in competition with the Beneficiary against the Consultant or any other person or demand or accept repayment of any monies or claim any right of contribution, set-off or indemnity and any sums received by the Guarantor or the amount of any set-off exercised by the Guarantor in breach of

this provision shall be held by the Guarantor in trust for and shall be promptly paid to the Beneficiary.

- 9.2 The Guarantor shall not hold any security from the Consultant in respect of this Guarantee and any such security which is held in breach of this provision shall be held by the Guarantor in trust for and shall promptly be transferred to the Beneficiary.
- 9.3 Until all amounts which may be or become payable under the Contract or this Guarantee have been irrevocably paid in full, if (notwithstanding the provisions of clause 9.1 and clause 9.2) the Guarantor has any rights of subrogation against the Contractor or any rights to prove in a liquidation of the Contractor, the Guarantor agrees to exercise such rights in accordance with the directions of the Beneficiary.

10 Payment and expenses

- 10.1 Each payment to be made by the Guarantor under this Guarantee shall be made in pounds sterling, free and clear of all deductions or withholdings of any kind, except for those required by law, and if any deduction or withholding must be made by law, the Guarantor shall pay that additional amount which is necessary to ensure that the Beneficiary receives a net amount equal to the full amount which it would have received if the payment had been made without the deduction or withholding.
- 10.2 If the Guarantor fails to make any payment due to the Beneficiary under this Guarantee by the due date for payment, then the Guarantor shall pay interest on the overdue amount at the rate of 2% per annum above the base rate of Barclays Bank plc from time to time. Such interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment. The Guarantor shall pay the interest together with the overdue amount.
- 10.3 The Guarantor shall reimburse the Beneficiary for all legal and other costs (including VAT) incurred by the Beneficiary in connection with the preservation, exercise or enforcement of any rights under or in connection with this Guarantee.
- 10.4 Each party shall pay its own costs incurred in connection with the negotiation, preparation and execution of this Guarantee.

11 Warranties

- 11.1 The Guarantor warrants and confirms to the Beneficiary:
- 11.1.1 that it is duly incorporated with limited liability and validly existing under the law of England and Wales; and
 - 11.1.2 its obligations under this Guarantee are legal, valid, binding and enforceable in accordance with its terms.

12 Assignment

- 12.1 The Beneficiary may without the consent of the Guarantor assign or charge the benefit of this Guarantee at any time to any person to whom the benefit of the Contract has been or will be validly assigned or charged and any such assignment or charge shall not release the Guarantor from liability under this Guarantee.
- 12.2 The Beneficiary shall notify the Guarantor of any such assignment or charge. If the Beneficiary fails to do so, the assignment or charge will still be valid.
- 12.3 The Guarantor shall not contend that any person to whom the benefit of this Guarantee is assigned or charged under clause 12.1 may not recover any sum under this Guarantee because that person is an assignee or chargee and not a named party to this Guarantee.
- 12.4 The Guarantor may not assign or charge the benefit of this Guarantee without the Beneficiary's written consent.

13 Notices

- 13.1 Any notice or other communication given to a party under or in connection with this Guarantee shall be in writing and shall be:
 - 13.1.1 delivered by hand or by pre-paid first-class post or other next working day delivery service at its registered office (if a company) or its principal place of business (in any other case); or
 - 13.1.2 sent by fax to its main fax number.
- 13.2 Any notice or communication shall be deemed to have been received:
 - 13.2.1 if delivered by hand, on signature of a delivery receipt;
 - 13.2.2 if sent by pre-paid first-class post or other next working day delivery service, at 9.00 am on the second working day after posting; or
 - 13.2.3 if sent by fax, at 9.00 am on the next working day after transmission.
- 13.3 This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

14 Waiver

- 14.1 No delay or omission of the Beneficiary in exercising any right, power or privilege under this Guarantee shall impair or be construed as a waiver of such right, power or privilege nor shall any single or partial exercise of any such right, power or privilege preclude any further exercise of such right, power or privilege or the exercise of any other right,

power or privilege. The rights and remedies of the Beneficiary provided for in this Guarantee are cumulative and not exclusive of any rights or remedies provided by law.

- 14.2 A waiver given or consent granted by the Beneficiary under this Guarantee will be effective only if given in writing and then only in the instance and for the purpose for which it is given and shall not prevent the Beneficiary from subsequently enforcing any of the provisions of this Guarantee.

15 Severance

- 15.1 If any provision or part-provision of this Guarantee is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted. Any modification to or deletion of a provision or part-provision under this clause shall not affect the validity and enforceability of the rest of this Guarantee.
- 15.2 If any provision or part-provision of this Guarantee is found to be invalid, illegal or unenforceable, the parties shall negotiate in good faith to amend such provision so that, as amended, it is legal, valid and enforceable, and, to the greatest extent possible, achieves the intended commercial result of the original provision.

16 Third party rights

- 16.1 Except for any person to whom the benefit of this Guarantee is assigned or charged in accordance with clause 12.1, a person who is not a party to this Guarantee shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Guarantee.

17 Counterparts

- 17.1 This Guarantee may be executed in any number of counterparts, each of which when executed and delivered shall constitute a duplicate original, but all the counterparts shall together constitute the one deed.

18 Entire agreement

- 18.1 This Guarantee constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.
- 18.2 The parties shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Guarantee.

19 Governing law and jurisdiction

- 19.1 This Guarantee and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.
- 19.2 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 Guarantee or its subject matter or formation (including non-contractual disputes or claims).
- 19.3 [The Guarantor irrevocably appoints [NAME] of [ADDRESS] [FAX NUMBER] as its agent to receive on its behalf in England or Wales service of any proceedings under this Guarantee. Such service shall be deemed completed on delivery to such agent (whether or not it is forwarded to and received by the Guarantor) and shall be valid until such time as the Beneficiary has received prior written notice that such agent has ceased to act as agent. If for any reason such agent ceases to be able to act as agent or no longer has an address in England or Wales, the Guarantor shall forthwith appoint a substitute acceptable to the Beneficiary and deliver to the Beneficiary the new agent's name and address [and fax number] within England and Wales.]
- 19.4 [The Guarantor irrevocably consents to any process in any legal action or proceedings under this Guarantee being served on it in accordance with the provisions of this Guarantee relating to service of notices of claims. Nothing contained in this Guarantee shall affect the right to serve process in any other manner permitted by law.]

20 Execution as a deed

- 20.1 This instrument is executed as a deed and was delivered when it was first dated.

[insert execution blocks for guarantor and beneficiary]

Appendix 6
Collaboration Protocol
[To be developed]