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| **Collateral warranty from a Consultant in favour of Atelier Capital Partners Limited** |
|  |
| Relating to the development at [▼] |
|  |
| Dated 20[▼] |
|  |
| 1. **ATELIER CAPITAL PARTNERS LIMITED** |
| 1. **[CONSULTANT]** |
| 1. **[EMPLOYER/ CONTRACTOR]** |

**IMPORTANT NOTE: This document is for information only and is made available on the basis that neither Atelier Capital Partners Limited or any affiliated company is responsible for the accuracy of its contents or its fitness for the purpose for which you may wish to use it. Should you wish to use it for a particular transaction we recommend that you seek professional advice from a lawyer.**

**DEED OF AGREEMENT** made this      day of 20[▼]

**BETWEEN:**

(1) **ATELIER CAPITAL PARTNERS LIMITED** (company number: 11888767) whose registered office is at 3-5 Rathbone Place London England W1T 1HJ (the **“Beneficiary”**) which expression shall include its successors in title and permitted assigns and those deriving title under it or them; and

(2) **[CONSULTANT]** (company number: [▼]) whose registered office is at [▼] (the **"Consultant"**) such expression shall include its successors and assigns; and

[(3) [[1]](#footnote-1)**[EMPLOYER/CONTRACTOR]** (company number: [▼]), whose registered office is at [▼] (the "**Employer**") such expression shall include its successors and assigns.]

**WHEREAS**

1. By the Appointment, the [Employer/Contractor[[2]](#footnote-2)] has appointed the Consultant to act in the capacity of [architect/structural engineer/mechanical and electrical engineer/quantity surveyor/project manager/insert other consultant type] in relation to the Development.
2. The Beneficiary is providing finance in connection with the Development.
3. The parties have agreed to enter into this agreement by way of Deed in favour of the Beneficiary and its successors and assigns.

**OPERATIVE PROVISIONS:**

1. **DEFINITIONS AND INTERPRETATION**
   1. In this Deed, unless the context otherwise requires, the following words have the following meanings:

|  |  |
| --- | --- |
| "**Appointment**" | means the appointment between the Employer and the Consultant for providing services in relation to the Development and includes any documents or arrangements which are supplemental or ancillary to it by way of variation; |
| **"British Standards"** | means standards or guidance published produced or approved by the British Standards Institute; |
| **"Building Contract"** | means the building contract between the Employer and [company name, number and registered office] (who is the [“Contractor”/”Employer”]) for the purposes of the Building Contract in relation to the design and construction of the Development and includes any documents or arrangements which are supplemental or ancillary to it by way of variation or otherwise; |
| **"Codes of Practice"** | means any standard or code of practice or guidance note produced or published by any relevant local, national or international body including but not limited to the Health and Safety Commission any relevant local authority or statutory undertaker; |
| "**Development**" | means the development of the Property comprising the design, construction and completion of [▼]; |
| [“Employer[[3]](#footnote-3)” | Means [company name, number and registered office] |
| **"this Deed"** | means this deed (including any schedule or annexure to it and any document in agreed form); |
| **“Facility Agreement”** | means the agreement dated on or about the date of this Deed between the Employer and the Beneficiary in relation to providing finance in respect of the Property and/or Works and any future facility agreement entered into by the Parties in respect of the Property and/or the Development;; |
| **“Finance Documents”** | means the Facility Agreement and any security documents entered into in relation to that agreement; |
| "**Practical Completion**" | means practical completion of the Development as defined under the Building Contract; |
| "**Prohibited Materials**" | means materials, goods or equipment which incorporates substances which are generally known at the time of specification to be deleterious to health and safety or the durability or integrity of the completed Development or any part of it in the particular circumstances in which they are to be used and/or which by their nature or application contravene any British Standards or Codes of Practice or European Union equivalent current at the date of specification or use; |
| "**Property**" | means [▼]; |
| **“Works"** | means the works to be performed by the contractor under the Building Contract. |

* 1. In this Deed, unless the context otherwise requires:
     1. words importing the singular only also include the plural and vice versa where the context requires.
     2. words importing persons or parties shall include firms, corporations and any organisation having legal capacity.
     3. a reference to a statute or statutory provision includes:
        1. any subordinate legislation (as defined in Section 21(1), Interpretation Act 1978) made under it;
        2. any repealed statute or statutory provision which it re-enacts (with or without modification); and
        3. any statute or statutory provision which modifies, consolidates, re-enacts or supersedes it.
     4. a reference to:
        1. any party includes its successors in title and permitted assigns;
        2. clauses is to clauses of this Deed and references to sub-clauses and paragraphs are references to sub-clauses and paragraphs of the clause in which they appear; and
        3. terms defined in the Appointment have the same meaning in this Deed unless the context otherwise requires.

1. **CONSIDERATION**

The consideration for this Deed is the payment of one pound (£1) by the Beneficiary to the Consultant, receipt of which the Consultant hereby acknowledges.

1. **DUTY OF CARE**
   1. The Consultant warrants and undertakes to the Beneficiary that it:
      1. has complied with and will continue to comply with the terms of the Appointment;
      2. has exercised and will continue to exercise all reasonable skill, care and diligence to be expected of a properly qualified, competent and experienced professional consultant of the relevant discipline providing professional services in connection with works of equivalent type, size, character, value, scope and complexity to the Development;
      3. shall owe a duty of care to the Beneficiary in respect of all matters which lie within the scope of the Consultant’s responsibilities in the Appointment; and
      4. The Consultant acknowledges that the Beneficiary is relying and shall continue to rely exclusively on the Consultant’s exercise of reasonable skill, care and diligence in respect of all matters within the scope of the Appointment and this Deed
2. **Consent To Security**
   1. The Employer hereby gives notice to the Consultant that, pursuant to the Finance Documents the Employer has charged (or may charge in the future) by way of security to the Beneficiary its present and future right title and interest in and to the Appointment.
   2. The Consultant acknowledges notice of, and consents to, the security interest granted by the Employer under the Finance Documents over the Employer's rights under the Appointment in favour of the Beneficiary.
   3. The Consultant confirms that it has not received notice of any other security interest granted over the Employer's rights under the Appointment.
   4. The Consultant shall promptly notify the Beneficiary of any default, potential default or any other event that may result in the termination, suspension or rescission of the Appointment by the Consultant.
3. **NO TERMINATION WITHOUT NOTICE**
   1. The Consultant shall not terminate the Appointment or regard the Appointment as terminated or treat the Appointment as having been repudiated by the Employer without giving to the Beneficiary at least 21 days' prior written notice (a "**Termination Notice**"). During the period of such notice the Consultant shall diligently and properly continue to perform its obligations under the Appointment. The Termination notice must identify:
      1. the proposed date of termination;
      2. the ground or grounds for termination;
      3. all unpaid amounts invoiced by the Consultant under the Appointment on or before the date of the Termination Notice; and
      4. the nature and amount of any sum or monetary claim due or asserted by the Consultant to be due under the Appointment from the Employer in accordance with the terms of the Appointment (not already included within clause 5.1.2).

The Consultant warrants to the Beneficiary that the statements submitted by it under this clause 5.1 shall be prepared with all due care and in good faith.

* 1. The Consultant shall not suspend its obligations under the Appointment without giving the Beneficiary 21 days' prior written notice (a "**Suspension Notice**") stating:
     1. the proposed date of suspension;
     2. the ground or grounds for suspension; and
     3. all unpaid amounts invoiced by the Consultant under the Appointment on or before the date of the Suspension Notice.
  2. A Termination Notice or Suspension Notice can be revoked by the Consultant at any time. On any such revocation, the rights and obligations of the Parties shall be construed as if the relevant notice had not been given.

1. **STEP-IN AND NOVATION**
   1. On or after receipt of a Termination Notice and/or a Suspension Notice, or upon termination of the finance agreement between the Employer and the Beneficiary the Beneficiary may (without prejudice to the Beneficiary’s rights under the Facility Agreement) give notice to the Consultant requiring it to accept the instructions of the Beneficiary and continue it's obligations under the Appointment in relation to the Development to the exclusion of the Employer:
      1. confirming that the Beneficiary or its nominee is assuming all the obligations of the Employer under the Appointment; and
      2. undertaking to the Consultant to discharge all payments which are due and payable to the Consultant under the terms of the Appointment provided that such payments were specified in the Termination Notice and/or Suspension Notice in accordance with the provisions of clause 5.1.3 and clause 5.2.3; and
      3. undertaking to the Consultant to discharge all payments which may subsequently become due and payable to the Consultant under the terms of the Appointment.
   2. Service by the Beneficiary of a notice under clause 6.1 will operate with effect from the date of the notice to novate the Appointment from between the Employer and the Consultant into a new contract between the Beneficiary (or its nominee) and the Consultant on the same terms mutatis mutandis as the Appointment and thereafter the Consultant will look solely to the Beneficiary (or its nominee) as the other contracting party. The form of novation agreement to be entered into by the Employer and the Consultant pursuant to this clause 5 shall be in a form approved by the Employer.
   3. Until the service of a notice under clause 6.1 nothing contained in this Deed shall operate expressly or by implication to constitute a novation of the Appointment and the Consultant shall look solely to the Employer for the performance of the duties and obligations on the part of the employer.
   4. Where the Consultant has given rights in relation to the Appointment similar to those contained in this clause 6 to any other person then if both the Beneficiary and any such other person serve notice under clause 5.1 or its equivalent, the following order of priority will apply:

* FIRST: the Beneficiary; and
* SECOND: any other third party who has been granted step-in rights under a collateral warranty.
  1. If there is any difference between the notice provisions in the Appointment and the notice provisions in this Deed the notice provisions in this Deed shall prevail.
  2. The Consultant acting in accordance with the provisions of this clause 6 shall not by so doing incur any liability to the Employer.

1. **COPYRIGHT AND LICENCE TO USE DOCUMENTS**
   1. The Consultant grants and agrees to grant to the Beneficiary an irrevocable, royalty-free, non-terminable, non-exclusive licence to use and reproduce all designs, drawings, models, plans, specifications, design details, photographs, brochures, reports, notes of meetings CAD Materials and any other materials provided by the Consultant in connection with the Development (whether in existence or to be made) and all amendments and additions to them and any works, designs or inventions of the Consultant incorporated or referred to in them for all purposes relating to the Development including (without limitation) the construction, completion, reconstruction, modification, extension, repair, reinstatement, refurbishment, redevelopment, maintenance, use, letting, sale, promotion and advertisement of the Development, such licence carrying the right to grant sub-licences and to be transferable without the prior consent of the Consultant provided that the Consultant shall not be liable for any such use by the Beneficiary (or any assignee or sub-licensee) for any purposes other than that for which the same were provided by the Consultant.
   2. The Consultant agrees:
      1. on request at any time to give the Beneficiary or any persons authorised by the Beneficiary access to the material referred to in clause 6.1 and, at the Beneficiary 's expense to provide copies of it; and
      2. at the Consultant's expense, to provide the Beneficiary with a set of all such material on Practical Completion.
   3. All royalties or other sums payable in respect of the supply and use of any patented articles, processes or inventions required in connection with the Appointment shall be paid by the Consultant.
   4. The Consultant shall indemnify the Beneficiary from and against all claims, proceedings, damages, costs and expenses suffered or incurred by the Beneficiary arising out of or in connection with the infringement or alleged infringement of any copyrights, design rights, registered design, patent or other intellectual property rights of third parties by the Consultant in the course of or in connection with the Appointment.
   5. The Consultant hereby waives (and to procure that any sub-consultants do likewise) all moral rights in the documents under Chapter IV of the Copyright, Designs and Patents Act 1998 or any re-enactment or modification of it.
2. **PROFESSIONAL INDEMNITY INSURANCE**
   1. The Consultant warrants to the Beneficiary that it has, or will take out, and will maintain for a period expiring no earlier than twelve years from the date of Practical Completion with reputable insurers carrying on business in the United Kingdom professional indemnity insurance with a limit of indemnity not less than £[▼] million for each and every claim or series of claims arising out of the same originating event, provided that such insurance is available at commercially reasonable rates
   2. As and when reasonably required by the Beneficiary the Consultant shall produce for inspection satisfactory documentary evidence that the insurance referred to in clause 8.1 is being properly maintained and confirm that payment has been made in respect of the last preceding premium due under it.
   3. The Consultant shall comply with all conditions and obligations of such insurance policy and shall immediately inform the Beneficiary if such insurance ceases to be maintained or ceases to be available at commercially reasonable rates and on reasonable terms. The Beneficiary and the Consultant shall discuss the best means of protecting the Beneficiary's interests and the Consultant shall if requested by the Beneficiary take out such insurance with such a limit of indemnity as is available in the market at commercially reasonable rates and on reasonable terms.
   4. Any increased or additional premium required by insurers by reason of the Consultant's own claims record or other acts, omissions, matters or things particular to the Consultant shall be deemed to be within commercially reasonable rates.
   5. The Consultant shall not knowingly do or omit any thing whereby the insurance policy for the time being in force may become void or voidable.
   6. The Consultant shall give notice to the Beneficiary of any claim arising under the insurance policy relating to the Development.
3. **PROHIBITED MATERIALS**

The Consultant further warrants to the Beneficiary that it has not specified for use, or permitted to be used, by or on behalf of the Consultant in relation to the Development or any part or parts of it any Prohibited Materials.

1. **[[4]](#footnote-4)[EMPLOYER] OR [CONTRACTOR]**

The [Employer OR Contractor] agrees that it will not take any steps which would prevent or hinder the Beneficiary from exercising its rights under this Deed and confirms that the rights of the Beneficiary in clauses 5 and 6 override any obligations of the Consultant to the Employer under the Appointment.

1. **CONCURRENT LIABILITIES**

The rights and benefits conferred upon the Beneficiary by this Deed are in addition to any other rights and remedies he may have against the Consultant including, without prejudice to the generality of the foregoing, any remedies in negligence.

1. **ASSIGNMENT**
   1. The Beneficiary shall be fully entitled without the consent of the Consultant to transfer this Deed and/or assign all its rights and benefits arising under this Deed at any time to any third party:
      1. by way of a security or by way of re-assignment on redemption;
      2. by absolute assignment to a subsidiary of the Beneficiary, or holding company or another subsidiary of a holding company of the Employer (as those expressions are defined in s.1159 of the Companies Act 2006); and
      3. by absolute assignment on three other occasions only.
   2. The Beneficiary shall notify the Consultant upon each occasion that it shall assign this Deed.
   3. The Consultant shall not be entitled to assign transfer charge or otherwise dispose of all or any of its rights or liabilities arising under this Deed to any other party.
   4. The Consultant undertakes to the Beneficiary not to contend in any proceedings under this Deed that any person to whom the Beneficiary assigns or has assigned its rights under this Deed or any of them in accordance with the foregoing provisions of this clause shall be precluded from recovering therein any loss resulting from any breach of this Deed (whenever happening) by reason that such person is an assignee and not the original promisee hereunder or by reason that the Beneficiary named herein or any intermediate assignee of the Beneficiary escaped loss resulting from such breach of its interest in the same.
2. **WARRANTIES**

Within fourteen days of a written notice so to do by the Beneficiary the Consultant shall use all reasonable endeavours to obtain from any sub-consultant appointed by the Consultant in connection with the carrying out and completion of its duties under the Appointment a warranty or warranties (to be executed as a deed) in favour of any third parties (including the Beneficiary) for whom the Consultant is required, under the Appointment, to procure warranties from its sub-consultants, such warranties to be in the same form as required under the Appointment.

1. **INDEPENDENT INSPECTION**

The liability of the Consultant under this Deed shall not be modified released or diminished or in any way affected by any independent inspection investigation or enquiry into any relevant matter which may be made or carried out by or for the Beneficiary nor by any failure or omission to carry out any such inspection investigation or enquiry nor by the appointment by the Beneficiary of any independent firm company or party whatsoever to review the progress of or otherwise report to the Beneficiary in respect of the Consultant's duties under the Appointment nor by any action or omission of such firm company or party whether or not such action or omission might give rise to any independent liability of such firm company or party provided always that nothing in this clause shall modify or affect any rights which the Consultant might have but for the existence of this clause to claim a contribution from any third party whether under statute or at common law.

1. **LIMITATION**
   1. The duties of the Consultant to the Beneficiary under this Deed shall be no greater than the duties the Consultant would have had to the Employer under the Appointment had the Beneficiary been named as the employer of the Consultant in the Appointment and in any action arising under this Deed the Consultant shall be entitled to rely upon the same defences as the Consultant would be entitled to raise under the Appointment in defence of such claim (but, for the avoidance of doubt, not for this purpose taking account of any set-off or counterclaim against the Employer or any agreement to vary the terms of the Appointment or any waiver of rights under the Appointment as would prejudice the Beneficiary 's rights under this Deed unless the Beneficiary has given its written consent) provided always that the Consultant shall not be entitled to raise any defence against a claim by the Beneficiary on the basis that any loss incurred by the Beneficiary is not a loss to the Employer.
   2. No action or proceedings for any breach of this Deed shall be commenced against the Consultant after the expiry of 12 years from the date of Practical Completion of the Development under the Contract.
2. **NOTICES**

Any notice provided for in this Deed shall be duly given if delivered by hand or sent by first class pre-paid special delivery or recorded delivery post to the party named therein at the address of such party shown above in this Deed or at such other address as such party may specify from time to time by written notice to the other party hereto and if sent by first class pre-paid special delivery or recorded delivery post it shall be deemed to have been received on the second working day after the date of posting.

1. **LAW**

This Deed and any dispute or claim arising out of, relating to or in connection with it is governed by, and construed in accordance with, the laws of England. All disputes or claims arising out of, relating to or in connection with this Deed shall be subject to the jurisdiction of the English courts to which the parties irrevocably submit.

1. **THIRD PARTY RIGHTS**

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

1. **ANTI-BRIBERY AND CORRUPTION**

The Consultant warrants that it has and will continue to comply with all applicable laws, statutes, regulations and codes relating to tax evasion, anti-bribery and anti-corruption including but not limited to the Bribery Act 2010 and the Criminal Finances Act 2017.

1. **GENERAL**

The provisions of this Deed shall remain in full force and effect notwithstanding the termination of the Appointment.

In witness this instrument has been executed as a deed on the date appearing at the head of page 1.

**EXECUTED** as a **DEED** by

**ATELIER CAPITAL PARTNERS LIMITED**

acting by a director

in the presence of a witness:

……………………………………….

(Signature)

Name:

Witness signature: ……………………………………….

Witness name:

Witness address:

Witness occupation:

**EXECUTED** as a **DEED** by

**[CONSULTANT]**

acting by a director

in the presence of a witness:

……………………………………….

(Signature)

Name:

Witness signature: ……………………………………….

Witness name:

Witness address:

Witness occupation:

**EXECUTED** as a **DEED** by

**[EMPLOYER]**

acting by a director

in the presence of a witness:

……………………………………….

(Signature)

Name:

Witness signature: ……………………………………….

Witness name:

Witness address:

Witness occupation:

1. Amend accordingly to reflect whether the Consultant was appointed by the Employer or the Contractor. [↑](#footnote-ref-1)
2. Delete the reference to Employer or to Contractor depending which has appointed the Consultant. [↑](#footnote-ref-2)
3. Delete definition where Employer is a party to the warranty. [↑](#footnote-ref-3)
4. Delete reference accordingly to reflect the parties to the warranty. [↑](#footnote-ref-4)