

**CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE'S DEVELOPMENT
MANAGEMENT AGREEMENT
(with ancillary ASSET MANAGEMENT SERVICES)
Second Edition 2019**

EXPLANATORY NOTES

PREFACE TO THE SECOND EDITION

- A The First Edition of the Asset and Development Management Agreement was issued In November 2015, but it is considered that the document needs continual review in order to keep pace with the changes in the development market and its sophisticated treatment. Having completed this review, the City of London Law Society Land Law Committee has made comparatively few revisions. There is set out in the following provisions of this Preface, a short summary of the substantive changes made.
- B The most conspicuous change is in respect of the document title. The precedent is mostly used as a development management agreement for a single development project to which the asset management services are incidental and the change more accurately characterises the nature of the document and its purpose.
- C References to statutory regulations and RICS valuation standards have been updated.
- D The reference in the definition of "Owner" to "its successors in title" has been changed to "where relevant, its assigns". This change is followed by a new optional clause 7.4 to the effect that, if the Agreement is novated with the assignee, the Owner is to be released from future liability under this Agreement. A footnote to the clause explains that this would be a likely provision where the assignor ceases to have any further responsibility in respect of the Development Project, but the clause would not be appropriate where the assignor retains the conduct, in whole or part, of the Development Project.
- E Clause 3.1.1 has been revised to include in respect of the Manager's warranty a specific date reference to the commencement of the Manager's appointment in respect of the Development Project if that is historic as distinct from a situation in which the Manager is appointed after the Development Project has begun.
- F Clause 3.3.3 has been adjusted to allow the parties in negotiations to agree the level of insurance cover to be effected by the Manager. The footnote to the clause suggests normal levels of indemnity cover appear to be £2m, £5m, £10m or £20m according to the degree of involvement of the Manager in the project, or how much cover the Manager can economically place. These suggestions are reflected in clause 12.2 where the Manager limits its liability for claims in damages or in debt for breach of the Agreement; coordination of the two provisions is frequently encountered.
- G A new optional sub-clause 6.3.3.5 has been added to the provisions for calculating the Performance Fee of the Manager relating to the effect on the IRR calculation involved of an inducement given by the Owner to a prospective buyer or tenant of the Property to

acquire its freehold or leasehold interest in other property. A footnote to the clause explains that the Manager may wish to resist the effects of this provision which may significantly reduce the Performance Fee by refusing to accept it or by placing a limit on its potential impact.

- H The Notices provisions in clause 20.3 now permits notices, other than of termination of the Agreement or of breach of obligation, to be given by email.
- I A new paragraph 12 has been added to Schedule 2 ("The Asset Management Services") to record that the duties of the Manager do not include those reasonably expected to be within the responsibilities undertaken by a property or estate managing agent.

1. INTRODUCTION

- 1.1 *The scope of the precedent.* The City of London Law Society Land Law Committee has prepared this precedent of an Asset and Development Management Agreement to cover a wide range of property development activity over large and small projects. Where the project does not require some of its sophistications, the relevant provisions can without difficulty be pruned. The "one size fits all" approach, nevertheless, is general and cannot cover specific requirements of a project where account has to be taken of all individual circumstances or characteristics. That is often so in the case of financing transactions where the financier is essentially concerned to be repaid its capital advance, interest and costs, plus any stipulated additional return; this will usually require more intense oversight and reporting on the part of the manager, particularly where the appointment of the manager results from the exercise of the financier's "step-in rights".
- 1.2 *The underlying approach of the precedent.* The precedent is drawn upon the premise that the developer (the "owner") does not have the opportunity or the skills to manage the development of a property or project and requires the services of a manager proficient in those respects. Many investors undertake such projects relying on professional assistance on a heavy, or total, scale. The role of the manager is therefore of key importance to the running and success of the project.
- 1.3 *The scope of management duties.* The precedent is prepared on the basis that the project has yet to start at the time that the manager is appointed; if it is appointed at a later stage, the provisions relating to spent matters can be omitted.

The manager is expected to be expert in the management of property development and related matters. Its qualifications for appointment should be experience in providing asset and development management services and the organisational skills for, and sufficient understanding of, what is required in all aspects of the development. Knowing what advice and where and how to obtain it are vital parts of the management role. This management role stands far apart from day-to-day estate management services and separate from the dedicated function of a construction manager.

The manager must, however, place reliance upon the professional consultants and building contractors involved in the development project and their respective expertise and seek their advice where necessary. The manager is not necessarily required to have

any of the professional skills of an architect, engineer, surveyor, building contractor or any of the numerous callings involved in a development. Its role is in management and oversight and advising the owner in the control of the development project and the decision-making process. The manager is not required to carry out the functions of the professional consultants and building contractors involved in the development project; that distinction is fundamental.

The precedent includes strategic property management provisions which may be required by an owner or investor preparatory to the determination of whether to undertake development and how best to deal with arranging and ascertaining how to go about it. Paragraph 2.10 of these notes comments on this further.

- 1.4 *The remuneration of the manager.* The precedent provides fairly usual fee arrangements of a management fee and a performance fee. The management fee is intended to be set at normal professional rates payable at regular monthly or quarterly intervals to remunerate the manager for services rendered. The performance fee is a "carried interest" fee as an inducement to reward the manager for conducting a project successful beyond basic target levels. The form of performance fee is a matter of negotiation and different forms are encountered. A fee based on the total return (IRR) to the owner from the project is regarded as a good measure of the performance of the manager and fairly representative of usual inducement-reward arrangements; it is based on a share of the total return derived by the owner above the target level set by the parties at the commencement of the project. This method is used in the precedent.
- 1.5 *A balanced approach.* The precedent is intended to provide a balance of rights and duties between the developer and the manager. While the owner is taking the risks of carrying out the development and has overall control, the manager is given reasonable protections in taking on the responsibilities of overseeing and advising on the implementation of the project. This balance is not the only approach which may dictate how that agreement is to be prepared in the particular circumstances of the development project or the policy requirements of the owner.
- 1.6 *The structure of the precedent.* The agreement is based on the appraisal of the development project which the owner is expected to have had carried out in order to establish whether it desires to proceed. It is an estimate of the costs of doing so and sets the expected basic return from the project. The business plan of the owner sets out the owner's aims that will provide a brief for the manager to adhere to in managing the project. The appraisal and the business plan are attachments to the agreement although, in practice, they may be regarded by the owner as too sensitive to be included in the agreement itself.

The principal part of the agreement sets out the terms of the appointment of the manager and the conditions applying to it, the scope of the authority of the manager, the obligations of the owner, the fees payable to the manager, termination of the agreement whether or not for breach, rights following termination, and limitations on liability; conventional boilerplate provisions are included. The schedules to the agreement cover details of asset management services, development management services, items of expenditure and receipts necessary to ascertain the total return to the owner from the

project, and the form of the duty of care deed that the manager is required to give to parties who have or will have an interest in the development and its funding. The duty of care deed allows for the interested party to exercise step-in rights to assume the owner's duties.

In paragraph 2 of these notes, comment is made only upon key matters and principles involved.

2. **KEY MATTERS**

2.1 *Term of appointment.* The term of the appointment of the manager lasts until the expiration of a number of months following practical completion of the construction contract (or the last of the construction contracts if there is more than one). Time is allowed for post-completion matters; clause 2.2. The term may, however, be brought to an end earlier. The owner retains the right to discontinue the project or to sell the property before the practical completion of the construction contract(s), and to terminate the appointment; the owner must have the freedom to stop the development project or to dispose of the property whenever and for whatever reason it wishes; clauses 9.1.3 and 9.5. The consequences in relation to the manager of the Owner doing so are explained in paragraph 2.6.1, dealing with termination of the appointment not in case of breach.

2.2 *Scope and conditions of manager's authority.* Clauses 2 – 4 set out the conditions applying to the manager. Clause 2.4.2 makes clear that the manager has no legal or equitable interest in the development property; it is not a joint venture; see also clause 25. Clause 3 applies to the duties of the manager. Provision is made for professional indemnity insurance cover to be maintained by the manager. The manager is also required to provide a duty of care deed to certain parties who are or become interested in the project or the property.

Clause 4 imposes constraints on the authority of the manager – to obtain confirmation by the owner of instructions given to the professional team and not to permit an increase in the cost of the development in excess of low ceiling limits. In particular, the manager may not commit the owner to an agreement with a third party or execute any deed or document on behalf of the owner except in an emergency. As stated, the manager is not responsible for the duties of a construction manager who would be expected to provide direct management of the construction works, but the manager is required to liaise with construction manager; paragraph 8.38.7, Schedule 3.

2.3 *Owner's obligations.* In clause 5, the owner is required to provide the manager with all relevant documents and information to enable the manager properly to discharge its duties. It is the duty of the owner to provide finance for the project as it proceeds and to bear the costs of the development. The owner is not required to accept the recommendations of the manager, but cannot seek redress from the manager if it does not and adverse consequences result. The owner acts, as between itself and the manager, as the only client for the purposes of the CDM Regulations but, under the development management services, the manager must monitor and report to the owner on compliance with the Regulations by consultants and contractors; paragraph 8.4 of Schedule 3. The owner is required to keep the manager indemnified against liabilities to

third parties unless they arise out of breaches of the obligations of the manager; clause 5.8.

- 2.4 *Fee issues.* The fees payable to the manager are discussed in paragraph 1.4 above. The performance fee, if any, is payable on completion of a sale (including the grant of a long lease at a premium or an exchange) of the property. If there has been none within the period of 24 months after practical completion (or such shorter period as the parties may agree), the fee is to be paid by reference to a valuation of the property as developed on a "deemed sale" basis; clause 6.3.5.

An optional provision is given (clause 6.4) in circumstances where the agreement involves duties of the manager within the definition of "construction operations" for the purposes of sections 104 and 105 of the Housing Grants, Construction and Regeneration Act 1996 (invoking the adjudication procedures for disputes in Part 2 of the Act). As the agreement is drawn, it is unlikely that those sections will apply as the manager is not providing architectural, design or surveying work, or advice on building, engineering, interior or exterior decoration or on the laying-out of landscape; those services are provided by the professional consultants and contractors engaged in the project. Practitioners should be alert to the consequences of adding any of those services to the list of duties of the manager in this regard.

- 2.5 *Alienation rights.* Under clause 7, the owner has freedom to assign the benefit of the agreement as a whole but, having assigned the benefit of the agreement, the owner nevertheless remains liable under its terms to the manager. The owner is also free to assign the benefit of the whole of the agreement as security for finance that is applied for the purposes of the development project. No other form of assignment of the whole or part of the agreement is permitted without the consent of the manager which is not to be unreasonably withheld.

The manager may not assign or charge the benefit of the agreement without the consent of the owner; the owner has an absolute discretion whether or not to consent; clause 8.

- 2.6 *Termination rights.* The agreement divides termination rights into those arising not in case of breach (clause 9) and those in case of breach (clause 10).

2.6.1 *Termination not in case of breach – Clause 9.* The agreement comes to an end on completion of a sale, subject to suspension to cover post-completion responsibilities referred to below; "sale" is defined in clause 1 as covering sale or exchange, or the grant of a long lease at a premium reserving a peppercorn or ground rent, of the whole, or substantially the whole, of the Property; "sale" also includes a disposition of control of a company or other such entity in which the full equity value of the property is substantially realised. In the context of the manager's entitlement to a performance fee, a sale is deemed to take place, on a valuation basis if, at the expiration of 24 months (or such shorter period as the parties may agree) after practical completion, a sale has not taken place; clause 6.3.5. In addition, the owner may discontinue and terminate the development project permanently at any time; it is not bound to the manager to continue.

In all such circumstances of termination, other than a "deemed" sale referred to above, the owner may require the manager to continue to act following termination in so far as there are matters requiring continuing work on the manager's part, so suspending the termination of the appointment until they have been dealt with. The management fee is payable until then.

The agreement provides for protection of the position of the manager in the relevant circumstances of early termination. On a sale of the property before practical completion, the manager's position under the agreement will be preserved if the owner is required under the terms of the sale to complete the development project, or the manager agrees to a novation of its appointment and so continues to manage the development project under the new agreement; clauses 9.4.1 and 9.4.2.

If the owner discontinues the project permanently or sells the property before practical completion of the construction contract(s) and the manager's position is not preserved as referred to above, the manager is entitled to be indemnified against redundancy of staff and cancellation of engagements, and the cost of equipment and premises acquired for use dedicated to the development project, which cannot reasonably be redeployed elsewhere in the manager's business; clause 9.5.1. In these circumstances, an optional provision is included (clause 9.5.2) for the manager to have the right of election to require the owner to pay, either a specified cancellation fee in lieu of the performance fee, or the performance fee; the rationale for this is to allow the manager to choose whichever would be the greater payment in the circumstances of early termination by the owner on the assumption that a cancellation fee would be the greater amount if termination were to occur at an early stage of the development project, and that performance fee might be more if termination were to occur at a late stage of the development project before practical completion.

2.6.2 *Termination in case of breach - clause 10.* The owner is entitled to terminate the agreement in case of fundamental breach by the manager when the owner becomes aware of it with immediate effect, or at a time when other less serious breaches of the agreement by the manager cumulatively amount to fundamental breach; insolvency of the manager entitles the owner to terminate. The owner may also terminate the agreement if the manager operates in a situation of material conflict of interest which the owner, on becoming aware of it, declines to accept, or if there is a breach of the Bribery Act 2010 (clause 26).

The manager may terminate the agreement if the owner is in material breach of its obligations or suffers an event of insolvency; clause 10.2.

Following termination of the agreement for any reason, clause 11 requires the manager to pass all information relating to the project to the owner. The copyright in project documents is to remain with the owner. Unless the owner directs otherwise, the manager is required to bring to an orderly end the services in respect of the whole or relevant part of the development project.

- 2.7 *Limitation of the manager's liability.* In case of breach by the manager of its obligations in the agreement, clause 12 provides that the manager is not to be held liable for "consequential loss" (defined as loss beyond the cost of remedying the breach and any loss of rental revenue from delay or inability to let the property during a period of delay resulting from the breach). In addition, the liability is capped so as not to exceed the level of professional indemnity insurance cover which the manager is required to maintain.

The manager ceases to be liable for breach at the expiry of a period of two years after practical completion under the construction contract, except for claims begun within that period or afterwards in respect of identified causes or action of which the owner has given notice to the manager before the expiration of that period. The curtailment of liability of the manager for after-discovered causes of action is considered appropriate in view of the nature of the role of the manager as distinct from the liability of the professional consultants and contractors where the statutory limitation periods on liability are suitable.

Other limits in the nature of protection for the manager are included. For example, subject to the manager having exercised due care and diligence and acted in good faith, it is not to be held liable for recommending the appointment or engagement of a third party in connection with the project, accepting the advice of professional advisers to assist in the performance of the manager's duties, or the consequences of its advice or recommendations to the owner being overruled or disregarded. Clause 12.4 lists various matters which exculpate the manager; the principle underlying them is that the manager is there to manage and not duplicate the functions of the professional consultants and contractors, nor even to save the owner from its misjudgements countermanding or disregarding the manager's recommendations.

- 2.8 *The owner's representative, key personnel, and manager's employees.* It is quite common for the owner to appoint a representative to deal on its behalf opposite the manager. Provision for this is made in clause 13. It is equally common for an owner to stipulate that a certain key person in the manager's business must be involved on the project. Any change of the nominated key person has to have the owner's approval; clause 14.

Clause 15 establishes that the owner is to be indemnified by the manager for claims made by members of the staff of the manager engaged on the project for redundancy, unfair dismissal or other claims arising under The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) which may be directed at the owner. Note that this does not affect the undertaking of the owner to indemnify the manager under clause 9.49.5 on termination of the project for such claims when the owner discontinues the project under clause 9.1.3.

- 2.9 *Boilerplate provisions.* The precedent includes a complement of "boilerplate" provisions – a copyright retention clause in respect of the manager's documents subject to a royalty-free licence for the owner, subject to payment of the manager's fees, to use them in connection with the development project and the property; expert determination and arbitration provisions; interest on late payments; notices; VAT; confidentiality; third party rights; a "no partnership or joint venture" declaration; Bribery Act provisions; and an applicable law and jurisdiction clause.

- 2.10 *Asset management services.* The asset management services set out in Schedule 2 that are suggested have to do with the strategic approach to improvement, in a wide sense, of the property, usually with a view to preparation of the property for development or refurbishment. This may lead to revision of the business plan. They essentially plot the course of arrangements at an early stage before the owner has finalised the formulation of its plans. The services listed are representative of arrangements of this kind encountered in practice. Note that the listed services are not suitable for use in a typical day-to-day estate management agreement.
- 2.11 *Development management services.* The development services set out in Schedule 3 are a more definitive list of what is normally required of the management role in a development project. The services are of an advisory, monitoring and supervisory nature. They should be distinguished from development obligations of a construction manager which have directly to do with day-to-day conduct of development operations as such.
- 2.12 *Items of expenditure and receipts.* Schedule 4 details the items of expenditure and receipts used in the calculation of the performance fee under clause 6.3.
- 2.13 *Duty of care deed.* Schedule 5 contains the substantive provisions of the duty of care deed mentioned at paragraph 2.2 above.

**CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE'S DEVELOPMENT
MANAGEMENT AGREEMENT (with ancillary ASSET MANAGEMENT SERVICES)**

SUITABLE FOR USE BY INVESTMENT FUND MANAGERS OR A FINANCIAL INSTITUTION REQUIRING STRATEGIC MANAGEMENT OF AN INVESTMENT PROPERTY WITH A VIEW TO ITS DEVELOPMENT, EXPERT PROPERTY ADVICE, THE OVERALL COORDINATION OF DEVELOPMENT IMPLEMENTATION AND THE MONITORING OF THE PROGRESS OF THE DEVELOPMENT. THERE ARE ALSO ANCILLARY ASSET MANAGEMENT SERVICES

THE MANAGER UNDER THIS AGREEMENT IS NOT INVOLVED WITH THE DAY TO DAY MANAGEMENT OF THE DEVELOPMENT, NOR DOES THE MANAGER FULFIL THE ROLE OF A PROPERTY MANAGER IN THE SENSE OF DEALING WITH RENT COLLECTION AND MAINTENANCE AND REPAIR OF THE PROPERTY.

Date

20__

(1)

and

(2)

DEVELOPMENT MANAGEMENT AGREEMENT
[With ancillary Asset Management Services]

Relating to

[brief description of the Property]

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DATE:

201[]

PARTIES:

- (1) [] **LIMITED** a company registered in England with registered number [] whose registered office is at [] (the "**Owner**")
- (2) [] **LIMITED** a company registered in England with registered number [] whose registered office is at [] (the "**Manager**")

BACKGROUND

- (A) The Owner is the registered proprietor of the [freehold] [leasehold] interest in the Property [held under the Lease].
- (B) The Owner intends to carry out the Development Project and ¹[to maximise the net income and the capital value of the Property] and, for that purpose, has agreed to appoint the Manager to perform the Services in relation to the Development Project and strategic management of the Property.

OPERATIVE PROVISIONS

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

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

"**Appraisal**" means the appraisal of the Development Project and strategic management of the Property in Annexure [1];

"**Asset Management Services**" means the services set out in Schedule 2, subject to variation in accordance with this Agreement;

"**Associate**" means:

- (a) a member of the group of companies of which the Owner, or the Manager as the case may be, is a member (a "**Group Member**"); a company is a member of a group of companies if one is the subsidiary of the other or both are subsidiaries of a third company, "subsidiary" having the meaning given to it in section 1159 of the Companies Act 2006;
- (b) any person with whom the Owner, Manager, or Group Member is connected, "connected" having the meaning given to it in section 1122 of the Corporation Tax Act 2010; and

¹ The maximisation of income and capital will normally be the aim of the commercial development project. It would not necessarily be appropriate in case of a residential development scheme. The words in brackets should be deleted where they are inappropriate.

- (c) any other joint venture, partnership or other collaborative entity in which the Owner, Manager or a Group Member, has an equity interest with which it is "connected" or which it "controls" or is under the same "control", as those expressions are respectively defined in sections 1122 and 1124 of the Corporation Tax Act 2010;

"Business Plan" means the plan set out in Annexure [2] detailing the Owner's strategy to achieve the Owner's Objectives for the Property during the term of this Agreement, including any asset management initiatives, the Development Project and other action to implement the strategy, as adjusted from time to time by the Owner;

"CDM Regulations" means the Construction (Design and Management) Regulations 2015;

"CIL" means any statutory tax, tariff or charge levied by the local planning authority [the Mayor of London] or any other person to fund the delivery of infrastructure whether the same is known as the "community infrastructure levy" or by any other name;

"Construction Contract" means the building contract, or building contracts if more than one, for the carrying out of the construction works involved in the Development Project;
"Contractor" is to be construed accordingly as the contractor under the Construction Contract;

["Construction Manager" means the person to be appointed by the Owner on its behalf to carry out the day-to-day management and supervision of the construction works involved in the Development Project;]

"Construction Team" means the Contractor and its sub-contractors;

"Cost Plan" means a plan of the estimated costs of the Development Project to be produced in accordance with duties of the Manager under this Agreement as updated from time to time;

"Development Management Services" means the services set out in Schedule 3, subject to variation of them in accordance with this Agreement;

"Development Project" means the project of development of the Property and includes the preparation of the Property for development, the construction works, the marketing and letting [and Sale] of the Property as developed;

"Development Project Team" means those employed or engaged by the Owner in carrying out and advising on the Development Project including:

- [(a) the Construction Manager;]
- (b) the Contractor and the Professional Team;
- (c) the letting or other such agent;
- (d) any other consultants and advisers appointed by the Owner in connection with the management of the Property;

- (e) the Property managing agent; and
- (f) any other person whom the Owner appoints in connection with the Property whose functions affect the duties of the Manager under this Agreement,

as may be appropriate in the circumstances; references to "members of the Development Project Team" are to be construed accordingly;

"**End Date**" is defined in clause 6.3.1;

"**Fees**" means the Management Fee and the Performance Fee referred to in clause 6;

"**Interest**" means interest at the rate and becoming due as provided in clause 19;

"**Lease**" means the lease dated [] of the Property between (1) [] and (2) [];]

"**Owner**" includes, ²where relevant, its assigns;

"**Owner's Representative**" means the person (if any) from time to time appointed by the Owner to act as its representative for the purposes of this Agreement of whom it gives notice to the Manager to that effect;

"**Owner's Objectives**" means the objectives of the Owner in relation to the Property and the Development Project as set out in the Business Plan;

"**Planning Permission**" means planning permission [insert details] for the Development Project as it may be varied from time to time;

"**Practical Completion**" means the practical completion of the works of construction involved in the Development Project in accordance with the Construction Contract or, if more than one, the Construction Contract for the works of construction last to be carried out, as identified by the issue of the certificate of Practical Completion under the terms of the relevant Construction Contract; "date of Practical Completion" is to be construed accordingly. References to "Practical Completion" are to include, where applicable, sectional completion under a Construction Contract; references to "certificate of Practical Completion" are to a statement of Practical Completion where the Construction Contract provides instead for that procedure;

"**Professional Team**" means the consultants appointed by the Owner in relation to the Development Project (but not the Owner's Representative) including the architect, principal designer, structural engineer, M&E engineer and quantity surveyor and such other consultants so appointed by the Owner;

"**Project Documents**" means documentation relating to the Development Project as from time to time approved by the Owner, whether then in the course of preparation or complete, including (as the context requires) the Business Plan, the Appraisal, the approved plans, the

² See Clause 7.4 and its footnote.

cash-flow forecast, the Cost Plan, outline specifications and programme, working drawings, records, plans, schedules, calculations and reports including all such documentation held in a building information model and any other electronic format;

"**Property**" means the property described in Schedule 1; a reference to the "Property" is to the whole or part of the Property as the context so allows;

³"**Requisite Consents**" means those permissions, consents, approvals, licences, certificates and permits in legally effectual form as may be necessary lawfully to commence, carry out, maintain and complete the Development Project, whether of a public or private nature, and to use and enjoy the Property as envisaged by the Business Plan, including:

- (a) planning permissions (other than the Planning Permission) and the approval of reserved matters;
- (b) building regulations, consents and by-law approvals;
- (c) the requirements of competent authorities regulating the Development Project and the use of the Property;
- (d) the consents of parties having interests or rights in or over the Property who, by the lawful exercise of their powers, not having given consent, could prevent or impede the carrying out or progress of the Development Project or its use and enjoyment;

"**Sale**" means:

- (a) the sale or exchange of the whole of the Property by the Owner;
- (b) the grant by the Owner of a long lease of the whole of the Property at a premium reserving a peppercorn rent or ground rent; or
- (c) the disposition of the control of the Owner in a company or other legal entity holding the Property by whatever means in which the equity value in the Property is, or is substantially, realised, "control" having the meaning defined in section 450 of the Corporation Tax Act 2010,

on terms reached between a willing seller (or disponent) and a willing buyer (or disponent) acting at arm's length and in good faith;

references to the "whole of the Property" are to be construed as applying in circumstances of a Sale (in any of its forms) where substantially the whole of the Property is Sold;

where the context so allows, "**Sale**" includes a deemed sale under clause 6.3.5; "**Sell**", "**Sold**" and "**Disposal**" are to be construed accordingly;

³ The definition of "Requisite Consents" is of general application. "Planning Permission" is excepted as it is specifically referred to in a number of settings in the agreement.

"**Services**" is a collective reference to the Asset Management Services and the Development Management Services; a reference to "Services" is to either or both of them as the context so allows;

["**Title Matters**" means those matters affecting the title to the Property [as set out in Schedule 1;]

"**Working Days**" means any day which is not a Saturday or Sunday or a public holiday.

1.2 Interpretation

In the interpretation of this Agreement, unless the context otherwise requires:

- 1.2.1 an obligation of a party includes the obligation to procure that it is performed or observed;
- 1.2.2 a restriction imposed on a party includes the obligation not to permit infringement of the restriction;
- 1.2.3 references to numbered clauses, schedules and paragraphs are references to clauses or schedules of or to this Agreement and paragraphs in the relevant schedule;
- 1.2.4 words denoting the singular include the plural and vice versa;
- 1.2.5 words importing one gender include both other genders;
- 1.2.6 headings to clauses, paragraphs and schedules are for ease of reference only and are not to be taken into account in the interpretation of the provisions to which they refer;
- 1.2.7 unless the context requires otherwise, references to any legislation include references to that legislation as amended, consolidated or re-enacted or as other legislation modifies its application from time to time and any subordinate legislation made or to be made under that legislation;
- 1.2.8 the term "**liability**" includes, if the context so allows, claims, demands, proceedings, damages, losses, costs and expenses;
- 1.2.9 the term "**monitor**" (and any cognate term) in relation to Services involves, as the context requires, the following activities:
 - 1.2.9.1 ascertainment of information as to the progress of the relevant activity or matter and the level of performance by a third party of its duties in pursuance of the Owner's Objectives and regularly reviewing these matters;
 - 1.2.9.2 keeping the Owner advised of these matters and of whether and to what extent the Owner's Objectives are being achieved;

- 1.2.9.3 taking such action within the scope of the Manager's duties to provide the Services as is requisite to achieve the Owner's Objectives;
- 1.2.9.4 reporting to the Owner on a regular and frequent basis; and
- 1.2.9.5 general supervision of the management of the Property and of the Development Project,

but does not involve undertaking the day-to-day management of the Property [the duties of the Construction Manager in relation to the Development Project], nor the duties of any contractor or professional adviser employed or whose services are engaged by the Owner in connection with the Property or the Development Project;

- 1.2.10 the term "**person**" includes a company, partnership, limited partnership or other collaborative entity; and
- 1.2.11 the words "**include**" and "**including**" are deemed to be followed by the words "without limitation", and general words introduced by the word "other" do not have a restrictive meaning by reason of being preceded by words indicating a particular class of acts, things or matters.

2. APPOINTMENT TERMS OF THE MANAGER

2.1 The Owner now appoints the Manager, and the Manager accepts the appointment in consideration of the Fees, to carry out and perform the Services in accordance with this Agreement.

2.2 The term of the appointment of the Manager [commences on the date of this Agreement] ⁴[commenced on specify earlier date] and expires on the ⁵[later] [earlier] of:

- 2.2.1 the date [24] months after the date of Practical Completion; and
- 2.2.2 either the date of the issue of the certificate of making good of defects under the Construction Contract (or last of the Construction Contracts, if more than one), or if none is issued, the date when the Manager has no further active involvement in the Development Project.

unless the appointment is terminated before then under clause 9 or 10.

2.3 The Manager shall comply with the obligations listed in Schedules 2 and 3 in the performance of the Services, but:

⁴ It is often the case that the Manager will have commenced operating under a preliminary arrangement with the Developer before this agreement has been drawn up or exchanged. If so, the warranty to be given by the Manager would relate back to the earlier date of the Manager having done so.

⁵ A period of 24 months coordinates with the End Date in respect of the Manager's Performance Fee and in many cases is sufficient to include the issue of the certificate of making good of defects under the Construction Contract, or if none is issued, when the Manager has no further involvement in the development project. The 24 month period also allows a reasonable period during which the owner may let or sell the property and to assess the value of property against its market performance. Much depends on the scale of the development. It is therefore a matter of negotiation whether the expiry date of the term should occur on the earlier or later of the relevant event.

- 2.3.1 the listed items are not exhaustive and are not intended to limit the scope of the Services comprehended by the duties of the Manager set out in clause 3.2; and
 - 2.3.2 compliance with them is subject to practical adaptation and modification to the extent that the circumstances attending the Development Project render them impracticable, unnecessary or requiring variation, but not without the consent of the Manager so as materially to alter the nature, scope and extent of the duties of the Manager for which it was originally engaged and any material alterations of those duties to which the Manager has in the meantime consented to be bound.
- 2.4 The Owner grants licence to the Manager and those authorised by the Manager (with or without vehicles, plant, equipment and materials) to enter into and upon the Property while this Agreement remains in operation for the purposes only of carrying out, or procuring the carrying out of, the Services. The licence:
- 2.4.1 is subject to the Owner's proprietary rights of possession, [Title Matters] and to any rights of third parties over or in respect of the Property; and
 - 2.4.2 is not to be construed as creating a legal or equitable interest in the Property.

3. THE CONDITIONS OF PERFORMANCE OF THE SERVICES BY THE MANAGER

3.1 The Manager:

- 3.1.1 warrants to the Owner that the Services and duties performed by it ⁶[from the date of this Agreement] [from *specify earlier date*] in connection with the Property and the Development Project; and
- 3.1.2 undertakes with the Owner that the Services and duties to be performed by it under this Agreement -

have been and will continue to be carried out with such skill, care and diligence as is reasonably to be expected of a competent asset and development manager experienced in providing services of the nature of the Services for assets and projects of a size, scope, type and complexity comparable with the Property and the Development Project.

3.2 In the performance of the Services, the Manager shall:

- 3.2.1 provide them in a good and efficient manner and as economically as is reasonably practicable;
- 3.2.2 devote as much of its time and attention to the performance of the Services as is necessary for the purpose;

⁶ Where the Manager has acted on or in connection with the Development Project before the signing of this Agreement, it is usual practice for the Owner to require the warranty to have retrospective effect. The alternative dates from which the warranty is to have effect take account of whether the Manager's involvement is historic or is just commencing. If the Manager's involvement is historic, the relevant past date should be inserted; if it is just commencing, the relevant date is the date of this Agreement. The date inserted should be consistent with the date of commencement of the Appointment in clause 2.2.

- 3.2.3 act in the interests of the Owner so as to protect and enhance its interests with respect to the Property and the Development Project and to attain the Owner's Objectives;
- 3.2.4 act in accordance with the Business Plan and advise the Owner of matters likely to affect the attainment of the objectives of the Business Plan;
- 3.2.5 provide advice to the Owner in a good, clear and concise manner when seeking instructions from the Owner;
- 3.2.6 seek consents and approvals of the Owner required under this Agreement in good time so as to enable the Owner to make an informed decision;
- 3.2.7 comply with the instructions, directions and guidelines reasonably given to it by the Owner on any matter connected with the performance, and within the scope, of the Services;
- 3.2.8 disclose fully to the Owner all matters material to the provision of the Services;
- 3.2.9 consult, liaise and co-operate with all members of the Professional Team and the Construction Team, acting consistently with the obligations of the Owner under the terms of the professional appointments or, as the case may be the Construction Contract;
- 3.2.10 disclose promptly to the Owner any actual or potential conflict of interest which may arise between the Manager and the Owner; where such a conflict exists, the Manager may not without the consent of the Owner take further action in relation to the Services;
- 3.2.11 act consistently with the obligations of the Owner under the terms of leases, lease agreements, licences, permits and other Project Documents [and obligations or restrictions under Title Matters;
- 3.2.12 take account of the financial, legal, strategic and investment implications applicable to the Property and the Development Project of which it has been informed or of which it is, or ought reasonably to be, aware;
- 3.2.13 in the exercise of its authority from the Owner under this Agreement, comply with all applicable laws, statutes, statutory requirements, rules, regulations, orders, directives and requirements of all statutory bodies;
- 3.2.14 notify the Owner from time to time of the identity of the person who is the Manager's representative for the purposes of this Agreement;
- 3.2.15 communicate with the Owner's Representative on all matters on which the Owner's Representative is authorised to act, of which the Owner has notified the Manager; and

- 3.2.16 not recommend nor advise on appointments or contracts to be entered into with an Associate of the Manager, unless:
- 3.2.16.1 it has disclosed to the Owner the identity of the Associate and its relationship with the Manager;
 - 3.2.16.2 the terms and costs of the appointment or contract are consistent with comparable appointments or contracts as would be negotiated on an arm's length basis; and
 - 3.2.16.3 the Manager would have recommended the appointment, or given the same advice on the contract, even if it had had no such relationship with the Associate.
- 3.3 The Manager shall maintain in force professional indemnity insurance to cover liability which it may incur under or in respect of this Agreement:
- 3.3.1 throughout the duration of this Agreement and for at least six years after the termination (whatever the cause) of, and completion of its duties under, this Agreement;
 - 3.3.2 with a reputable insurance company incorporated and carrying on business in the United Kingdom;
 - 3.3.3 in respect of each and every claim, or series of claims arising out of any one event, of not less than ⁷[£ _____)],
- and shall on request from time to time produce to the Owner evidence of compliance with the requirements of this clause 3.3.
- 3.4 The Manager shall, if so requested by the Owner, execute and deliver a duty of care deed in respect of its Development Management Services to interested parties ("**Interested Parties**") subject to the conditions set out in this clause 3.4:
- 3.4.1 The Manager is required to give a duty of care deed at the request of the Owner made at any time before the term of the appointment of the Manager is terminated or comes to an end as provided in clause 2.2.
 - 3.4.2 The Interested Parties are any of the following:
 - 3.4.2.1 a person who has agreed to provide finance to the Owner in connection with the acquisition, or the carrying out, of the Development Project;

⁷ The usual amounts of the indemnity in this context are £2m, £5m, £10m or £20m, depending on the scale of the Development Project, the extent of involvement of the Manager and sometimes how much insurance cover the Manager can economically place. See also clause 12.2 below.

- 3.4.2.2 a buyer to whom the Owner has agreed to Sell the Property or the substantial part of it if the Development Project is to be, is in the course of being, or has been, carried out;
- 3.4.2.3 an Associate of the Owner who has a substantial financial interest in the Development Project;
- 3.4.2.4 [the freehold owner/a superior landlord] of the Property;] and
- 3.4.2.5 [a first tenant of a commercial unit in the Development Project having a net internal area of more than [] square metres.]

⁸[References to the "**substantial part**" of the Property in this clause 3.4.2 are to the part of the Property in which the preponderance of value, once the Development Project has been carried out, is or would be reposed.]

- 3.4.3 The operative provisions of the duty of care deed between the Manager and an Interested Party are to contain the rights and obligations set out in Schedule 5 or such other provisions as the parties to the duty of care deed may agree.
- 3.5 The Manager may not without the consent of the Owner make any profit or commission from the provision of the Services, other than the Fees.
- 3.6 Neither the Manager nor any Associate of the Manager, may acquire or have any interest or involvement in any property of comparable nature and which is situated within ⁹[an area shown edged red on the attached plan], if that interest or involvement would, or would be likely to, compete with the Property for prospective tenants or buyers before or at a time while the Property is being marketed in accordance with this Agreement.
- 3.7 The duties of the Manager in relation to the Development Management Services do not include any of the duties required to be performed and observed by the Construction Manager under the terms of its contract of appointment by the Owner.

4. **SCOPE OF THE MANAGER'S AUTHORITY**

- 4.1 The Manager is authorised by the Owner:
 - 4.1.1 to perform the Services; and
 - 4.1.2 subject to confirmation by the Owner, to issue instructions on behalf of the Owner to the Contractor and members of the Professional Team in the performance of the Development Management Services.

⁸ The definition of "substantial part" as an option in this context is provided as a suggestion in circumstances where the scale of the relevant part of the Property is an issue between the owner and the manager in negotiations on the terms of the agreement.

⁹ The use of a plan to show definitively the restricted area provides certainty and is desirable, but may not be appropriate in all circumstances.

- 4.2 The Manager may not without the approval of the Owner:
 - 4.2.1 make any material alteration or variation to or authorise any omission from the Development Project which would affect the design or specification of the Development Project previously approved by the Owner;
 - 4.2.2 issue instructions or give approval for the doing of any other act, matter or thing which would, or would be likely to, contravene or exceed the scope of a consent, approval, authorisation or instruction of the Owner previously given which the Owner has not since withdrawn or waived;
 - 4.2.3 issue an instruction or permit an increase in the cost of the Development Project by more than [£5,000] for any one instruction and [£50,000] in the aggregate above the total amount of the costs (including provision for contingencies) shown in the Appraisal;
 - 4.2.4 make material variations to:
 - 4.2.4.1 materials specified or selected for the Development Project; or
 - 4.2.4.2 the quality, performance and standards of materials and workmanship comprised in the Development Project; or
 - 4.2.5 make a material variation to the terms of the Construction Contract or the appointments of the Professional Team and the Construction Team or waive compliance with them in any material respect.
- 4.3 Subject to clause 4.4, the Manager may not without authorisation of the Owner :
 - 4.3.1 commit the Owner to an agreement with a third party;
 - 4.3.2 compromise, waive, vary or abandon an action, right or remedy in connection with the Property or the Development Project to which the Owner is or may be entitled;
 - 4.3.3 act or hold itself out as having authority to act on behalf of the Owner in any manner which is beyond the scope of the Manager's authority under this Agreement; or
 - 4.3.4 execute or sign any deed or document for or on behalf of the Owner.
- 4.4 In an emergency where there is no opportunity to obtain prior authorisation from the Owner, the Manager:
 - 4.4.1 has authority as agent for the Owner to issue such orders and instructions as may reasonably be required in order to prevent danger to life or limb or material damage to the Property or Development Project; but
 - 4.4.2 shall seek to minimise any adverse impact on the Property or the Development Project to the extent reasonably practicable in the circumstances; and

4.4.3 shall immediately notify the Owner and, as appropriate, the Contractor of the actions and measures it has taken and seek authorisation for any further measures to be taken in the circumstances.

4.5 The Manager may delegate certain of its functions and duties under this Agreement to a person only if doing so is first authorised by the Owner, but the Manager is not to be relieved from liability to the Owner for the due performance of those of the functions and duties so delegated.

5. THE OWNER'S OBLIGATIONS

5.1 In order to enable the Manager properly to discharge its obligations in this Agreement, the Owner shall:

5.1.1 disclose to the Manager all relevant documents, information, data, permissions and approvals with respect to the Development Project and the Property in the possession of, or available to the Owner;

5.1.2 promptly do all lawful acts, matters and things as may be necessary in connection with the provision by the Manager of the Services as it should, as the Owner of the Property, do in the context of the Manager's obligations in this Agreement;

5.1.3 promptly confirm the Manager's authority for the instructions (or, as the case may be, ratify the instructions) properly issued by the Manager to professional advisers in connection with the performance of the Services and to the Contractor and the Development Project Team;

5.1.4 co-operate with the Manager and respond promptly to it with information and with approvals, consents, instructions, information and assistance reasonably requested by the Manager, and

5.1.5 ¹⁰[provide or procure finance for the Development Project as it proceeds.]

5.2 The costs of carrying out the Development Project are to be borne by the Owner and not by the Manager; accordingly:

5.2.1 the Manager is not required to make any advances to, or for the account of, the Owner or to pay any amount except out of funds provided by or obtained from the Owner for the relevant purpose; but

5.2.2 the Manager may not incur, nor be required to incur, any liability or obligation as principal for the account of the Owner unless and to the extent that the Manager is permitted to do so on behalf of the Owner under clause 4 or monies are reimbursable as incidental out-of-pocket expenses.

¹⁰ Developers are usually reluctant to give this undertaking, but a manager may sometimes have brought the development project to the owner on the basis that it will provide finance for the development project and the performance fee is the only share in the success of the development project that is available to the manager.

- 5.3 Decisions relating to the Property and the Development Project are at the absolute discretion of the Owner; the Owner is not required to accept the advice or recommendations of the Manager, but the Owner:
- 5.3.1 is not entitled to seek redress from the Manager for adverse consequences resulting from the Owner declining or failing to do so;
 - 5.3.2 subject to clause 5.5, may not obstruct or hinder the Manager from performing the Services; and
 - 5.3.3 shall keep the Manager indemnified against liability incurred by it in consequence of the exercise of the Owner's discretion effecting revocation or alteration of commitments to third parties .
- 5.4 The Owner shall:
- 5.4.1 pay the Fees to the Manager in accordance with this Agreement;
 - 5.4.2 provide the Manager on request with all information reasonably required by the Manager to calculate the Fees; and
 - 5.4.3 record accurately all items of expenditure and receipts as those terms are defined in Schedule 4 and the times at which they were expended and received.
- 5.5 The Owner intends to carry out the Development Project, but may at any time:
- 5.5.1 vary, suspend, postpone, discontinue or cancel the whole or part of the Development Project;
 - 5.5.2 sell the Property before the completion of the Development Project; or
 - 5.5.3 lawfully terminate this Agreement if it abandons the Development Project,
- without incurring liability to the Manager beyond payment of the Fees due to it in accordance with this Agreement.
- 5.6 As between the Owner and the Manager, the Owner shall act as the only client for the purposes of the CDM Regulations in respect of the Development Project.
- 5.7 The Owner may vary the Services by addition to, omission from, or alteration of, them, but not without the consent of the Manager so as materially to alter the nature, scope and extent of the duties of the Manager for which it was originally engaged and any material alterations of those duties to which the Manager has in the meantime consented to be bound.
- 5.8 The Owner shall keep the Manager indemnified against liability to third parties incurred by the Manager in the discharge of its duties except to the extent that the liability arises out of or in consequence of breach of the obligations of the Manager under this Agreement.

6. FEES

6.1 The Owner shall pay to the Manager a management fee ("**Management Fee**") and a performance fee ("**Performance Fee**") in accordance with the following provisions of this clause 6. The Manager does not cease to be entitled to the Performance Fee by reason only that the term of its appointment has come to an end in the meantime.

6.2 ¹¹The Management Fee is payable at the yearly rate of £[] during the continuation of this Agreement. The following provisions of this clause 6.2 apply to the Management Fee:

6.2.1 the Management Fee is to be payable to the Manager by monthly instalments of £[] on the last day of each consecutive calendar month, the first such payment to be made on []; and

6.2.2 [if this Agreement is terminated under clause 9.1.3 or clause 9.4.3, the Manager is entitled to be paid a termination fee equal to [] months' Management Fee.]

6.3 The Performance Fee is []% of the sum equal to such amount (if any) as would, if that amount were laid out by way of Expenditure at the End Date, reduce the IRR to []%. The following provisions of this clause 6.3 apply to the Performance Fee:

6.3.1 In this clause 6.3 and in references in Schedule 4 the following words and expressions have the following meanings:

"**End Date**" means the date up to which the calculation of the Performance Fee is to be made; the End Date occurs at such one of the following times as applies in the circumstances:

- (a) in case of a Sale of the whole of the Property completed on or after the date of Practical Completion - the date of completion of the Sale;
- (b) in case of a "deemed" Sale under clause 6.3.5 - the date of the expiry of the relevant period at which that clause is to operate;
- (c) in case of discontinuance of the Development Project under clause 9.1.3 - the date on which notice of discontinuance is given by the relevant party to the other;
- (d) in case of a Sale of the whole of the Property completed before the date of Practical Completion in respect of which neither clause 9.4.1 nor 9.4.2 applies - the date of completion of the Sale; or

¹¹ The provisions as to payment of the management fee are designed to remunerate the manager for its services provided during the carrying out of the development project on a straight-line monthly-payment basis. It may be prudent to set different fixed rates for the various phases of the development process when the scale of involvement of the manager is more or less intense. Other arrangements are encountered in practice, such as an overall fee in respect of management of which payment of "slices" of the management fee are on a staggered basis – e.g.35% on obtainment of planning permission, 55% up to practical completion and 10% during the defects period. As an example, this takes account of a likely scale of involvement of the manager throughout the development project.

(e) in case of a Sale of the whole of the Property to which clause 9.4.1 applies – the date of Practical Completion,

but in any such case other than sub-paragraph (b) above, the End Date is to be postponed to the end of the period of suspension of the termination of this Agreement as may be required by clause 9.2;

"Expenditure" means the expenditure incurred by or on behalf of the ¹²Owner or borne by it in respect of the Property, including the purchase price and associated costs of acquisition, the expenditure and costs of and in connection with the Development Project, the costs of management, maintenance, upkeep, repair and insurance of the Property, interest on loans to the Owner in respect of and applied to the Development Project and the Management Fee up to and including the End Date;

"IRR" means the discount rate per annum required to reduce the net present value of the quarterly cash-flows of Expenditure and Receipts to zero;

"Quarterly" means the periods before the End Date beginning on 1 January, 1 April, 1 August and 1 October in each year and includes periods before and after those dates respectively beginning on the date of this Agreement and ending on the End Date to and from the relevant Quarterly date if either of those dates does not correspond with the Quarterly dates; and

"Receipts" means monies or monies' worth received by or on behalf of the Owner in respect of the Property, including rent and income from the Property and the proceeds from the Sale of the Property.

Items of Expenditure and of Receipts and their treatment are set out in Schedule 4, but the listed items are not intended to be exhaustive.

6.3.2 The Performance Fee is to be calculated as at the End Date and is to be payable by the Owner within [40] Working Days after the End Date.

6.3.3 The IRR is to be calculated in accordance with the following principles:

6.3.3.1 Receipts and Expenditure during a Quarterly period are to be treated for the purposes of calculation of the IRR as having been received or expended on the [first] [last] day of the Quarterly period;

6.3.3.2 the Manager is to produce and keep a schedule of Quarterly cash-flows of Expenditure and Receipts;

6.3.3.3 cash which is from time to time held by the Owner or on its behalf is to be kept in an interest bearing account and the interest accruing on the account is to be treated as a Receipt; [and]

¹² See footnote to clause 7.4.

6.3.3.4 monies which are receivable in respect of the period up to and including the End Date, but which have not been received by then are to be treated as having been received on the End Date if they are received afterwards; [and]

6.3.3.5 ¹³[if the Owner acquires a freehold or leasehold interest in property elsewhere (the “**relevant property interest**”) owned by a prospective buyer or tenant as an inducement for it to acquire, or to take a lease of, the Property, there is to be taken into account for the purposes of Schedule 4 and clauses 6.3.4 and 6.3.5, so far as may be applicable:

- (a) the expenditure of and incidental to the acquisition and disposal of the relevant property interest (including the surrender or other termination of the relevant property interest if leasehold);
- (b) the expenditure on maintenance, repair, insurance and management while the Owner retains the relevant property interest or is otherwise required to be responsible for those costs;
- (c) the receipts from or in respect of the relevant property interest while it is held by the Owner and from its disposal; and
- (d) the value of the relevant property interest if retained by the Owner at the End Date.]

6.3.4 In case of a disposition of the Property otherwise than by outright sale, and which falls within the definition in this Agreement of "Sale", the value of the Property is to be assessed by:

6.3.4.1 taking into account the terms of the disposition; and

6.3.4.2 making such adjustments to those terms as may be necessary in the circumstances to equate to the value of the Property as if it had been sold outright by the Owner,

and the Property is to be deemed to have been Sold at a price equal to that value. For the purposes of this clause 6.3.4, a Sale is not an outright sale if the value of the disposition (or deemed disposition) under the terms of the Sale can be finally determined only on the completion of the Development Project or on the termination of this Agreement by the Sale.

¹³ Where the owner acquires or negotiates the termination of the interest in existing or former premises of a prospective buyer or tenant of the property who would have been unable or unwilling otherwise to buy or take up a lease of the property, it is a negotiable term which the manager may resist as significantly reducing the amount of the performance fee or may require some limit to be placed on the amount of expenditure in that connection.

- 6.3.5 If the Property has not been Sold within a period of [24] months after the date of Practical Completion (or such shorter period as the parties may agree):
- 6.3.5.1 at the expiry of that period, it is to be valued in lieu of Sale in accordance with clause 6.3.5.4 and clause 6.3.6 (and is to be deemed to have been Sold accordingly);
 - 6.3.5.2 the value so attributed to the Property (less []% in respect of the hypothetical expenses of the Sale) is to be treated as the price realised from the Sale for the purposes of assessing the IRR;
 - 6.3.5.3 the Property is to be deemed to have been Sold at the expiry of the relevant period; and
 - 6.3.5.4 the value is to be agreed or determined as being equal to the market value in accordance with section 4 of Valuation Practice Statement 4 of RICS Valuation – Global Standards 2017.
- 6.3.6 Where clause 6.3.4 or 6.3.5 applies, the parties are to use their reasonable endeavours to agree the value of the Property but, if they cannot or do not do so, the value is to be determined by an expert¹⁴, appointed at the request of either of the parties by the President (or other appropriate officer) of the Royal Institution of Chartered Surveyors, acting in accordance with the provisions of clause 17.
- 6.3.7 If at the time the Performance Fee is due for payment the full amount of the Expenditure at the End Date has not been quantified or the amount of Receipts due in respect of the last Quarterly period up to and including the End Date have not been received by then:
- 6.3.7.1 so much of the Performance Fee as may then definitely be due and also so much (if any) as is estimated under clause 6.3.7.2 to be due is to be paid to the Manager;
 - 6.3.7.2 the [quantity surveyor] [architect] is to be requested as often as may be required to quantify fully or so far as may be practicable the Expenditure and to take account of the relevant Receipts which have been received after the End Date and to make a safe estimate of the Performance Fee; a "safe estimate" is an amount which having regard to all reasonable contingencies relating to the part of the Expenditure for the time being unquantified or relevant outstanding Receipts will ultimately become payable or be received; and
 - 6.3.7.3 if, when the final amount of the Expenditure has been quantified and all relevant outstanding Receipts that were reasonably expected to be

¹⁴ If the parties wish an arbitrator to determine the value, replace "expert" with "arbitrator" and replace the reference to clause 17 with clause 18.

received have been received thereby enabling the Performance Fee to be finalised:

6.3.7.3.1 the Owner is shown to have underpaid the Performance Fee, the Owner shall as soon as possible pay the Manager the amount of the underpayment with Interest on the underpaid amount for the period commencing on the date the Performance Fee is finalised and ending on the date of actual payment of the underpayment;

6.3.7.3.2 the Owner is shown to have overpaid the Performance Fee, the Manager shall as soon as possible repay to the Owner the amount of the overpayment with Interest on the overpaid amount for the period commencing on the date the Performance Fee is finalised and ending on the date of actual repayment of the overpayment.

6.4 [For any sum due from the Owner to the Manager under any part of this Agreement that relates to "construction operations" (as interpreted in accordance with sections 104 and 105 of the Housing Grants, Construction and Regeneration Act 1996):

6.4.1 no later than five days after payment becomes due, the Owner shall notify the Manager of the sum that the Owner considers to have been due at the payment due date in respect of the payment and the basis on which that sum was calculated;

6.4.2 subject to clause 6.4.5 and unless the Owner has served a notice under clause 6.4.3, it shall pay the Manager the sum referred to in the Owner's notice under clause 6.4.1 (or, if the Owner has not served a notice under clause 6.4.1, the sum referred to in the Manager's invoice) (in either case in this clause 6.4, the notified sum) on or before the final date for payment of each invoice;

6.4.3 not less than seven days before the final date for payment (in this clause 6.4, the prescribed period), the Owner may give the Manager notice that it intends to pay less than the notified sum (in this clause 6.4, a pay less notice). Any pay less notice shall specify:

6.4.3.1 the sum that the Owner considers to be due on the date the notice is served; and

6.4.3.2 the basis on which that sum is calculated;

6.4.4 if the Owner fails to pay an amount due to the Manager by the final date for payment and fails to give a pay less notice under clause 6.4.3, interest equal to 3% above the base rate of [] Bank Plc or, if higher, 6% per annum shall be added to the unpaid amount from the final date for payment until the actual date of payment. The parties acknowledge that the Owner's liability under this clause 6.4.4 is a substantial remedy for the purposes of section 9(1) of the Late Payment of Commercial Debts (Interest) Act 1998; and

6.4.5 if the Manager is subject to an event of insolvency as defined in clause 10.1.5 after the prescribed period, the Owner shall not be required to pay the Manager the notified sum.]

7. ALIENATION BY THE OWNER

7.1 The Owner may assign the benefit of the whole, but not part, of its interest in this Agreement to an Associate without the need for consent from the Manager, but the Owner is to remain liable to the Manager following the assignment for the observance and performance of the obligations of the Owner under this Agreement.

7.2 The Owner may assign the benefit of the whole, but not part, of its interest in this Agreement, by way of security, to a person who has agreed to provide finance to the Owner in connection with the carrying out of the Development Project and which is applied for that purpose.

7.3 The Owner may not otherwise assign, transfer or deal with the benefit of the whole or part of its interest in this Agreement unless:

7.3.1 the Manager gives its prior consent for the Owner to do so, consent not to be unreasonably withheld; and

7.3.2 the assignee or other disponent covenants by deed with the Manager in a form reasonably required by the Manager on terms that the assignee, or other disponent, is to observe and perform the obligations of the Owner in this Agreement.

7.4 ¹⁵[Upon the provision of the deed by the assignee or other disponent, the Owner is to be released from future liability under the terms of this Agreement]

8. ALIENATION BY THE MANAGER

The Manager may not assign, charge or otherwise transfer the benefit of its interest in this Agreement without the consent of the Owner.

9. TERMINATION PROVISIONS NOT IN CASE OF BREACH

9.1 The termination of this Agreement occurs in the following circumstances:

9.1.1 the completion of a Sale of the whole of the Property on or after the date of Practical Completion;

9.1.2 the provision for a "deemed" Sale of the Property under clause 6.3.5 is operated; or

9.1.3 the discontinuance by the Owner of the Development Project permanently, or for an indefinite period lasting for more than [] [months], by either party giving notice to the other to that effect,

¹⁵ Clause 7.4 will apply if the owner ceases to have any further responsibility in respect of the continuance of the development project. The terms on which there is a change of ownership of the property may place upon the owner retention of the conduct, wholly or in part, of the development project.

subject, as the case may be, to suspension under clause 9.2.

- 9.2 Termination under clause 9.1 or 9.4.1 may be subject to conditions reasonably required by the Owner for the continuation of such of the duties of the Manager in order to deal with outstanding matters as may be appropriate in the circumstances; termination in those circumstances is to be suspended in the meantime and is to take effect only upon substantial completion of those duties.
- 9.3 While termination of this Agreement is suspended under clause 9.2, the Manager shall provide the Services appropriate to the observance and performance of the outstanding matters and is entitled to payment of the Management Fee or a proportionate part of it according to the scale and nature of the services being supplied.
- 9.4 This clause 9.4 applies if a Sale of the whole of the Property is completed before the date of Practical Completion:
- 9.4.1 if the terms of the Sale require the Owner to complete the Development Project, this Agreement is to continue as between the Owner and the Manager until the date of Practical Completion;
- 9.4.2 if the terms of the Sale require this Agreement to be novated, to which arrangement the Manager has consented to be bound, this Agreement is to terminate accordingly; or
- 9.4.3 the Owner may terminate this Agreement on completion of the Sale by giving notice to the Manager to that effect.
- 9.5 This clause 9.5 applies if this Agreement is terminated under clause 9.1.3 or clause 9.4.3:
- 9.5.1 the Owner shall indemnify the Manager against all or any of the following:
- 9.5.1.1 liability for the redundancy of any employees and consultants engaged by the Manager; and
- 9.5.1.2 the costs of disposal of equipment acquired by the Manager and the disposal of premises,
- not otherwise recoverable by the Manager as Items of Expenditure and Receipt under Schedule 4, where those engagements, liabilities and costs:
- 9.5.1.2.1 have reasonably been undertaken, assumed or incurred by the Manager specifically for, and dedicated exclusively to, the purposes of the Development Project; and
- 9.5.1.2.2 following termination, cannot reasonably be mitigated by redeployment by the Manager elsewhere in its business or otherwise.

9.5.2 [If this Agreement is terminated under clause 9.1.3 or clause 9.4.3, the Manager is to be entitled to payment of either (a) a cancellation fee of £__ in lieu of the Performance Fee or (b) the Performance Fee, as the Manager elects, as follows:

9.5.2.1 the Manager must elect as to which payment it requires to be made by giving notice to the Owner;

9.5.2.2 the notice of election must be given within the period of [40] Working Days after the date of termination of this Agreement;

9.5.2.3 failure of the Manager to make the election within the time allowed to do so is to be treated as an election by it to be paid the cancellation fee; and

9.5.2.4 clause 6.3 applies if the Manager elects to be paid the Performance Fee.]

10. TERMINATION IN CASE OF BREACH

10.1 The Owner may terminate this Agreement on becoming aware of a breach of obligation of the Manager by giving notice to the Manager in the following circumstances:

10.1.1 with immediate effect, if the Manager has committed a fundamental breach of its obligations under this Agreement;

10.1.2 at a time when the Owner reasonably considers that the Manager has committed breaches of obligation under this Agreement which cumulatively amount to a fundamental breach of its obligations under this Agreement;

10.1.3 at a time when:

10.1.3.1 the Manager has committed a breach of its obligations under this Agreement of which notice has been given by the Owner;

10.1.3.2 the Manager has failed to remedy the breach within such a period as may be reasonable in the circumstances; and

10.1.3.3 the Owner reasonably considers that the continuing failure to remedy the breach has become such as to amount to a fundamental breach of its obligations under this Agreement;

10.1.4 the Manager has materially failed to perform its duties in clauses 3.1 and 3.2 to the standard reasonably to be expected; or

10.1.5 an event of insolvency occurs in relation to the Manager;

"an event of insolvency" occurs in the following circumstances, namely entry into liquidation whether voluntarily (except for reconstruction or amalgamation of a solvent company approved by the Owner, approval not to be unreasonably withheld) or compulsorily, the

passing of a resolution for a creditors winding up, the making of a proposal to the Manager and its creditors, a company voluntary arrangement or a composition in satisfaction of its debts or a scheme of arrangement of its affairs, the appointment of a provisional liquidator, a receiver or an administrator, or inability to pay its debts within the meaning of section 123 Insolvency Act 1986;

the events of insolvency mentioned above are, wherever appropriate, to be interpreted in accordance and in conjunction with the relevant provisions of the Insolvency Act 1986; or

10.1.6 the Manager operates under this Agreement in a situation of material conflict of interest which the Owner, on becoming aware of it, declines to accept; or

10.1.7 the Manager or an Associated Person (as defined in clause 26) has committed a breach of clause 26.

10.2 The Manager may at any time terminate this Agreement by giving notice to the Owner if:

10.2.1 the Owner is in material breach of its obligations under this Agreement which is not remediable, or which is remediable but, by the Owner's failure to remedy within a reasonable period following notice specifying the breach, the Manager reasonably considers that the failure has become such as to amount to a material breach of the Owner's obligations;

10.2.2 an event of insolvency (as defined in clause 10.1.5, but in relation to the Owner) occurs, [unless an Interested Party exercises step-in rights].

11. RIGHTS AND DUTIES FOLLOWING TERMINATION

11.1 After the coming to an end of this Agreement for any reason under clauses 9 or 10, the following provisions of this clause 11 are to apply and to remain in effect.

11.2 The termination of this Agreement under clauses 9 or 10 does not prejudice accrued rights of either of the parties against the other for breach of its obligations in this Agreement.

11.3 As soon as may be reasonably practicable, or within such other period as may be agreed between the parties acting reasonably, the Manager shall:

11.3.1 cause to be delivered to the Owner, or to whomsoever the Owner may direct, all information and Project Documents in its possession, but subject to any rights of lien of the Manager over them;

11.3.2 unless directed by the Owner not to do so, take steps to bring to an end in an orderly manner the Services in respect of the whole or the relevant part of the Development Project.

11.4 As soon as may be reasonably practicable, or within such other period as may be agreed between the parties, acting reasonably, the Owner shall pay to the Manager the amounts (if any) which have accrued due and become payable to the Manager under this Agreement.

11.5 The copyright in the Project Documents provided to, but not produced by, the Manager under this Agreement does not pass to or vest in the Manager as a term of this Agreement.

12. **LIMITATION OF MANAGER'S LIABILITY**

12.1 The Manager is not to be held liable for consequential loss arising from a breach of its obligations under this Agreement whether or not the breach is fundamental; "consequential loss" is loss beyond the cost of remedying the breach and any loss of rental revenue from delay or inability to let the Property during a period of delay resulting from the breach¹⁶.

12.2 The liability of the Manager under this Agreement for damages or debt for breach of obligation in respect of each and every claim, or series of claims arising out of any one event, is not to exceed the sum of ¹⁷£_____ [unless the claim arises out of wilful breach by the Manager of the scope of its authority as specified in clause 4 of this Agreement, or its fraudulent act.]

12.3 The Manager is to cease to be liable for breach of obligation to the Owner in respect of the Services at the expiry of the period of [two] years after the date of Practical Completion under the Construction Contract, except for claims begun and identified causes of action in respect of which the Owner has given notice to the Manager of intention to make a claim before the expiry of that period.

12.4 The Manager is not to be held accountable for:

12.4.1 a breach of obligation of a third party involved in the Development Project who is appointed, employed or engaged by the Owner on the recommendation of the Manager if the Manager has acted in good faith and with due care and diligence in making the recommendation.

12.4.2 the acceptance of the advice of professional advisers engaged to assist it in the performance of its duties under this Agreement if it has acted in good faith and exercised due care in engaging their respective services and accepting the advice;

12.4.3 the consequences of its advice or recommendations to the Owner, if given with due diligence and explanation, being overruled or disregarded;

12.4.4 loss or damage suffered due to inability to obtain or delay in obtaining a Requisite Consent if it has used reasonable endeavours to obtain it:

12.4.5 failure to achieve objectives of the Business Plan which prove to be unattainable;

12.4.6 architectural, engineering or planning advice or advice in relation to compliance with applicable laws, codes and regulations;

¹⁶ This clause requires particularly careful consideration in light of the circumstances of a transaction. For example, if the Owner is debt funding the development, any delay caused by the Manager's breach of obligation may lead to increased financing costs and, as drafted, clause 12.1 would exclude recovery of that increased cost from the Manager.

¹⁷ Insert the agreed amount. The usual limits are £2m, £5m, £10m or £20m to coordinate with the obligation of the manager to maintain professional indemnity insurance cover. See clause 3.3.3 and footnote 7.

- 12.4.7 the design of the Development Project;
 - 12.4.8 the construction methods, techniques and procedures employed by any consultants or contractors in the performance of their duties;
 - 12.4.9 the underlying investment decisions of the Owner;
 - 12.4.10 the consequences of failure by the Owner or the Owner's Representative to provide to the Manager timely instructions, consents or approvals;
 - 12.4.11 the consequences of a failure by the Owner to provide sufficient funding for the Development Project to enable the Manager to discharge its obligations; or
 - 12.4.12 any action or matter where it has acted on the instructions of the Owner's Representative as authorised in accordance with clause 13.
- 12.5 The Manager is entitled to rely on the accuracy and completeness of information and reports provided by the Development Project Team unless, by the due application of skill, care and diligence, the Manager should have been aware of the inaccuracy or lack of completeness.
- 12.6 The Manager is not to be required to comply with an instruction or do anything which might be illegal or cause the Manager, its directors or officers to be in breach of any law, statutory duty, regulation or fiduciary duty.
- 13. THE OWNER'S REPRESENTATIVE**
- 13.1 The Owner may authorise the Owner's Representative to do all or any specified acts, matters or things on the Owner's behalf under this Agreement, but the Owner may at any time terminate the authorisation in whole or in part.
- 13.2 The authorisation referred to in clause 13.1, or its termination, is to be effective against the Manager if and when notice to that effect is given to it by the Owner.
- 13.3 Unless the authorisation of the Owner has been terminated or curtailed by further notice to the Manager to that effect:
- 13.3.1 the Manager is not required to enquire, nor concerned to see, whether the Owner's Representative has the requisite authority when acting on instructions or authority from the Owner's Representative which are within the scope of the notice given by the Owner; and
 - 13.3.2 an act, matter or thing done by the Owner's Representative within the scope of the notice given by the Owner is to be binding on the Owner.
- 14. KEY PERSONNEL**
- 14.1 The Manager shall ensure that the following person [] ("**Key Person**") is responsible for and devotes such time and attention as may reasonably be appropriate and necessary for the fulfilment of the performance by the Manager of the Services.

14.2 The Key Person or any replacement approved by the Owner in accordance with clause 14.3 is to have full authority to act on behalf of the Manager for all purposes in connection with this Agreement.

14.3 The Manager may not remove or re-assign the Key Person from the Development Project, except in case of death, incapacity or the bona fide termination of employment or engagement, without the approval of the Owner, such approval not to be unreasonably withheld; in that event, the Manager shall appoint a replacement approved by the Owner, such approval not to be unreasonably withheld, who is then to become the Key Person.

15. **EMPLOYEES, AGENTS AND SUB-CONTRACTORS OF THE MANAGER**

15.1 Persons employed or engaged by the Manager to perform, or assist in the performance of, its obligations under this Agreement are not to be regarded or treated as employees, agents or sub-contractors of the Owner.

15.2 Subject to clause 9.5, the Manager shall keep the Owner indemnified against all liability, however arising, out of or in connection with a claim made by or on behalf of a person employed by the Manager on the basis that the person is or may be an employee of the Owner. For those purposes:

15.2.1 "**liability**" includes claims, actions, costs, expenses, damages, awards, compensation, fines, court or tribunal awards and any other liability pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006; and

15.2.2 the Owner shall:

15.2.2.1 as soon as reasonably practicable, give notice of the claim made against it to the Manager, specifying the nature of the claim in reasonable detail;

15.2.2.2 not make any admission of liability, agreement or compromise in relation to the claim without the consent of the Manager;

15.2.2.3 give the Manager and its professional advisers all information as to matters and things relevant to the claim either in its possession or of which it is aware; and

15.2.2.4 take such action as the Manager may reasonably request, but at the Manager's cost, to avoid, dispute, compromise or defend, as the case may be, the claim.

16. **COPYRIGHT LICENCE**

16.1 Copyright in any drawings, plans, specifications and calculations produced by the Manager is to remain vested in the Manager.

16.2 [Subject to the payment of the Fees,]¹⁸ the Owner is to have a non-exclusive, royalty-free licence to use any such drawings or documents for all purposes connected with:

16.2.1 the Development Project and the Property;

16.2.2 the construction, completion, reconstruction, modification, maintenance, repair, reinstatement, alteration and renewal of the Property; and

16.2.3 the use, letting, occupation, management, sale and advertisement of the Property.

17. **EXPERT DETERMINATION**¹⁹

17.1 Where an issue is required by this Agreement to be dealt with by or submitted for the determination of an expert, or the parties agree to deal with an issue by expert determination, or there is a dispute between the parties relating to or arising out of this Agreement and either party gives notice to the other requiring the dispute to be referred to an expert, the expert is to be appointed by the Owner and the Manager jointly, or if they cannot or do not agree on the appointment, appointed at the request of either of them by the President of whichever of the following institutions is appropriate:

17.1.1 the Royal Institution of Chartered Surveyors;

17.1.2 the Institute of Civil Engineers;

17.1.3 the Institute of Chartered Accountants in England and Wales; or

17.1.4 the Law Society,

or, in any case, the duly appointed deputy of the president, or other person authorised by him to make such appointments on his behalf (the "**appropriate officer**"). If the Owner and the Manager cannot or do not agree on which institution is appropriate, the appointment shall be made by the appropriate officer of the Law Society.

17.2 The expert so appointed is to be [of not less than 10 years' professional qualification/suitably qualified] and a specialist in relation to the subject matter of the submission.

17.3 The expert so appointed must afford the parties the opportunity within such a reasonable time limit as he may stipulate to make representations to him and permit each party to make submissions on the representations of the other.

17.4 The fees and expenses of the expert, including the cost of his nomination, are to be borne as the expert may direct (or in the absence of such a direction, by the parties in equal shares) but, unless they otherwise agree, the parties shall bear their own costs with respect to the determination of the issue by the expert.

¹⁸ An Owner may not be prepared to accept the wording in square brackets.

¹⁹ For any dispute that relates to "construction operations" (as interpreted in accordance with sections 104 and 105 of the Housing Grants, Construction and Regeneration Act 1996), it is important to note that the expert determination provision may not be fully effective because of the Act's adjudication provisions.

- 17.5 One party may pay the costs required to be borne by the other if they have remained unpaid for more than 20 Working Days after they become due and then recover as a debt these and any incidental expenses incurred from the other party on demand.
- 17.6 If the expert refuses to act, becomes incapable of acting or dies, the Owner or the Manager may request the appointment of another expert in his stead under clause 17.1.
- 17.7 The determination of the independent expert, except in case of manifest error, is to be binding on the parties.

18. **ARBITRATION**

18.1 Where:

- 18.1.1 an issue is required to be dealt with by or submitted for the determination of an arbitrator, whether pursuant to the terms of this Agreement or under the provisions of the Housing Grants, Construction and Regeneration Act 1996 (as amended by part 8 of the Local Democracy, Economic Development and Construction Act 2009); or
- 18.1.2 the parties agree to deal with an issue by the determination of an arbitrator; or
- 18.1.3 there is a dispute between the parties relating to or arising out of this Agreement and either party gives notice to the other requiring the dispute to be referred to an arbitrator,

the arbitrator is to be appointed by the Owner and the Manager jointly or, if they cannot or do not agree on the appointment, appointed at the request of either of them by the President of whichever of the following institutions is appropriate:

- 18.1.3.1 the Royal Institution of Chartered Surveyors;
- 18.1.3.2 the Institute of Civil Engineers;
- 18.1.3.3 the Institute of Chartered Accountants in England and Wales; or
- 18.1.3.4 the Law Society,

or, in any case, the duly appointed deputy of the president, or other person authorised by him to make such appointments on his behalf (the "**appropriate officer**"). If the Owner and the Manager cannot or do not agree on which institution is appropriate, the appointment shall be made by the appropriate officer of the Law Society.

- 18.2 The arbitrator is to be [of not less than 10 years' professional qualification/suitably qualified] and a specialist in relation to the subject matter of the submission;
- 18.3 If the appointed arbitrator dies or is unwilling or becomes incapable of acting, the Owner or the Manager may request the appointment of another arbitrator in his stead under clause 18.1.

18.4 The person so appointed is to act as an arbitrator in accordance with the Arbitration Act 1996.

19. **INTEREST**

An amount due for payment to be made by either party under this Agreement is to bear interest equal to [3]% above the base rate of [] Bank Plc on so much as from time to time remains unpaid from the date it fell due until the date payment is made. Payment is to be treated as becoming due on an agreed date for it to be paid but, if that is not applicable, 10 Working Days after the payment has been demanded.

20. **NOTICES**

20.1 Notices and notifications required to be given under this Agreement must be given in writing.

20.2 A notice of termination of this Agreement or of breach of obligation may only be given by recorded delivery post addressed to the other party; unless the notice is returned undelivered by the Post Office, it is to be deemed to have been received by the addressee on the second Working Day after posting.

20.3 A notice, other than one of termination of this Agreement or of breach of obligation, is to be treated as properly given if:

20.3.1 delivered personally; [or]

20.3.2 sent by ordinary mail [or

20.3.3 sent by email.]

20.4 A notice given under clause 20.3 is to be deemed to have been received by the addressee if properly addressed in accordance with this clause 19.20:

20.4.1 when actually delivered to the addressee personally; or

20.4.2 on the second Working Day after the day of posting unless it is proved not to have been received,

but where sent by email, one hour after despatch..

20.5 Notices received after 5.00 p.m. on any Working Day are to be deemed to be received at 9.00 a.m. on the next following Working Day. Notices received on a day other than a Working Day are to be deemed to have been received on the next following Working Day.

20.6 A notice is to be treated as properly addressed if given or sent to the address of the relevant party given at the head of this Agreement, or such other address as is notified in writing; but where sent by email, it is sent to the relevant email address below:

The Owner at [*set out email address*];

The Manager at [*set out email address*]

20.7 Clause 27.4 applies where a party has appointed an agent to receive on its behalf in England service of any proceedings or notices.

21. **VALUE ADDED TAX**

21.1 Sums required to be paid under or in connection with this Agreement for taxable supplies of goods or services are to be treated as exclusive of such VAT as is chargeable on the payment; the tax chargeable is to be payable in addition.

21.2 Payment of VAT chargeable to the supplier is to become due only on provision by the supplier of a Value Added Tax invoice.

21.3 Where one party is entitled under this Agreement to recover the cost of goods and services supplied to another, but in respect of which it makes no taxable supply, the supplier is to be indemnified against so much input tax on the cost for which the supplier is not entitled to credit allowance under section 26 of the Value Added Tax Act 1994.

22. **CONFIDENTIALITY**

22.1 The parties may not, and they each shall use their reasonable endeavours to procure that every person connected with or associated with it does not, disclose to any person or use confidential information without the consent of the others, except to the extent necessary to:

22.1.1 comply with a statutory or legal requirement;

22.1.2 comply with a regulatory requirement of a stock exchange or other regulatory body;

22.1.3 comply with the terms of this Agreement or otherwise give effect to it; or

22.1.4 provide information to its auditors, solicitors and professional advisers.

22.2 Disclosure may be made to the professional advisers of the parties on a confidential basis who are under a professional obligation, or are otherwise to be required to undertake, to keep confidential the information disclosed to them.

23. **CONSENTS AND APPROVALS**

A consent or approval to be given under this Agreement is to be effective only if it is given in writing.

24. **THIRD PARTY RIGHTS**

24.1 Unless the right of enforcement is expressly provided, it is not intended that a third party should have the right to enforce a provision of this Agreement under the Contracts (Rights of Third Parties) Act 1999.

24.2 The parties may rescind or vary this Agreement without the consent of any third party to whom a right of enforcement has been expressly provided.

25. **NO PARTNERSHIP**

This Agreement does not constitute a partnership or joint venture between the Owner and the Manager.

26. **BRIBERY ACT**

26.1 In this clause:

26.1.1 "**Adequate Procedures**" means policies, procedures, processes and systems designed to ensure, and which are reasonably expected to continue to ensure, compliance with the applicable Anti-Bribery Laws;

26.1.2 "**Anti-Bribery Laws**" means any applicable law, rule, regulation and other legally binding measure relating to the prevention of bribery, corruption, fraud or similar or related activities in any country including the BA 2010 of the United Kingdom;

26.1.3 "**Associated Person**" means in relation to the Manager, a person (including an employee, agent or subsidiary) who performs or has performed services (including those within the meaning of section 8 of the BA 2010) for the Manager or on its behalf and in respect of whose actions or inactions the Manager may be liable under Anti-Bribery Laws;

26.1.4 "**BA 2010**" means the Bribery Act 2010.

26.2 The Manager shall:

26.2.1 conduct its business in compliance with all applicable Anti-Bribery Laws;

26.2.2 employ and maintain in place throughout the term of this Agreement its own Adequate Procedures and enforce the same where appropriate;

26.2.3 if not already in place, appoint a senior manager or working committee tasked with monitoring the adequacy of and adherence to its own Adequate Procedures;

26.2.4 not engage in any activity, practice or conduct which would constitute an offence under sections 1, 2 or 6 of the BA 2010 if such activity, practice or conduct had been carried on in the UK;

26.2.5 within [six] months of this Agreement and annually thereafter, certify to the Owner in writing signed by an officer of the Manager compliance with this clause 26 by the Manager and its Associated Persons and provide such supporting evidence of compliance as the Owner may reasonably request;

26.2.6 procure that:

26.2.6.1 an Associated Person who is performing services or doing anything else in connection with this Agreement does so only on the basis of a written contract; and

26.2.6.2 the contract imposes and secures from the Associated Person terms equivalent to those imposed on the Manager in this clause 26 or subject to such variations as the Manager reasonably considers appropriate having regard to the extent of the responsibilities of the Associated Person's contract,

and the Manager is to be responsible for the observance and performance by the Associated Person of those terms and directly liable to the Owner for any breach by such Associated Person of them;

26.2.7 promptly notify the Owner of a breach or potential breach of the Anti-Bribery Laws of which it becomes aware; in such an event, the Manager shall co-operate with the Owner and provide to the Owner all information reasonably requested by the Owner for the purpose of assessing the Owner's own potential liability under the Anti-Bribery Laws in connection with the breach or potential breach.

26.3 The Manager shall indemnify the Owner against any losses, liabilities, damages, costs (including legal fees) and expenses incurred by, or awarded against, the Owner as a result of any breach of this clause 26 by the Manager .

27. **JURISDICTION**

27.1 The validity, construction and performance of this Agreement and any non-contractual obligations arising out of or in connection with it (and any claim, dispute or matter arising under or in connection with this Agreement or such obligations, or the enforceability of, or the legal relationships established by this Agreement or such obligations) are to be governed by and construed in accordance with the law of England and Wales.

27.2 Each party to this Agreement irrevocably agrees to submit to the exclusive jurisdiction of the courts of England and Wales over any claim, dispute or matter arising under or in connection with this Agreement or any non-contractual obligations arising out of or in connection with it, or the enforceability of, or the legal relationships established by this Agreement or such obligations.

27.3 Each such party irrevocably:

27.3.1 waives any objection which it may have now or in the future to proceedings being brought in the courts of England and Wales and any claim that proceedings have been brought in an inconvenient forum; and

27.3.2 agrees that a judgment in any proceedings brought in the courts of England and Wales is to be conclusive and binding upon each such party and may be enforced in the courts of any other jurisdiction.

27.4 ²⁰[With respect to service of proceedings and notices;

²⁰ If this provision is applicable, it is unlikely that the Manager will be an overseas entity not having a place of business in the UK. It is assumed that this provision will apply if the owner is an overseas entity.

- 27.4.1 [The Owner irrevocably appoints [name] of [address] (the "**Agent**") as its agent to receive on its behalf in England service of any proceedings or notices arising out of or in connection with this Agreement or any non-contractual obligations arising out of or in connection with it, or the enforceability of, or the legal relationships established by this Agreement or such obligations;
- 27.4.2 service upon the Agent is to be deemed completed on delivery to the Agent (whether or not it is forwarded to and received by the Owner); and
- 27.4.3 if for any reason the Agent ceases to be able to act as agent or no longer has an address in England, the Owner shall immediately appoint a substitute acceptable to the Manager and deliver to the Manager] the new Agent's name and address.]

SIGNED by the duly authorised representatives of the parties on the date at the beginning of this Agreement.

SCHEDULE 1

Description of the Property and the Development Project

[and Title Matters]

[]

[SCHEDULE 2

The Asset Management Services

1. **Formulation of strategy**

Assisting in the formulation of the strategy for the Property (including the need for or desirability of the Development Project), and in the preparation and revision of the Business Plan.

2. **Implementation of the Business Plan**

Assisting in the preparation, periodic updating and implementation of the Business Plan.

3. **Advice on maximising value**

Advising and making recommendations with the object of maximising revenue from, and the capital value of, the Property.

4. **Recommendation of specialist suppliers**

Recommending specialist suppliers to the Owner and assisting in fee negotiations with them.

5. **Monitoring duties**

Monitoring:

5.1 selected suppliers and the standard of their performance in accordance with the Business Plan;

5.2 the performance of persons employed or engaged by the Owner in relation to the Property;

5.3 the relationship between the Owner and a third party with an interest or potential interest in the Property and managing the relationship including:

5.3.1 active liaison with the third party and, where applicable, negotiation, in furtherance of the implementation of the Business Plan;

5.3.2 so far as reasonably practicable and with the cooperation of the Owner, procuring compliance on behalf of the Owner with the obligations and duties of the Owner to the third party; and

5.3.3 endeavouring to procure that the third party complies with its obligations and duties to the Owner and also those obligations and duties under a lease, lease agreement and other occupational arrangements.

6. **Payment of invoices**

Preparing and procuring appropriate authority forms and confirming that invoices for expenditure on the Property (other than service charge invoices to be dealt with by the managing agent) have been properly incurred and are due for payment.

7. **Progress reports**

Providing quarterly progress reports to the Owner in relation to the Asset Management Services, reports to the Owner as are required under an agreement for Sale and such other information as the Owner may reasonably require.

8. **Information to be given to the Owner**

Passing to the Owner information relating to the Property, including offers from third parties, material to the Business Plan or the Asset Management Services provided by the Manager.

9. **Attendance at meetings**

Attending meetings reasonably required by the Owner in order to give advice and review the performance of the Asset Management Services and the implementation of the Business Plan.

10. ²¹**[Duties in connection with the letting of the Property**

Preparing for the approval of the Owner a draft letting strategy and budget for the marketing and promotion of the Property for letting in conjunction with the letting agents appointed by the Owner; if so approved, issuing instructions to the letting agents consistent with the letting strategy and budget.]

11. **Duties in connection with a Sale of the Property**

Assisting in a Sale of the whole or part of the Property by the Owner and residual matters consequential upon or following completion of the sale which fall within the scope of the Asset Management Services.

12. **Excluded responsibilities**

The duties of the Manager do not include those reasonably expected to be within the responsibilities undertaken by a property or estate managing agent, or other such person, unless and to the extent that liaison with the property or estate managing agent is required to enable the Manager to perform its other responsibilities.]

²¹ Consider if necessary where paragraph 13 of Schedule 3 applies (the Development Management Duties).

SCHEDULE 3

The Development Management Services

1. Preliminary matters and overall duties

1.1 Making recommendations to the Owner for its approval as to:

1.1.1 surveys to be undertaken, (whether measured, topographical, environmental, geotechnical, or archaeological or other surveys, as may be appropriate);

1.1.2 specialists to be appointed and the terms of their appointments for those purposes; and

1.1.3 organising the carrying out of the surveys on terms approved by the Owner.

1.2 Reviewing requirements for the Development Project including:

1.2.1 design standards, performance criteria and financial criteria;

1.2.2 programming and phasing the procurement route;

1.2.3 letting and sales criteria; and

1.2.4 the revision of the Project Documents and the Business Plan from time to time as may be appropriate.

2. Planning permission

2.1 Reporting to and advising the Owner on the form, content and timing of the planning application and progress of the planning application in all its stages in respect of the Development Project and obtaining the approval of the Owner on the following matters in this paragraph 2.

2.2 Coordinating and issuing instructions to the Professional Team in accordance with the Owner's requirements for and in connection with the preparation of the planning application.

2.3 Monitoring the submission on behalf of the Owner of the planning application to the local planning authority, applications for approval of reserved matters and any variations of the Planning Permission.

2.4 Entering into discussions and negotiations with the local planning authority in pursuance of the planning application and monitoring progress of the planning application and the approval of reserved matters.

2.5 Monitoring negotiations and advising the Owner on the terms of an agreement under section 106 of the Town and Country Planning Act 1990 or other planning agreement.

2.6 Making recommendations as to, and monitoring appeals against the refusal of Planning Permission or approval of reserved matters, the imposition of onerous conditions or other

appropriate action in order to enable the Development Project to proceed as approved by the Owner.

- 2.7 Monitoring compliance by the Professional Team and the Construction Team with conditions in the Planning Permission.

3. **Requisite consents**

- 3.1 Issuing instructions to the relevant members of the Professional Team in connection with obtaining Requisite Consents and monitoring information provided by the Professional Team and generally in connection with Requisite Consents.

- 3.2 Withdrawing an application for a Requisite Consent or appealing against the conditions or taking other appropriate action where it would impose, or is issued containing, conditions unacceptable to the Owner.

- 3.3 Making recommendations as to, and monitoring appeals against the refusal of a Requisite Consent or other appropriate action in order to enable the Development Project to proceed as approved by the Owner.

- 3.4 Negotiating heads of terms with the owners and occupiers of neighbouring property, as approved by the Owner, for:

- 3.4.1 the release of rights of way, light and air or otherwise; and

- 3.4.2 the extinguishment of interests in, over or with respect to the Property to the extent that such rights and interests would be infringed by the Development Project or would prevent or impede the carrying out or progress of the Development Project or its use and enjoyment.

- 3.5 Monitoring compliance by the Professional Team and the Construction Team with conditions in Requisite Consents.

4. **Appointments and construction contracts**

- 4.1 Advising on the method of construction procurement for the Development Project.

- 4.2 Making recommendations as to:

- 4.2.1 prospective appointees to the Professional Team and the Construction Team and the method for their selection;

- 4.2.2 the terms of appointment of members of the Professional Team and the Construction Team; and

- 4.2.3 competitive fee arrangements.

- 4.3 Consulting with the Owner's solicitors in connection with the preparation, negotiation and agreement of:

- 4.3.1 the terms of the appointments of the members of the Professional Team and Construction Team; and
- 4.3.2 [duty of care warranties]²² to be procured for the respective benefit of tenants, future purchasers of the Property, funders and Owners of the Development Project .
- 4.4 Monitoring the terms of professional indemnity insurance cover (and as renewed annually) of the members of the Professional Team and the Construction Team having design responsibilities in relation to the Development Project.
- 4.5 Advising and assisting the Owner with its duties as the client under regulations 4 and 5 of the CDM Regulations.

5. **Design process**

- 5.1 Formulating, supervising and monitoring throughout the Development Project the design concept and design development in accordance with the Project Documents.
- 5.2 Defining and establishing the responsibilities of the consultants in the design process.
- 5.3 Procuring the submission to the Owner for its approval of the design of the Development Project as the design is developed, settled and, as the case may be, varied.
- 5.4 Monitoring the proposals for energy efficiency.
- 5.5 Advising on the financial and timetable implications of any proposed changes, variations, alternative designs and materials, the effect of them on the cost of the Development Project and recommending appropriate action.
- 5.6 On the advice of the members of the Professional Team, reporting to the Owner from time to time on the selection of materials, building systems, equipment, availability of materials and labour, time requirements for design construction and installations.

6. **General supervisory duties**

- 6.1 Procuring that there is consistency between and coordination of the appointments of the Professional Team and the Construction Team and the Construction Contract in the implementation of the Development Project.
- 6.2 Procuring that the Project Documents represent a practicable co-ordinated plan for the provision and integration of all the services to be provided by the Professional Team and the Construction Team throughout the Development Project in respect of:
 - 6.2.1 the time needed for the Development Project and meeting critical dates in the programme; and

²² The CLLS Construction Law Committee is keen to promote the use of third party rights instead of warranties in which case suitable alternative provision for TPRs may be inserted here.

- 6.2.2 the time limits for required action in relation to the Planning Permission and any other Requisite Consents.
- 6.3 Providing assistance to the Professional Team and Construction Team and others engaged in the Development Project in the interpretation of the Project Documents.
- 6.4 Reviewing at regular intervals the programme, the Cost Plan, the cash flow forecast and the appraisal of the Development Project, and reporting and making recommendations on them accordingly.
- 6.5 Monitoring the valuation, payment and variations procedures under the Construction Contract.
- 6.6 Reviewing the environmental implications of the works of construction as advised by the Owner's environmental consultants.
- 6.7 Establishing and monitoring procedures for communication and reporting between the members of the Professional Team, the Construction Team and others engaged on the works of construction and coordination of their respective responsibilities.
- 6.8 Subject to prior authorisation of the Owner, providing such information and documentation in relation to the Development Project as may be required from time to time by any persons acquiring, or intending to acquire, an interest in the Property.
- 6.9 Submitting claims under insurance policies relating to the Development Project and the Property.
- 6.10 Requiring the Professional Team to consult with and obtain all appropriate consents from the competent authorities, statutory undertakers and any other parties and attending meetings for the purpose as and when necessary.
7. **Construction contract²³**
- 7.1 With the Construction Manager and the Professional Team, assisting with and advising on the adoption of a suitable procedure for selection and method of appointment of preferred Contractors, the method of construction procurement, and advising on whether the procedure is competitive and whether the extent of design and specifications to be included in tender documents is appropriate.
- 7.2 Providing available information to, and discussing proposals with, the Construction Manager and the Professional Team in relation to the preparation of tender information.
- 7.3 In conjunction with the Professional Team, reviewing and assisting in the preparation of specifications or schedules of works and schedules of rates and any documents required to

²³ Paragraphs 7 to 9 envisage procurement by way of Construction Management, so if that is not being used, suitable amendments will be required. Moreover, paragraph 7 has been drafted in anticipation of the Contractor being appointed following a single stage competitive tender so if, for example, a two stage tender is envisaged (as is currently common for larger projects) drafting will need to be added to deal with that.

enable prospective Contractors to prepare a tender and taking steps to have incorporated in it all requisite matters.

- 7.4 If required by the Owner, requesting prospective Contractors to include, as an alternative, a fixed price for the construction works involved in the Development Project.
- 7.5 Reporting to the Owner on the tender procedure, the selection method, the tender information, the list of tenders for the Construction Contract, the technical suitability, experience and expertise of prospective candidates for employment as Contractor and the Construction Contract period.
- 7.6 Procuring an analysis and appraisal of the tenders by the Construction Manager and the Professional Team.
- 7.7 With the Construction Manager and the Professional Team, negotiating with tenderers for the Construction Contract.
- 7.8 In conjunction with the Professional Team:
 - 7.8.1 checking the Contractor's programme proposals;
 - 7.8.2 negotiating the contract prices with the selected Contractor and making recommendations upon them to the Owner; and
 - 7.8.3 making recommendations to the Owner as to the tender awards.

8. **Construction monitoring**

- 8.1 Monitoring the progress of the Professional Team and the Construction Team in accordance with their respective duties by:
 - 8.1.1 making site visits as and when necessary;
 - 8.1.2 making observations and recommendations to them;
 - 8.1.3 reporting to the Owner on items likely to result in the Development Project not being completed materially in accordance with the Project Documents;
 - 8.1.4 attending and participating at site meetings, making such representations as are appropriate and reviewing and reporting on the meetings to the Owner with the agendas and minutes of them and any other such meetings; and
 - 8.1.5 reporting on adherence to the construction programme.
- 8.2 Monitoring the quality of the completed items of the construction works involved in the Development Project and, so far as is reasonably practicable, advising on whether the construction works involved in the Development Project are constructed and the services of the Professional Team and Construction Team are performed in accordance with their respective duties.

- 8.3 Reviewing quality management and control programmes of the Construction Team and its general performance as to site management in the context of good industry practice.
- 8.4 Monitoring and reporting on compliance by the Contractor with the CDM Regulations and health and safety requirements generally.
- 8.5 Reporting and advising on variations proposed under the Construction Contract and their impact on the Development Project.
- 8.6 Monitoring applications for and the obtaining of Requisite Consents to enable the construction programme to proceed without interruption in due time and in a proper manner.
- 8.7 In conjunction with the Professional Team and the Construction Manager, taking such action on behalf of the Owner as the employer under the Construction Contract as is from time to time required for the proper execution and completion of the construction works involved in the Development Project, subject to the prior approval of the Owner.
- 8.8 Obtaining approval of requisite documentation.
- 9. **Financial monitoring**
- 9.1 Proposing financial management and cost control procedures for the Owner's approval, establishing the approved procedures with the relevant members of the Professional Team and monitoring their implementation.
- 9.2 Preparing, reviewing and regularly updating the Appraisal with information provided by members of the Professional Team.
- 9.3 Instructing the quantity surveyor to prepare and periodically update the Cost Plan, and making recommendations upon the Cost Plan.
- 9.4 Monitoring and assisting the Construction Team and the Professional Team in the preparation of budget costs, and costs in relation to temporary works, common use services, site staff and office expenses.
- 9.5 Monitoring and assisting the Construction Team and the Professional Team in the preparation and maintenance of the cash-flow forecast.
- 9.6 Monitoring and advising on the forecast of the cost of design, construction, variations, the implications of extensions of time and completion dates and final costs.
- 9.7 Monitoring and advising the Owner on cost overruns and appropriate remedial action.
- 9.8 Subject to authorisation of the Owner, utilising contingency provisions in the Project Documents.
- 9.9 Monitoring valuations by the Construction Manager and the Professional Team of works which have been carried out under the Construction Contract and approving certificates for payments to be made to the Contractor for the works as valued.

- 9.10 Monitoring and reviewing costs reports and opportunities for cost control.
- 9.11 With the Construction Manager and the Professional Team, monitoring fees for statutory approvals.
- 9.12 Checking and approving the payments to the Construction Manager and payments of the fees of the Professional Team.
- 9.13 Checking all other fees, statutory and certification invoices and the certificates related to the Development Project and comparing them against the Cash Flow Forecast, the Cost Plan and the Appraisal and, where appropriate, approving them.
- 9.14 Monitoring the preparation of the final accounts of the Contractor by the Construction Manager and of the members of the Professional Team.
- 9.15 Submitting to the Owner monthly a consolidated list of the payments becoming due during the month, supported by valid VAT invoices for the relevant amounts addressed to the Owner and appropriate supporting evidence that the amounts are due and payable, and recommending payment by the Owner.

10. Certification and completion

- 10.1 With the appropriate members of the Professional Team, monitoring and considering items for which the Contractor claims a variation in a Construction Contract price and advising the Owner on issues of the Contractor's entitlement to the variation.
- 10.2 Issuing on behalf of the Owner as employer, but subject to the Owner's prior approval and excluding any certificates for payment as referred to in paragraph 9.9, notices, accounts, statements, and certificates in accordance with the terms of the Construction Contract and the appointments of the members of the Professional Team.
- 10.3 Monitoring the progress of the preparation and agreement of the final fee accounts for the Professional Team and the final accounts for the Construction Team and advising the Owner upon them.
- 10.4 Assisting the Owner's solicitors in the preparation of any necessary documentation and reports in relation to litigation, arbitrations, adjudications, mediations or expert determinations arising out of or in connection with the Development Project and, if required by the Owner, attending any hearings.

11. Sectional and practical completion and defects liability period

- 11.1 Attending meetings and inspections convened with respect to the issue of a certificate of Practical Completion under the Construction Contract.
- 11.2 Inspecting the construction works involved in the Development Project with the architect (or employer's agent) and liaising with other members of the Professional Team concerning any matters which should be notified to the Contractor and are required to be remedied or

completed before Practical Completion and to confirm the notification of these matters to the Contractor.

- 11.3 With the Professional Team and the Construction Team, making inspections of the completed fabric, structure and finishes, and agreeing lists and a programme for the rectification of the snagging works and delivery of omitted items and reviewing progress thereafter.
- 11.4 Monitoring progress and taking steps to procure that defects in and omissions from the construction works involved in the Development Project are promptly remedied.
- 11.5 Agreeing a programme and method statement for any remedial works required to be carried out and monitoring progress and completion of the remedial works.
- 11.6 Coordinating the production of "as built" drawings, operation and maintenance manuals, test certificates, manufacturers' guarantees, health and safety plan pursuant to the CDM Regulations, consents and any other documentation relating to the operation or maintenance of buildings by the Professional Team and the Construction Team in accordance with their appointments and the Construction Contract.
- 11.7 Advising the Owner as to the standard of and completeness of "as built" information and maintenance manuals supplied to the Owner.
- 11.8 Reinspecting the construction works involved in the Development Project at the end of the defects liability or rectification period in conjunction with the Professional Team and the Construction Team and compiling a list of defects to be remedied.
- 11.9 With the architect, advising the Owner whether the defects have been remedied before the issue of the certificate of making good defects and making representations to the Professional Team accordingly.

12. **Reports to the Owner**

- 12.1 In conjunction with the Construction Team and the Professional Team, delivering to the Owner periodic reports (but not more frequently than monthly) on the status of the Development Project.
- 12.2 Reports to the Owner are to include the following items as appropriate in the circumstances:
 - 12.2.1 a description of the construction works involved in the Development Project and any approved or proposed changes;
 - 12.2.2 execution plan identifying the current status of the construction works involved in the Development Project, progress and planned completion against the programme;
 - 12.2.3 key event completion report providing an overview of the status of the construction works involved in the Development Project by listing key events, plotting these events against the programme and measuring actual performance against the work plans to provide early warning of areas of concern;

- 12.2.4 areas of concern highlighting potential delays, the Construction Team's resourcing problems or other matters requiring attention;
 - 12.2.5 cost report identifying actual expenditure, cost overruns, cash flow commitments and the allocation of the contingency;
 - 12.2.6 the status of the appointments of the Professional Team and the Construction Team, Construction Contract and warranties ;
 - 12.2.7 review of variations' orders providing a list of approved and pending scope changes from those previously supplied and their impact on the Cost Plan and the programme;
 - 12.2.8 breaches and claims reporting on matters which the Manager considers are, or might lead to:
 - 12.2.8.1 material breach of obligation by the Construction Team or the Professional Team; or
 - 12.2.8.2 claims for additional time for completion or additional money under their respective appointments and Construction Contract;
 - 12.2.9 details of Requisite Consents obtained and required and progress with compliance;
 - 12.2.10 background explanatory notes and supporting calculations so that the reports are self-contained and self-explanatory;
 - 12.2.11 such other matters or things as the Owner reasonably requests.
- 12.3 Holding project and steering committee meetings with the Construction Team, the Professional Team and the Owner monthly, or more frequently as may be required once the construction works involved in the Development Project have commenced, and reporting to the Owner accordingly.
- 13. Marketing and letting**
- 13.1 In conjunction with the letting agents appointed by the Owner:
- 13.1.1 preparing and submitting for approval by the Owner a draft letting strategy for the marketing and promotion of the Property including a budget for its implementation; and
 - 13.1.2 in consultation with the Owner, instructing the letting agents to conduct a marketing campaign which is consistent with the approved letting strategy and budget.
- 13.2 Keeping the Owner informed of the status and effect of all promotional and marketing campaigns for the letting of the Property;
- 13.3 Holding regular meetings with the letting agents and the Owner and providing minutes.

- 13.4 Reporting to the Owner on meetings with prospective tenants or their representatives and their implications on the letting strategy.
- 13.5 Attending marketing presentations to potential tenants.
- 13.6 Assessing and advising the Owner on offers received for lettings from prospective tenants.
- 13.7 In conjunction with the letting agents, negotiating and agreeing heads of terms for lettings as approved by the Owner.
- 13.8 Obtaining and commenting on recommendations of the letting agents on the proposed terms for lettings for approval by the Owner supported by such financial and other information as the Owner reasonably requires.
- 13.9 Providing the Owner's solicitors with all relevant information and instructions for lettings.
- 13.10 Advising the Owner on compliance with the obligations of the landlord in agreements for lease both before and after the grant of the relevant lease.
- 13.11 Advising the Owner on enforcement of the provisions of agreements for lease, leases and related documents.
- 13.12 Advising the Owner on applications by tenants for licences for fitting out, alterations, assignments, sublettings and charging with appropriate recommendations, and assisting the Owner's solicitors to document the licences.
- 13.13 Monitoring compliance with the obligations of tenants with respect to works to premises which are or are to be demised to the tenant and reporting to the Owner accordingly.

SCHEDULE 4

Items of Expenditure and Receipts

1. Items of Expenditure

Items of Expenditure include:

- 1.1 the cost of acquisition of estates and interests in the Property (including indemnity payments and interest payments on or with respect to them);
- 1.2 compensation payments made in respect of the exercise of compulsory acquisition powers (including disturbance payments and claims in respect of blight) and interest on them;
- 1.3 the cost of extinguishment or variation of any interests or rights in, over or against the Property held by a person who by the lawful exercise of his powers could prevent or impede the carrying out or progress of the development of the Property or its use and enjoyment;
- 1.4 the cost of acquisition of rights in relation to the Property (including rights required over other land for the purpose of the Development Project);
- 1.5 stamp duty land tax and land registration fees;
- 1.6 compensation for disturbance paid to tenants on quitting the Property and for compensation for improvements and goodwill on termination of tenancies of business premises;
- 1.7 the cost of obtaining the Planning Permission and the Requisite Consents;
- 1.8 the cost of carrying out surveys and soil investigations;
- 1.9 the cost of carrying out the demolition works;
- 1.10 the cost of the works of construction involved in the Development Project whether or not carried out under the Construction Contract, including remedying defects and omissions;
- 1.11 the cost of highway works and of public utilities, and of public realm works, required in connection with the Development Project;
- 1.12 the cost of CIL which is or becomes payable in respect of the Development Project;
- 1.13 the fees of the Professional Team and any other consultant or professional appointed in connection with the Development Project;
- 1.14 the Management Fee paid to the Manager;
- 1.15 interest paid on loans or on other monies to finance or fund Development Project expenditure;
- 1.16 guarantee fees, commitment fees, procurement fees and finance charges in respect of them payable to entities other than in respect of finance provided in connection with the Development Project;

- 1.17 net losses on currency transfers on funds provided in connection with the Development Project;
- 1.18 the cost of letting (including payments or other consideration made or given to tenants);
- 1.19 legal and surveyors fees, agency commission, advertising, promotional expenses, marketing expenses and other costs in connection with the matters referred to in this Schedule including:
 - 1.19.1 the negotiation of this Agreement and funding documentation;
 - 1.19.2 the negotiation and exchange of agreements for lease, leases and any licence, consent or other approval required in relation to any of them in respect of units of accommodation comprised or to be comprised in the Property whether or not before the Development Project is commenced;
 - 1.19.3 the negotiation and completion of the Construction Contract, the Professional Team appointments and all ancillary documents; and
 - 1.19.4 the approval and monitoring of the initial fitting out works of the units of accommodation in the Property;
- 1.20 annual, recurring and capital outgoings whether parliamentary, parochial or otherwise;
- 1.21 the cost of insurance (including decennial insurance) and insurance valuations;
- 1.22 the cost of providing security for the Property;
- 1.23 the cost of repair, management, maintenance, upkeep, insurance of the Property and the provision of services to users and occupiers of the Property;
- 1.24 payments made to statutory undertakers or other service providers for the provision of services to the Property;
- 1.25 VAT on supplies of goods and services to the extent that it is not recoverable by credit against output tax or repayment by HM Revenue and Customs;
- 1.26 the costs of pursuing, defending, settling or meeting any claim arising in respect of the Property and the carrying out and completion of the Development Project; and
- 1.27 any other item of expenditure properly incurred in relation to the Development Project and the Property not specifically mentioned in the foregoing items.

2. **Items of Receipt**

Items of Receipt include:

- 2.1 rent or other payments received for the use and enjoyment of the Property or its facilities up to the End Date;

- 2.2 premiums received on the grant of leases or other interests in the Property or for the surrender, variation or renewal of a lease or other interest in the Property;
- 2.3 contribution payments to items of Expenditure from tenants and other occupiers or users of the Property;
- 2.4 service charges, insurance premiums and outgoings received;
- 2.5 the proceeds of insurance paid in respect of items of Expenditure;
- 2.6 damages or other compensation recovered by the Owner from or paid by third parties in respect of works of construction or which otherwise relate to items of Expenditure;
- 2.7 any grants obtained to meet the cost of development; and
- 2.8 interest received up to and including the End Date in respect of any such receipts (net of any withholding of tax to the extent that what is withheld is irrecoverable).

3. **Treatment of Expenditure**

Expenditure is to be treated in accordance with the following provisions:

- 3.1 Interests in the Property acquired by the Owner before the date of this Agreement are to be included as items of Expenditure equal to the amount of the market value as at the date of this Agreement determined in accordance with Section 4 of Valuation Practice Statement 4 of RICS Valuation – Global Standards 2017.
- 3.2 An item of Expenditure counted under one head is not to that extent to be counted under another.
- 3.3 An item of Expenditure does not include any expenditure attributable to the breach, non-observance or non-performance of the obligations of the Owner under this Agreement, but any such expenditure is to be excluded only to the extent that it would not have been incurred in the absence of the breach, non-observance or non-performance.
- 3.4 Interest payments made by the Owner are to be allowable as items of Expenditure only to the extent that they are at competitive rates prevailing at the relevant times in the open market having regard to relevant risk factors involved.
- 3.5 An item of Expenditure is not to be taken into account until the time it is paid or otherwise debited to the account of the Owner.
- 3.6 References to cost include incidental costs, expenses and fees incurred.
- 3.7 References to fees include incidental disbursements incurred.
- 3.8 Items of Expenditure are to be allowable to the extent only that they are properly incurred by the Owner.

SCHEDULE 5

Substantive Provisions of Duty of Care Deed

1. Definitions

In this Deed, the following words and expressions have the following meanings:

"**Agreement**" the Development Management Agreement (with ancillary Asset Management Services) dated [] made between [Owner] (1) and the Manager (2) relating to the Property at [];

"**Development Management Services**" has the meaning defined in the Agreement;

"**Interested Party**" [];

"**Owner**" the party for the time being referred to as the Owner in the Agreement.

2. Warranty

2.1 The Manager warrants and undertakes to the Interested Party that the Manager:

2.2 has performed and will continue to perform the Development Management Services in accordance with the terms of the Agreement;

2.3 has exercised and will continue to exercise, in the performance of the Development Management Services, all the professional skill, care and diligence which may reasonably be expected of a qualified and competent development project manager experienced in the provision of the Development Management Services in respect of projects of a similar size, scope, nature and complexity to the Development Project; and

2.4 owes a duty of care to the Interested Party in respect of the performance of the Development Management Services.

3. Professional indemnity insurance

3.1 The Manager shall maintain professional indemnity insurance in accordance with, and subject to the terms of, clause 3.3 of the Agreement.

3.2 When reasonably required to do so by the Interested Party, the Manager shall produce documentary evidence that the insurance required by this clause 3 is being properly maintained.

4. Assignment

4.1 The Interested Party may at any time assign the benefit of this Deed and any rights under it to any person who qualifies as an Interested Party under clause 3.4 of the Agreement (subject to a maximum of two such assignments) without the consent of the Manager being required.

4.2 Assignments of the benefit of this Deed to a subsidiary or holding company of the Interested Party or any other subsidiary of the holding company of the Interested Party do not require the consent of the Manager and do not count towards the maximum number of permitted assignments.

4.3 The Interested Party shall notify the Manager within a reasonable time of any such assignment.

5. **Obligations of the Manager before terminating the Agreement**

5.1 The Manager may not exercise any right to terminate, or to discontinue performance of his obligations under, the Agreement without having given to the Interested Party at least 28 days' notice of that intention, and specifying the grounds for doing so.

5.2 Any period stipulated in the Agreement for the exercise of rights of termination by the Manager is to be extended, if necessary, to accommodate the period of notice to the Interested Party required in clause 5.1 of this Deed.

5.3 By complying with clause 5.1, the Manager is not to be treated as waiving his right to terminate the Agreement unless that right is overridden by the operation of clause 6 of this Deed.

6. **Interested Party's assumption of the Owner's duties**

6.1 The right of the Manager to terminate the Agreement is to be overridden if within the period of 28 days referred to in clause 5.1 the Interested Party:

6.1.1 gives notice to the Manager requiring him to continue performance of his obligations in the Agreement;

6.1.2 acknowledges to the Manager that he is assuming all the obligations of the Owner under the Agreement; and

6.1.3 pays to the Manager any monies which have become due under the Agreement, but which are then unpaid.

6.2 The Manager shall allow to the Interested Party such additional time as may be reasonable to remedy a default of the Owner which does not involve arrears of payment of ascertained amounts.

6.3 If the Interested Party exercises his rights under clause 6.1 of this Deed, the Agreement is to continue in force as if:

6.3.1 the right of termination of the Agreement had not arisen; and

6.3.2 the Agreement had been made between the Interested Party and the Manager to the exclusion of the Owner.

- 6.4 Clause 6.3 of this Deed is to operate even if there is dispute between the Owner and the Manager as to whether the right of termination of the Agreement had arisen, but the Owner:
- 6.4.1 is not to be treated as having waived any rights against the Manager which had accrued beforehand; nor
- 6.4.2 precluded from action for damages against the Manager for improperly invoking the exercise by the Interested Party of his rights under clause 6.1 of this Deed.
- 6.5 The Interested Party is not to incur liability to the Owner by reason only of exercising his rights under clause 6.1 of this Deed.
- 6.6 The Manager is not entitled to enquire whether, as between the Owner and the Interested Party, the Interested Party may exercise the rights in clause 6.1, and does not incur liability to the Owner by reason only of acting in accordance with clause 6.3 of this Deed.

7. **Limitation**

- 7.1 The provisions of clause 12 of the Agreement apply to this Deed as they do to the Agreement.
- 7.2 The Manager is entitled in an action or proceedings by the Interested Party under this Deed to rely on any limitation or exclusion in the Agreement and to raise the equivalent rights in defence of liability (apart from the right of set-off and counterclaims against the Owner) as it would have had if the Interested Party had been named as a party jointly with the Owner in the Agreement.

8. **Notices**

- 8.1 A notice or other communication required under this Deed is to be given in writing and is to be deemed properly given if it complies with section 196 of the Law of Property Act 1925.
- 8.2 The addresses and numbers for service of the Interested Party and of the Manager are those set out below unless another address or number for service is notified by a party to the other.

[Here set out the addresses and numbers for service of each party]

9. **Governing law and Jurisdiction**

This Deed is governed by the law of England and Wales. The parties irrevocably submit to the exclusive jurisdiction of the Courts of England and Wales.

ANNEXURE [1]

Appraisal

ANNEXURE [2]

Business Plan

SIGNED by an authorised signatory)
on behalf of the Owner)

SIGNED by an authorised signatory)
on behalf of the Manager)