

CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE'S ASSET AND DEVELOPMENT MANAGEMENT AGREEMENT

EXPLANATORY NOTES

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 8.3, 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 9.4 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 ASSET AND DEVELOPMENT
MANAGEMENT AGREEMENT**

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.

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.

**ASSET AND DEVELOPMENT MANAGEMENT
AGREEMENT**
– RELATING TO –
[]

(1) []

(2) []

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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 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
- (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 Owner's Objectives for the Property during the term of this Agreement, including 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 tax tariff or charge introduced by the local planning authority [the Mayor of London] or any other person pursuant to the Planning Act 2008 the Localism Act 2011 and regulations made thereunder (including the Community Infrastructure Levy Regulations 2010) and/or pursuant to any subsequent legislation or provision 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.¹

"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;

¹ The Cost Plan may be dealt with as part of the Appraisal.

- (c) the letting or other such agent;
- (d) 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**" interest equal to the base rate of [] Bank Plc or, if higher, 4% per annum.

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

"**Owner**" includes its successors-in-title to the Property and assigns².

"**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.

"**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, CDM Co-ordinator, the Construction manager, structural engineer, M&E engineer and quantity surveyor and such other consultants so appointed by the Owner.

² Especially where the Owner is overseas, the tax implications of the Agreement need to be carefully examined.

"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.

"Project Documents" means documentation relating to the Development Project as from time to time approved by the Owner or to the Property, whether then in the course of preparation or complete, including (as the context requires) the Business Plan, the Appraisal, the approved plans, the cash-flow forecast, the Cost Plan, outline specifications and programme records, plans, schedules and reports.

"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 and to use and enjoy the Property as intended by the parties, including:

- (a) planning permissions (except 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"³ 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 such legal entity holding the Property by whatever means in which the full 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;

³ A principal measure by which the Manager obtains a Performance Fee will be the price obtained by the Owner on a Sale of the Property as developed.

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

"**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.

"**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 the day-to-day management of the Property of the Property manager, 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 and expires on the date ⁴[24] months after the date of Practical Completion unless it is terminated before then under clauses 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:

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

⁴ The suggested period is one likely to meet the maximum time that the Agreement is likely to run and to coordinate with a "deemed Sale" under clause 6.3.5. It should be tailored to the relevant circumstances of the Development Project.

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, the rights, covenants, conditions and other matters affecting the Property 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 before the date of this Agreement 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;

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;
- 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;
- 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 up to a limit of indemnity in respect of each and every claim, or series of claims arising out of any one event, of not less than [£10,000,000 (ten million pounds⁵)],

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 Services⁶ 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 date of issue of the certificate (or notice) of making good defects under the Construction Contract (or the date of the last such certificate (or notice) to be issued in case of more than one Construction Contract).

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 carrying out of the Development Project;

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 ⁷[the freehold owner/a superior landlord] of the Property;] and

⁵ Check that this clause is consistent with the actual insurance available to the Manager. Ensure also consistency with the liability limit in clause 12.2. The amount will vary depending on the development.

⁶ Since the Manager has no design responsibilities under this Agreement, Interested Parties will also be concerned to obtain a duty of care deed from the Contractor, sub-contractors and members of the Professional Team with design responsibilities.

⁷ The interests of freeholders/superior landlords and certain tenants have been included in the definition of "Interested Parties" as optional provisions. The relevant issue as to whether to include those parties in relation to each is different. It may be necessary to include any freehold owner or other superior landlord whose interest is not remote from that of the Owner and stands to be potentially affected by the Manager's failure to take reasonable care in the discharge of its duties. Whether certain tenants should be included in the net of protection afforded by the duty of care deed depends on the attitude of the Owner or its financiers about drawing the net too widely. In either situation, instructions need to be taken when preparing the Agreement.

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.]

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 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 Owner⁸.

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.

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;

⁸ Take instructions on the interaction between the duties of the Manager and the Construction manager.

- 4.2.3 issue an instruction or permit an increase in the cost of the Development Project for 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 Owner⁹:
 - 4.3.1 commit the Owner to an agreement with a third party¹⁰;
 - 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

⁹ This highlights that the Manager is not a joint venture partner and is answerable to the Owner. The limited stake that the Manager has in the Development Project is also reflected in not requiring the Manager to give an indemnity, although this can be a point of contention.

¹⁰ Usually, the Manager is acting as agent for the Owner in entering into agreements with third parties (in accordance with this Agreement) and, therefore, should not require an indemnity from the Owner for any liability arising from entering into such agreements since the liability will fall on the Owner. However, if the Manager enters into agreements in accordance with this Agreement but not in an agent capacity for the Owner, the Manager should seek an indemnity from the Owner for any liability incurred except where this is due to a breach by the Manager.

- 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 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.
- 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 parties¹¹.
- 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 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 3 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

¹¹ Institutions will sometimes refuse to provide owner indemnities.

out of or in consequence of breach of the obligations of the Manager under this Agreement.¹²

6. **FEES**¹³

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.

6.2 The 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 []%¹⁴ 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 IRR¹⁵ 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;

¹² Institutions will sometimes refuse to provide owner indemnities.

¹³ The fee arrangements in this Agreement are examples only and they will often need to be changed for the particular agreement.

¹⁴ Take instructions on the percentage of the difference between the target internal rate of return (IRR) and the actual IRR, where the actual IRR exceeds the target IRR.

¹⁵ Basing the Performance Fee on IRR allows the Manager a share in the amount represented by the actual total return at the End Date in excess of the target rate. This is a real incentive to purposeful strategic management and is more sophisticated than the fee being based on "development profit". The percentage to be specified in the space on the third line of clause 6.3 is the reasonable minimum target IRR rate, which is usually something between 12% and 14% according to feasibility. Clearly, instructions are required here. More generally, IRR is not the same as "yield".

- (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
- (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 laid out or borne by the Owner 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 cashflows 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 cashflows 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

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.

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:

6.3.4.1 taking into account the evidence of the terms of the disposition on the value of the Property; and

6.3.4.2 by 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.

6.3.5 If the Property has not been Sold within a period of ¹⁶[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 Valuation Practice Statement 4 paragraph 1.2 (Market Value) of the RICS Valuation – Professional Standards January 2014.

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 expert, appointed at the request of either of the parties by the President (or other appropriate officer) of the Royal

¹⁶ It is assumed for these purposes that enough time has elapsed since Practical Completion for the Development Project to have been completed. It is implicit that either the Owner has not been able to effect a suitable Sale, or that the Owner has decided to retain the Property for itself. See also footnote 4.

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 Development Project 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 Development Project 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 Development Project 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 Development Project Expenditure has been quantified and all relevant outstanding Receipts that were reasonably expected to be 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.]¹⁷

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

¹⁷ Be aware that there are differences of opinion and practice among practitioners as to whether such a pay less provision is required for this type of document. It is included for ease of reference, but you should speak to a member of the Construction team.

7.3.2 the assignee covenants by deed with the Manager in a form reasonably required by the Manager on terms that the assignee is to observe and perform the obligations of the Owner in 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.¹⁸

9. TERMINATION PROVISIONS NOT IN CASE OF BREACH

9.1 The termination of this Agreement, whether it comes to an end or is terminated, 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,

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 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.

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

¹⁸ The Manager will have been selected for its particular expertise and experience and the Owner will resist a change and certainly want total control.

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 ¹⁹[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 relevant End Date applying in clause 6.3.1;

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.

¹⁹ The choice of a cancellation fee or Performance Fee will depend on which is the greater sum. If the Owner sells at an early stage of the Development Project, the Performance Fee may be nil or negligible; if the Sale takes place when the construction stage is nearing Practical Completion, the Performance Fee may then be substantial.

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 breach²⁰ 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 material 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 by the Manager's failure to remedy the breach, the Owner reasonably considers that the failure 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;

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

²⁰ That is a breach which goes to the root of the Agreement.

- 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 ²¹material breach of its obligations under this Agreement which is not remediable, or by the Owner's failure to remedy the breach, the Manager reasonably considers that the failure has become such as to amount to a material breach of the Owner's obligations under this Agreement;
- 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 ²²].

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 are to remain vested in the Owner.

²¹ Case law indicates that "material breach" will normally be interpreted as being close to fundamental breach. The usual circumstances entitling development managers to terminate are persistent non-payment or tardy payment of fees. It is comparatively rare for managers to terminate because of disagreement with an owner; termination in those circumstances is more often consensual.

²² Please note that clause 10.2.1 is likely to be resisted by the Owner's Bank.

12. LIMITATION OF MANAGER'S LIABILITY²³

- 12.1 ²⁴The 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 breach.
- 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 [£10,000,000] [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;

²³ If acting for the Owner, seek instructions on the limitations on the Manager's liability, since the limitations in this clause may be unacceptable to the Owner or an Interested Party.

²⁴ The Manager will want to limit its exposure to damages, normally to the level of its professional indemnity insurance cover. This may not be acceptable to certain interested parties, particularly financiers.

- 12.4.7 the design and construction 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 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, 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**

- 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:

- 17.1.1 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:

- 17.1.1.1 the Royal Institution of Chartered Surveyors;
- 17.1.1.2 the Institute of Civil Engineers;
- 17.1.1.3 the Institute of Chartered Accountants in England and Wales; or
- 17.1.1.4 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 ten 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.
- 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 17.1.1.

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 In this Agreement where an issue is required to be dealt with by or submitted for the determination of an arbitrator, or the parties agree to deal with an issue by the determination of 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:

18.1.1 the Royal Institution of Chartered Surveyors;

18.1.2 the Institute of Civil Engineers;

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

18.1.4 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.

18.2 The arbitrator is to be [of not less than ten 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 1996²⁵.

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 or, if higher, [6]% per annum on so much as from time to time remains unpaid from the date it fell due until the date payment is made.

²⁵ The parties may choose to include drafting to enable alternative dispute resolution.

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 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, is to be treated as properly given if:

20.3.1 delivered personally; or

20.3.2 sent by ordinary mail.

Unless the parties otherwise agree, a notice under this Agreement given by email is not to be treated as properly given.

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 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.

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.

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 [6] 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 cooperate 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 Manager²⁶.

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 With respect to service of proceedings and notices;
- 27.4.1 [Party 2] 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

²⁶ The indemnity may not be enforceable by the courts on public policy grounds, since under the Bribery Act the corporate offence attaches directly to the Owner and the courts may not be prepared to change that position.

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 [Party 2]); 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, [Party 2] shall immediately appoint a substitute acceptable to [Party 1] and deliver to [Party 1] 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

[]

SCHEDULE 2

The Asset Management Services²⁷

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 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

²⁷ The nature of these services is one of strategic planning of what to do with the Property and supervisory in relation to those advisers and managers who have dedicated responsibilities with respect to limited aspects of strategy in relation to the Property such as property managers and letting agents. Parties may have their own lists of services.

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. **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.

SCHEDULE 3

The Development Management Services²⁸

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, 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 and for approvals of reserved matters.
 - 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.

²⁸ Do not confuse the Manager's role with that of the Construction manager. The Manager coordinates and monitors the Development Project. The Construction manager controls the activities on the construction site. Parties may have their own lists of services.

- 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.
- 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 to be procured for the respective benefit of tenants, future purchasers of the Property, funders and Owners of the Development Project²⁹.
- 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.

²⁹ Amend if Third Party Rights are being used.

- 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
 - 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 contract**

- 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 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 Construction (Design and Management) Regulations 2007 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 cashflow 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, 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 be stated to have been delivered 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 Requiring the production of "as built" drawings, operation and maintenance manuals, test certificates, manufacturers' guarantees, health and safety plan pursuant to the Construction (Design and Management) Regulations 2015, 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 *scope of work* 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 *documentation* the status of the appointments of the Professional Team and the Construction Team, Construction Contract and warranties³⁰;
 - 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 *Requisite Consents* details of those 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 *other matters* 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.

³⁰ Amend if Third Party Rights are being used.

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 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 EC grants and any other 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 valuation practice statement 4 paragraph 1.2 (Market value) of the RICS Valuation – Professional Standards January 2014.
- 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 Asset and Development Management Agreement 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 (as amended by the Postal Services Act 2000).

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**

This Deed is governed by English law and the parties irrevocably submit to the non-exclusive jurisdiction of the English Courts.

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)