Appendix E Collateral Warranty

DATED 2018

* 1. **[CONSULTANT]**
  2. **[BENEFICIARY]**
  3. **[CLIENT]**

CONSULTANT WARRANTY

relating to [SPECIFY]

**THIS DEED** is made on 2018

BETWEEN:

1. **[CONSULTANT] [(**registered number [no.]) whose registered office is] [of] [Address] (“the Consultant”);
2. **[BENEFICIARY] [(**registered number [no.]) whose registered office is] [of] [Address] (“the Beneficiary” which expression includes its permitted successors in title and assigns); and
3. **[CLIENT] [(**registered number [no.]) whose registered office is] [of] [Address] (“the Client”).

**BACKGROUND**:

* 1. The Consultant has been appointed by [Name] of [Address] under a deed of appointment dated [date] (“the Appointment”) to provide services in relation to certain works of construction to be carried out on land known as [Site Address] (“the Site”) which construction project is referred to in this Deed as “the Works”.
  2. [By an agreement dated [date] and made between the [Employer][Client] and the Beneficiary the Beneficiary has agreed to provide finance in connection with the Works (“the Finance Agreement”)].]
  3. The Consultant is obliged under the Appointment to give a warranty in this form in favour of the Beneficiary.

**OPERATIVE PROVISIONS**

1. **CONSIDERATION**

This Deed is made in consideration of the payment of one pound (£1.00) by the Beneficiary to the Consultant receipt of which the Consultant acknowledges.

1. **CONSULTANT’S WARRANTIES**

The Consultant warrants to the Beneficiary that it has performed and will continue to perform its duties under the Appointment in accordance with the Appointment and that it has exercised and will continue to exercise in the performance of the services under the Appointment all the reasonable skill, care and diligence to be expected of a properly qualified member of its profession experienced in carrying out such services in relation to works of similar size, scope, value, character and complexity and on a similar site or at a similar location to the Works.

1. **INTELLECTUAL PROPERTY RIGHTS**
   1. Subject to the following provisions of this Deed, all Intellectual Property in the drawings, plans, models, specifications, reports, calculations, chart, diagrams, sketches (including without limitation any such items retained on or in any computer software or other electronic medium) and other works prepared conceived or developed by or on behalf of Consultant in the course of performing its obligations under the Appointment and including all amendments, additions and all designs, ideas, concepts and inventions contained in them (“the Documents”) will remain vested in the Consultant. For the purposes of this **clause 3**, “Intellectual Property” shall mean all copyright and all neighbouring and database rights and moral rights, registered designs, registered and unregistered design rights, or any rights or property similar to the foregoing in any part of the world whether registered or unregistered together with the right to apply for the registration of such rights in any part of the world and the rights to current applications for registration of any such intellectual property referred to above.
   2. The Consultant grants (or, if such a grant cannot legally take place until a later date, agrees to grant) to the Beneficiary with effect from the date of this Deed or in the case of any of the Intellectual Property not yet in existence with effect from the creation of such Intellectual Property, an irrevocable, royalty-free, non-exclusive licence (such licence to remain in full force and effect notwithstanding the completion of the Consultant’s obligations or the termination of the Appointment or this Deed or the determination of the Consultant’s engagement under the Appointment or any dispute under the Appointment or this Deed) to use the Intellectual Property and to reproduce all Documents for any purpose whatsoever connected with the Works including, but without limitation, the construction, completion, maintenance, letting, sale, promotion, advertisement, extension, reinstatement, refurbishment and repair of the Works. Such licence will carry the right to grant sub-licences and will be transferable to third parties. Such licence will enable the Beneficiary to use and reproduce the Documents for any extension of the Works, but shall not include a licence to reproduce the Intellectual Property in the Documents for any extension of the Works.
   3. The Consultant will not grant to any third party the right to use any of the Documents save under any warranty it is obliged to give under the Appointment or under this Deed or as otherwise required to enable it to fulfil its obligations under the Appointment.
   4. The Consultant will not be liable for any use the Beneficiary may make of the Documents for any purpose other than the purposes for which they were originally prepared.
   5. The Consultant warrants that the Documents (save to the extent that duly authorised sub-consultants have been used to prepare the same) are the Consultant’s own original work and that in any event their use in connection with the Works will not infringe the rights of any third party. The Consultant further warrants that where duly authorised sub-consultants are used their work will be original and that the Consultant will obtain the necessary consents in relation to **clause 3.2**.
   6. The Consultant agrees on reasonable request at any time and following reasonable prior written notice to give to the Beneficiary, or those authorised by the Beneficiary, access to the Documents and to provide copies (including copy negatives and CAD disks) of the Documents at the Beneficiary’s expense.
2. **PROFESSIONAL INDEMNITY INSURANCE**
   1. The Consultant by this Deed covenants with the Beneficiary that it has at its own cost taken out and will maintain professional indemnity insurance with reputable insurers carrying on business in the United Kingdom with a limit of indemnity of not less than £5,000,000 (five million pounds) for any one occurrence or series of occurrences arising out of any one event, in relation to the Works provided always that:
      1. such insurance shall be in place from the date of commencement of the Consultant’s services until no less than 6 years after practical completion of the Works;
      2. if such insurance is not available to the Consultant (and/or members of the Consultant’s profession engaged in services of a similar scope, size, nature and complexity as the Consultant) at commercially reasonable rates and terms (excluding any increase in premiums attributable to the actions, omissions, errors or defaults of the Consultant), the Consultant and the Beneficiary will meet and the Consultant will outline the steps he intends to take to manage such risks. If the steps proposed by the Consultant are not reasonably acceptable to the Beneficiary, the parties shall agree an alternative method of managing such risk.
   2. The Consultant will provide the Beneficiary with evidence that the policies referred to in this **clause 4** are in full force and effect together with a summary of the policy terms and conditions.
3. **NOTICES**

Any notice to be given by either party under this Deed will be sufficiently served if sent by hand, by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand

will be deemed to be served on the date of delivery and any notice sent by facsimile transmission will be deemed to be served in full at the time recorded on the facsimile report sheet, provided that if any notice sent by hand or facsimile is sent after 4.45p.m. on any day it will be deemed to be served on the next working day. Any notice sent by post will be deemed to have been duly served at the expiration of 48 hours after the time of posting if the end of that period falls before 4.45p.m. on a working day and otherwise on the next working day.

1. **ASSIGNMENT**
   1. Without prejudice to the provisions of **clause 10**, the Beneficiary may assign the benefit of and its benefits and rights under this Deed to any person by way of absolute legal assignment, on up to two occasions only without consent and afterwards only with the consent of the Consultant (not to be unreasonably withheld or delayed) provided that assignments by the Beneficiary to any company within its own group of companies or assignments by way of security to any party providing finance to the Beneficiary and any re-assignment on redemption shall not count towards the number of assignments permitted without consent under this **clause 6.1**.
   2. The Consultant will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original beneficiary under this Deed or by reason that the original beneficiary or any intermediate beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Site or that the original beneficiary or any intermediate beneficiary has not suffered any or as much loss.
2. **OTHER RIGHTS AND REMEDIES**

The rights and benefits conferred upon the Beneficiary by this Deed are in addition to any other rights and remedies it may have against the Consultant including, without limitation, any remedies in negligence.

1. **NO APPROVAL**

The Consultant’s liabilities under this Deed will not be in any way reduced or extinguished by reason of any inspection or approval of the Documents or attendance at site meetings or other enquiry or inspection which the Beneficiary may make or procure to be made for the Beneficiary’s benefit or on its behalf.

1. **PROHIBITED MATERIALS**
   1. The Consultant warrants that, to the extent it either is obliged to specify or approve products or materials for use in the Works or does so specify or approve, it has

exercised and will exercise reasonable skill and care in accordance with this Deed not to specify, approve or use any products or materials which are generally known to be deleterious within the Consultant’s profession at the time of specification or use, in the particular circumstances in which they are used, to health and safety and/or the durability of buildings or structures or those identified as potentially hazardous in or not in conformity with:

* + 1. the report entitled “Good Practice in the Selection of Construction Materials” (2011, published by the British Council for Offices);
    2. relevant British or European Standards or Codes of Practice (or where no such standard exists do not conform with a British Board of Agrément Certificate);
    3. any publications of the Building Research Establishment related to the specification of products or materials.
  1. If, in the performance of its duties under the Appointment, the Consultant becomes aware that it, or any other person, has specified or used, or authorised or approved the specification or use by others of any such products or materials the Consultant will immediately give the Beneficiary written notice of the same. This **clause 9.2** does not create any additional duty for the Consultant to inspect or check the work of others which is not required by the Appointment.

1. **STEP-IN RIGHTS**
   1. The Consultant will not exercise or seek to exercise any right which may be or become available to it to terminate or treat as terminated or repudiated the Appointment or its engagement under it or discontinue or suspend the performance of any duties or obligations under the Appointment, without first giving to the Beneficiary not less than twenty-eight days prior written notice specifying the Consultant’s grounds for terminating or treating as terminated or repudiated the Appointment or its engagement under it or discontinuing or suspending its performance of the Appointment and stating the amount (if any) of monies outstanding under the Appointment. Within such period of notice:
      1. the Beneficiary may give written notice to the Consultant that the Beneficiary shall become the client under the Appointment to the exclusion of the Client and, upon giving such notice, that will be the case and the Appointment will be and remain in full force and effect notwithstanding any of the grounds in the Consultant’s notice under **clause 10.1**; and
      2. if the Beneficiary has given such notice under **clause 10.1.1** or under **clause 10.3**, the Beneficiary will then as soon as practicable remedy any outstanding breach by the Client (provided that where the notice is given under **clause 10.1.1** rather than under **clause 10.3** such breach has properly been included in the Consultant’s specified grounds under **clause 10.1**); and
      3. if:
         1. the Beneficiary has given such notice under **clause 10.1.1**

then from the date of the Consultant’s notice; or

* + - 1. the Beneficiary has given notice under **clause 10.3** then from the date of the Beneficiary’s notice

the Beneficiary will, by **clause 10.1.1**, become responsible for all sums properly payable to the Consultant under the Appointment and for the observance and performance of all of the other duties and obligations on the part of the client to be observed and performed under the Appointment accruing due after the service of such Consultant’s notice or Beneficiary’s notice (as applicable) but the Beneficiary will in paying such sums be entitled to the same rights of set-off and deduction as would have applied to the client under the Appointment.

* 1. Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by the Beneficiary to the Consultant the Beneficiary will not be under any obligation to the Consultant nor will the Consultant have any claim or cause of action against the Beneficiary unless and until the Beneficiary has given written notice to the Consultant under either **clause 10.1.1** or **clause 10.3**.
  2. Provided that the Appointment has not previously been terminated the Consultant further covenants with the Beneficiary that if [the Finance Agreement is terminated by the Beneficiary] [and] [the employment of the Contractor under the Contract is determined or if the Contract is terminated], the Consultant, if requested by the Beneficiary, by written notice and subject to **clause 10.1.2** and **clause 10.1.3**, will accept the instructions of the Beneficiary to the exclusion of the Client in respect of the Works upon the terms and conditions of the Appointment. The Beneficiary shall then become the client under the Appointment to the exclusion of the Client and the Consultant will, if so requested, enter into a novation agreement in order to substitute the Beneficiary for the Client under the Appointment.
  3. [Where the Consultant has given rights in relation to the Appointment similar to those contained in this **clause 10** to any other person then if both the Beneficiary and any such other person serve notice under **clause 10.1** or **clause 10.3** or its

equivalent the notice served by the Beneficiary shall [prevail] [not prevail] [not prevail over any notice served by [Name] but prevail over any notice served by any other person]].

* 1. The Client acknowledges that the Consultant will be entitled to rely on a notice given to the Consultant by the Beneficiary under **clause 10.3** as conclusive evidence that the Beneficiary is entitled to serve such notice.
  2. The Beneficiary may by written notice to the Consultant appoint another person to exercise its rights under this **clause 10** subject to the Beneficiary remaining liable to the Consultant as guarantor for its appointee in respect of its obligations under this Deed.

1. **LIMITATION**
   1. The Consultant has no liability under this Deed which is greater or of longer duration than it would have had if the Beneficiary had been a party to the Appointment as joint employer.
   2. The Consultant shall be entitled in any action or proceedings brought by the Beneficiary under this Deed to rely on any limitation in the Appointment and to raise equivalent rights in defence of liability (but excluding set-offs and counterclaims) as would have been available to the Consultant had the Beneficiary been the employer under the Appointment.
   3. The parties agree that no action or proceedings may be brought or commenced under this Deed at any time after the date being six years after the date of practical completion of the Works.
2. **GOVERNING LAW AND JURISDICTION**

This Deed will be construed in accordance with English law and be in all respects subject to the non-exclusive jurisdiction of the English courts.

1. **THIRD PARTY RIGHTS**

The parties to this Deed do not intend that any of its terms will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person not a party to it.

**THIS DOCUMENT** is executed as a deed and delivered on the date stated at the beginning of this Deed.

[ALL PARTIES TO EXECUTE]

**DATED 2018**

1. **[CONSULTANT]**
2. **[PURCHASER/TENANT/FINANCIER OF A PURCHASER/TENANT]**

CONSULTANT WARRANTY

relating to [SPECIFY]

**THIS DEED** is made on 2018

BETWEEN:

1. **[CONSULTANT] [(**registered number [no.]) whose registered office is] [of] [Address] (“the Consultant”);
2. **[BENEFICIARY] [(**registered number [no.]) whose registered office is] [of] [Address] (“the Beneficiary” which expression includes its permitted successors in title and assigns).

**BACKGROUND**:

* 1. The Consultant has been appointed by [Name] of [Address] under a deed of appointment dated [date] (“the Appointment”) to provide services in relation to certain works of construction to be carried out on land known as [Site Address] (“the Site”) which construction project is referred to in this Deed as “the Works”.
  2. [The Beneficiary is [the/a] [purchaser][tenant][provider of finance in connection with the [purchase][lease]] of [the Site][the part of the Site shown edged red on the plan at Schedule 1].
  3. The Consultant is obliged under the Appointment to give a warranty in this form in favour of the Beneficiary.

**OPERATIVE PROVISIONS**

1. **CONSIDERATION**

This Deed is made in consideration of the payment of one pound (£1.00) by the Beneficiary to the Consultant receipt of which the Consultant acknowledges.

1. **CONSULTANT’S WARRANTIES**

The Consultant warrants to the Beneficiary that it has performed and will continue to perform its duties under the Appointment in accordance with the Appointment and that it has exercised and will continue to exercise in the performance of the services under the Appointment all the reasonable skill, care and diligence to be expected of a properly qualified member of its profession experienced in carrying out such services in relation to works of similar size, scope, value, character and complexity and on a similar site or at a similar location to the Works.

1. **INTELLECTUAL PROPERTY RIGHTS**
   1. ubject to the following provisions of this Deed, all Intellectual Property in the drawings, plans, models, specifications, reports, calculations, chart, diagrams,

sketches (including without limitation any such items retained on or in any computer software or other electronic medium) and other works prepared conceived or developed by or on behalf of Consultant in the course of performing its obligations under the Appointment and including all amendments, additions and all designs, ideas, concepts and inventions contained in them (“the Documents”) will remain vested in the Consultant. For the purposes of this **clause 3**, “Intellectual Property” shall mean all copyright and all neighbouring and database rights and moral rights, registered designs, registered and unregistered design rights, or any rights or property similar to the foregoing in any part of the world whether registered or unregistered together with the right to apply for the registration of such rights in any part of the world and the rights to current applications for registration of any such intellectual property referred to above.

* 1. The Consultant grants (or, if such a grant cannot legally take place until a later date, agrees to grant) to the Beneficiary, with effect from the date of this Deed or in the case of any of the Intellectual Property not yet in existence with effect from the creation of such Intellectual Property, an irrevocable, royalty-free, non-exclusive licence (such licence to remain in full force and effect notwithstanding the completion of the Consultant’s obligations or the termination of the Appointment or this Deed or the determination of the Consultant’s engagement under the Appointment or any dispute under the Appointment or this Deed) to use the Intellectual Property and to reproduce all Documents for any purpose whatsoever connected with the Works including, but without limitation, the construction, completion, maintenance, letting, sale, promotion, advertisement, extension, reinstatement, refurbishment and repair of the Works. Such licence will carry the right to grant sub-licences and will be transferable to third parties. Such licence will enable the Beneficiary to use and reproduce the Documents for any extension of the Works, but shall not include a licence to reproduce the Intellectual Property in the Documents for any extension of the Works.
  2. The Consultant will not grant to any third party the right to use any of the Documents save under any warranty it is obliged to give under the Appointment or under this Deed or as otherwise required to enable it to fulfil its obligations under the Appointment.
  3. The Consultant will not be liable for any use the Beneficiary may make of the Documents for any purpose other than the purposes for which they were originally prepared.
  4. The Consultant warrants that the Documents (save to the extent that duly authorised sub-consultants have been used to prepare the same) are the Consultant’s own original work and that in any event their use in connection with the Works will not infringe the rights of any third party. The Consultant further warrants that where duly

authorised sub-consultants are used their work will be original and that the Consultant will obtain the necessary consents in relation to **clause 3.2**.

* 1. The Consultant agrees on reasonable request at any time and following reasonable prior written notice to give to the Beneficiary, or those authorised by the Beneficiary, access to the Documents and to provide copies (including copy negatives and CAD disks) of the Documents at the Beneficiary’s expense.

1. **PROFESSIONAL INDEMNITY INSURANCE**
   1. The Consultant by this Deed covenants with the Beneficiary that it has at its own cost taken out and will maintain professional indemnity insurance with reputable insurers carrying on business in the United Kingdom with a limit of indemnity of not less than £5,000,000 (five million pounds) for any one occurrence or series of occurrences arising out of any one event, in relation to the Works provided always that:
      1. such insurance shall be in place from the date of commencement of the Consultant’s services until no less than 6 years after practical completion of the Works;
      2. if such insurance is not available to the Consultant (and/or members of the Consultant’s profession engaged in services of a similar scope, size, nature and complexity as the Consultant) at commercially reasonable rates and terms (excluding any increase in premiums attributable to the actions, omissions, errors or defaults of the Consultant), the Consultant and the Beneficiary will meet and the Consultant will outline the steps he intends to take to manage such risks. If the steps proposed by the Consultant are not reasonably acceptable to the Beneficiary, the parties shall agree an alternative method of managing such risk.
   2. The Consultant will provide the Beneficiary with evidence that the policies referred to in this **clause 4** are in full force and effect together with a summary of the policy terms and conditions.
2. **NOTICES**

Any notice to be given by either party under this Deed will be sufficiently served if sent by hand, by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on the date of delivery and any notice sent by facsimile transmission will be deemed to be served in full at the time recorded on the facsimile report sheet provided that if any notice sent by hand or facsimile is sent after 4.45p.m. on any day it will be deemed to be served on the next working day. Any

notice sent by post will be deemed to have been duly served at the expiration of 48 hours after the time of posting if the end of that period falls before 4.45p.m. on a working day and otherwise on the next working day.

1. **ASSIGNMENT**
   1. The Beneficiary may assign the benefit of and its benefits and rights under this Deed to any person by way of absolute legal assignment, on up to two occasions only without consent and afterwards only with the consent of the Consultant (not to be unreasonably withheld or delayed) provided that assignments by the Beneficiary to any company within its own group of companies or assignments by way of security to any party providing finance to the Beneficiary and any re-assignment on redemption shall not count towards the number of assignments permitted without consent under this **clause 6.1**.
   2. The Consultant will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original beneficiary under this Deed or by reason that the original beneficiary or any intermediate beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Site or that the original beneficiary or any intermediate beneficiary has not suffered any or as much loss.
2. **OTHER RIGHTS AND REMEDIES**

The rights and benefits conferred upon the Beneficiary by this Deed are in addition to any other rights and remedies it may have against the Consultant including, without limitation, any remedies in negligence.

1. **NO APPROVAL**

The Consultant’s liabilities under this Deed will not be in any way reduced or extinguished by reason of any inspection or approval of the Documents or attendance at site meetings or other enquiry or inspection which the Beneficiary may make or procure to be made for the Beneficiary’s benefit or on its behalf.

1. **PROHIBITED MATERIALS**
   1. The Consultant warrants that, to the extent it either is obliged to specify or approve products or materials for use in the Works or does so specify or approve, it has exercised and will exercise reasonable skill and care in accordance with this Deed not to specify, approve or use any products or materials which are generally known to be deleterious within the Consultant’s profession at the time of specification or use, in the particular circumstances in which they are used, to health and safety

and/or the durability of buildings or structures or those identified as potentially hazardous in or not in conformity with:

* + 1. the report entitled “Good Practice in the Selection of Construction Materials” (2011, published by the British Council for Offices);
    2. relevant British or European Standards or Codes of Practice (or where no such standard exists do not conform with a British Board of Agrément Certificate);
    3. any publications of the Building Research Establishment related to the specification of products or materials.
  1. If, in the performance of its duties under the Appointment, the Consultant becomes aware that it, or any other person, has specified or used, or authorised or approved the specification or use by others of any such products or materials the Consultant will immediately give the Beneficiary written notice of the same. This **clause 9.2** does not create any additional duty for the Consultant to inspect or check the work of others which is not required by the Appointment.

1. **LIMITATION**
   1. The Consultant has no liability under this Deed which is greater or of longer duration than it would have had if the Beneficiary had been a party to the Appointment as joint employer.
   2. The Consultant shall be entitled in any action or proceedings brought by the Beneficiary under this Deed to rely on any limitation in the Appointment and to raise equivalent rights in defence of liability (but excluding set-offs and counterclaims) as would have been available to the Consultant had the Beneficiary been the employer under the Appointment.
   3. The parties agree that no action or proceedings may be brought or commenced under this Deed at any time after the date being six years after the date of practical completion of the Works.
2. **GOVERNING LAW AND JURISDICTION**

This Deed will be construed in accordance with English law and be in all respects subject to the non-exclusive jurisdiction of the English courts.

1. **THIRD PARTY RIGHTS**

The parties to this Deed do not intend that any of its terms will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person not a party to it.