

SCHEDULE 6

FORM OF DEED OF NOVATION

DATED [Insert Date] 20[Insert]

[EMPLOYER] (1)

and

[CONSULTANT] (2)

and

[CONTRACTOR] (3)

NOVATION AGREEMENT

In relation to

[Insert Details of Project]

THIS AGREEMENT is made on the **[Insert]** day of **[Insert]** 20 **[Insert]**

BETWEEN:

- 1) **[EMPLOYER]** of **[Registered Address]** together with its successors and its permitted assigns ("the Employer"); and
- (2) **[CONSULTANT]** (registered in England and Wales No [company number]) whose registered office is at **[Registered Office]** ("the Consultant")
- (3) **[CONTRACTOR]** (registered in England and Wales No [company number]) whose registered office is at **[Registered Office]** ("the Contractor")

RECITALS

- (A) By an agreement dated on or about **[Insert Date]** (the "**Appointment**") the Employer has appointed the Consultant to provide **[Insert Details]** services (the "**Services**").
- (B) Under a Contract dated on or about **[Insert Date]** (the "**Contract**") the Employer has appointed the Contractor to design and construct certain works as described in the Contract (the "**Works**").
- (C) The Employer, Consultant and Contractor have agreed that from the date of this agreement the Contractor shall assume the rights, liabilities and obligations of the Employer and that the Consultant shall perform its obligations under the Appointment in favour of the Contractor and that the Employer and the Consultant shall each release the other from any obligations owed by the other to them under the Appointment.

NOW IT IS AGREED as follows:

1. RELEASE BY THE EMPLOYER OF THE CONSULTANT

- 1.1 The Employer releases and discharges the Consultant from any and all obligations and liabilities owed to the Employer under the Appointment.

2. RELEASE BY THE CONSULTANT OF THE EMPLOYER

- 2.1 Subject to all fees properly due and owing under the Appointment at the date of this agreement having been paid to the Consultant, the Consultant releases and discharges the Employer from any and all obligations and liabilities owed to the Consultant under the Appointment, and accepts the liability of the Contractor under the Appointment in lieu of the liability of the Employer.

3. ACCEPTANCE OF LIABILITY BY THE CONSULTANT TO THE CONTRACTOR

- 3.1 Subject to the variations, if any, set out in **Appendix 1** to this Agreement, the Consultant undertakes to perform the Appointment and to be bound by its terms, in every way as if the Contractor were and had been from inception of the Appointment a party to the Appointment in lieu of the Employer.
- 3.2 All rights of action and remedies against the Consultant under or pursuant to the Appointment vested in the Employer shall from the date of this Deed vest in the Contractor.
- 3.3 The Consultant warrants to the Contractor that, in respect of the duties and obligations which it has already performed under the Appointment, it has performed those duties and obligations in accordance with the standards of skill and care set out in the Appointment. Furthermore, the Consultant shall be liable for any loss or damage suffered or incurred by the Contractor, arising out of any negligent act, default or breach of the Consultant's obligations under the Appointment, provided always that the Contractor has taken all reasonable action to mitigate such losses or damage, notwithstanding that the Employer may not have suffered any or as much loss or damage. No waiver by the Employer, either express or implied, shall affect the Consultant's liability to the Contractor pursuant to this clause.

- 3.4 The liability of the Consultant to the Contractor pursuant to this agreement, or pursuant to the Appointment, shall not be affected by the Consultant's assumption of liability for design to the Employer pursuant to the Contract.
- 3.5 The Consultant acknowledges that the Contractor has relied upon, and will continue to rely upon, the Services carried out by the Consultant.
- 3.6 The Consultant shall have regard to any obligations on the part of the Contractor in the Contract, and shall perform the Services in the Appointment or as amended in the Schedules hereto in such manner and at such times so as not to constitute, cause or contribute to any breach of the Contract by the Contractor.

4. ACCEPTANCE OF LIABILITY BY THE CONTRACTOR

- 4.1 With the exception of any outstanding liability to pay any fees properly owing under the Appointment at the date of this agreement, and subject to the variations if any set out in **Appendix 2** to this agreement, the Contractor accepts the liabilities of the Employer, and undertakes to perform the Appointment and to be bound by its terms in every way as if the Contractor were, and had been from inception of the Appointment, a party to the Appointment in lieu of the Employer, and as if all acts and omissions of the Employer under or pursuant to the Appointment prior to the date of this Agreement were the acts or omissions of the Contractor.
- 4.2 All rights of action and remedies vested in the Contractor under or pursuant to the Appointment shall from the date of this agreement vest against the Contractor.

5. AFFIRMATION OF APPOINTMENT

- 5.1 The terms and conditions of this agreement represent the entire agreement between the parties relating to the novation of the Appointment, and except as specifically amended by this agreement, all the terms and conditions of the Appointment remain in full force and effect.

6. WARRANTIES AND ACKNOWLEDGEMENTS

6.1 The Employer warrants and acknowledges to the Contractor that:

- (a) it has at all times observed and performed and is not in breach of the Appointment; and
- (b) at the date hereof it has paid to the Consultant the sum of £[] plus VAT in accordance with the terms and conditions of the Appointment; and
- (c) at the date hereof there is no sum or sums due to the Consultant under the Appointment or arising therefrom that have not been discharged by the Employer; and
- (d) it is not aware of any breach of the Appointment committed by the Consultant; and
- (e) it has not assigned the Appointment nor any benefit arising under or from that Appointment to any third party and it is not holding any such benefit on trust for any third party.

6.2 The Consultant acknowledges that, prior to entering into this agreement, it has inspected a copy of the Contract (including all documents comprising the Contract). The Consultant further acknowledges that any breach of the Appointment (whether on or before the date of this agreement or at any time thereafter) may result in the Contractor incurring liabilities under or arising out of the Contract and/or other contracts that the Contractor has or may enter into.

7. EXISTING CLAIMS

7.1 In this clause the “Existing Claims” mean such breaches or alleged breaches of obligations under the Appointment as are at the date of this agreement the subject of adjudication, arbitration, litigation or any other form of dispute resolution between the Employer and Consultant, brief details of which are set out in **Appendix 3**.

7.2 Notwithstanding any other provision in this Agreement, this Agreement shall not operate to release or discharge the Employer or the Consultant in respect of the Existing

Claims.

7.3 The Employer hereby assigns to the Contractor the right to pursue or defend the Existing Claims in the name of the Employer.

7.4 The Contractor shall indemnify the Employer in respect of any costs, damages, or expenses incurred by the Employer in consequence of the Contractor pursuing or defending the Existing Claims.

7.5 The Employer shall account to the Contractor in respect of any sums which the Employer receives from the Consultant in respect of the Existing Claims.

8. LAW AND JURISDICTION

8.1 This Agreement and the rights and obligations of the parties under it shall be governed and construed according to the laws of England & Wales as applied in Wales. Any dispute shall be subject to the jurisdiction of the courts of England & Wales.

9. CONTRACT (RIGHTS OF THIRD PARTIES) ACT 1999

9.1 No provision of this Agreement is intended to create or creates any right or benefit enforceable against the parties to this Agreement under the Contract (Rights of Third Parties) Act 1999.

IN WITNESS whereof the parties have executed and delivered this Agreement as a Deed on the date and year stated above

EXECUTED as a **DEED** by the
EMPLOYER by affixing its
Common Seal in the presence
of:-

Authorised signatory

Alternative A (where the Consultant is a company)

**EXECUTED as a DEED by THE
CONSULTANT** acting by a Director and
the Company Secretary or by two
Directors whose signatures appear below:

Director

Director/Company Secretary

Alternative B (where the Consultant is a partnership)

**EXECUTED AS A DEED by THE
CONSULTANT** by the signatures of
those partners authorised to bind the
Consultant:-

Partner

(name)

(signature)

In the presence of: (witness signature)

Full name of witness

Occupation of witness

Address of witness

Partner

(name)

(signature)

In the presence of: (witness signature)

Full name of witness

Occupation of witness

Address of witness

Partner

(name)

(signature)

In the presence of: (witness signature)

Full name of witness

Occupation of witness

Address of witness

**EXECUTED as a DEED by THE
CONTRACTOR** acting by:

Alternative A

Authorised Signatory

Authorised Signatory

Alternative B

Director

Director/Company Secretary

***NOTE: ATTESTATION CLAUSES WILL BE SUBJECT TO CHANGE DEPENDING UPON
EACH LOCAL AUTHORITY'S SPECIFIC REQUIREMENTS.***

APPENDIX 1

Schedule of amendments to be made to the Consultant's Services and or Obligations

The parties hereto agree that with effect from date of agreement the Appointment is amended as follows:

- 1.1.1 Automatic termination of the Appointment upon termination for whatever reason of the Building Contract.
- 1.1.2 Compliance with the Consultant's programme.
- 1.1.3 Compliance with a design programme.
- 1.1.4 Extensions of time for performance of the Consultant's obligations.
- 1.1.5 Delete obligations which, if novated, would make a nonsense of the Deed e.g.:
 - For consultant to advise on main contract tenders
 - For consultant to instruct Consultant to rectify unsatisfactory work or advise on deductions.

NB If there are no amendments to the Appointment then this should be stated.

APPENDIX 2

Schedule of amendments to be made to the Employer's obligations and or liabilities

APPENDIX 3

Schedule of Existing Claims