

SILVERTOWN TUNNEL

Volume 3: Project Agreement – Schedules 2 to 31

Schedule 28 – Direct Agreements and Other Contracts and Agreements

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SCHEDULE 28

DIRECT AGREEMENTS AND OTHER CONTRACTS AND AGREEMENTS

Part 1 - Funders' Direct Agreement¹

¹ [REDACTED]



Silvertown Tunnel Project Funders' Direct Agreement

TfL

and

[Security Trustee]

and

[Project Co]

Part 1 - Funders' Direct Agreement

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Part 1 - Funders' Direct Agreement

THIS AGREEMENT is made on

201●

BETWEEN:

(1) **TRANSPORT FOR LONDON** of Windsor House, 42-50 Victoria Street, London, SW1H 0TL ("TfL");

(2) [SECURITY TRUSTEE] (company number ●) whose registered office is at ● (the "Security Trustee" for the Senior Funders²);

(3) [PROJECT CO] (company number ●) whose registered office is at ● ("Project Co"),

each a "Party" and together the "Parties".

RECITALS

(A) Under the Senior Financing Agreements dated on or around the date hereof, the Senior Funders have agreed to make certain credit facilities available to Project Co in relation to the Project.

(B) The Project Agreement sets out the terms on which TfL has appointed Project Co to undertake the Works and perform the Services.

(C) This Agreement sets out certain agreements between TfL, Project Co and the Security Trustee.

THE PARTIES AGREE AS FOLLOWS:

1. **INTERPRETATION³**

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

"Accrued Rights" has the meaning given to it in clause 10.8;

"Accrued Rights Value" means each of the [D&C Accrued Rights Liquidated Damages Value, the D&C Accrued Rights Value, [the O&M Accrued Rights Lifecycle Works Value], the O&M Accrued Rights Termination Value and the O&M Accrued Rights Value];

"Adjudicator" means an adjudicator appointed pursuant to clause 13 (*Dispute Resolution*) to determine a dispute relating to this Agreement;

"Appointed Representative" means a Representative that has assumed Project Co's rights under the Project Agreement pursuant to clause 5.1;

["D&C Accrued Rights Liquidated Damages Value" means the amounts that would count against the D&C Contractor's Liquidated Damages Cap upon realisation of the Accrued Rights based upon the assessment notified to TfL under clause 10.15, as the same may be adjusted in accordance with clause 13 (*Dispute Resolution*);]

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["**D&C Accrued Rights Value**" means the amounts that would count against the D&C Contractor's Liability Cap upon realisation of the Accrued Rights based upon the assessment notified to TfL under clause 10.15, as the same may be adjusted in accordance with clause 13 (*Dispute Resolution*)];

"**D&C Contract**" means the D&C Contract as defined in the Project Agreement and/or any novation thereof pursuant to the TfL D&C Collateral Warranty;

["**D&C Contractor Default**" has the meaning given to it in the D&C Contract];

["**D&C Contractor's Liability Cap**" has the meaning given to it in the D&C Contract];

["**D&C Contractor's Liquidated Damages Cap**" has the meaning given to it in the D&C Contract;]

["**Final Statement**" has the meaning given to it in the D&C Contract];

["**Interim Payment**" has the meaning given to it in the D&C Contract];

["**Life Cycle Works Cap**" has the meaning given to it in the O&M Agreement;]⁴

["**Monthly O&M Payment**" has the meaning given to it in the O&M Agreement];

"**No Liquid Market Notice**" has the meaning given to it in clause 4.1;

"**Notice of Adjudication**" has the meaning given to it in clause 13.6;

["**O&M Accrued Rights Life Cycle Works Value**" means the amount that would count against the Life Cycle Works Cap upon realisation of the Accrued Rights based upon the assessment notified to TfL under clause 10.15, as the same may be adjusted in accordance with clause 13 (*Dispute Resolution*)];

["**O&M Accrued Rights Termination Value**" means the amounts that would count against the O&M Contractor Termination Cap upon realisation of the Accrued Rights based upon the assessment notified to TfL under clause 10.15, as the same may be adjusted in accordance with clause 13 (*Dispute Resolution*)];

["**O&M Accrued Rights Value**" means the amount that would count against the O&M Contractor Liability Cap upon realisation of the Accrued Rights based upon the assessment notified to TfL under clause 10.15, as the same may be adjusted in accordance with clause 13 (*Dispute Resolution*)];

"**O&M Agreement**" means the O&M Agreement as defined in the Project Agreement and/or any novation thereof pursuant to TfL O&M Collateral Warranty;

["**O&M Contractor Default**" has the meaning given to it in the O&M Agreement];

["**O&M Contractor Liability Cap**" has the meaning given to it in the O&M Agreement];

["**O&M Contractor Termination Cap**" has the meaning given to it in the O&M Agreement];

⁴ [REDACTED]

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"Payment Mechanism" means the payment mechanism set out in Schedule 20 (*Payment Mechanism*) of the Project Agreement;

"Project Agreement" means the project agreement dated on or about the date of this Agreement between TfL and Project Co in relation to the Project;

"Relevant Required Insurances" means the Required Insurances described in paragraph 2 (*Delay in Start Up Insurance*) of Part 1 (*Policies to be taken out during the Works*) and paragraph 2 (*Business Interruption Insurance*) of Part 2 (*Policies to be taken out during the Availability Period*) of Schedule 21 (*Insurance*) of the Project Agreement;

"Relevant Sub-Contractor" means a counterparty to a Sub-Contract;

"Relevant Year" means the Agreement Year in which the Termination Date occurs;

"Representative" means:

- (a) the Security Trustee, any Finance Party and/or any of their Affiliates;
- (b) an administrator, administrative receiver, receiver or receiver and manager of Project Co appointed under the Security Documents;
- (c) a person directly or indirectly owned or controlled by the Security Trustee and/or any Finance Party; or
- (d) any other person approved by TfL (such approval not to be unreasonably withheld or delayed);

"Required Period" means, subject to clause 4 (*No Liquid Market*), a period starting on the date of a Termination Notice (or, where TfL has exercised its rights pursuant to clause 37.1 (*Continuity of Service*) of the Project Agreement, the period starting on the date of expiry of the three (3) month period referred to therein) and:

- (a) prior to the Permit to Use Date, ending ninety (90) Working Days after the date of the Termination Notice;
- (b) on or after the Permit to Use Date, ending sixty (60) Working Days after the date of the Termination Notice; or
- (c) in either case, ending on such earlier date as the Security Trustee may specify by written notice to TfL;

"Senior Debt Discharge Date" means the date on which all amounts which may be or become owing by Project Co to each Finance Party under the Senior Financing Agreements have been irrevocably paid in full;

"Senior Representatives" has the meaning given to it in clause 13.5;

"Step-In Date" means the date on which the Security Trustee takes any action under clause 5.1;

"Step-In Period" means a period from the Step-In Date up to and including the earlier of:

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- (a) the date specified in a written notice from the Security Trustee or the Appointed Representative to TfL (which date shall be at least twenty (20) Working Days after such notice is received by TfL);
- (b) the date of any transfer under clause 8 (*Novation*);
- (c) the date of any termination for breach under clause 6 (*Step-In Period*); and
- (d) the date of expiry of the Project Agreement;

"Step-Out Date" means the date of expiry of the Step-In Period;

"Sub-Contract" means a contract relating to the provision of Works or Services which is the subject of a Collateral Warranty;

"Suitable Substitute Project Co" means a person approved by TfL (such approval not to be unreasonably withheld or delayed) as:

- (a) having the legal capacity, power and authority to become a party to and perform the obligations of Project Co under the Project Agreement;
- (b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to enable it to perform the obligations of Project Co under the Project Agreement; and
- (c) not being an Unsuitable Third Party;

"Termination Notice" means a notice given by TfL to the Security Trustee under clause 3.1;

["TfL D&C Collateral Warranty" means the Collateral Warranty between TfL, Project Co and the D&C Contractor;]

["TfL Construction Liability Cap" means the D&C Contractor's Liability Cap less the D&C Accrued Rights Value;]

["TfL Construction Liquidated Damages Cap" means the D&C Contractor's Liquidated Damages Cap less the D&C Accrued Rights Liquidated Damages Value;]

["TfL O&M Collateral Warranty" means the Collateral Warranty between TfL, Project Co and the O&M Contractor;]

["TfL O&M Liability Cap" means the O&M Contractor Liability Cap for the Relevant Year less the O&M Accrued Rights Value;]

["TfL O&M Life Cycle Works Cap" means the Life Cycle Works Cap less the O&M Accrued Rights Life Cycle Works Value;]

["TfL O&M Termination Cap" means the O&M Contractor Termination Cap less the O&M Accrued Rights Termination Value;]

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["**TfL Liability Cap**"⁵ means each of TfL O&M Liability Cap, TfL O&M Termination Cap, [the Life Cycle Works Cap,] or TfL Construction Liability Cap [, or TfL Construction Liquidated Damages Cap];] and

["**Unrestricted Assets**" means those Assets which are required by TfL or its nominee or any replacement of Project Co for the purposes of the construction, operation or maintenance of the Project Facilities following expiry or termination of the Project Agreement assuming such construction, operation or maintenance is carried out on terms substantially the same as the terms of the Project Agreement, excluding any revenues or cash balances or rights accrued as at the End Date under or pursuant to or in connection with any of the Relevant Required Insurances (but not other Required Insurances), any Sub-Contract or any Project Document.]

- 1.2 The following terms have the meaning given to them in the Project Agreement : [**Note: to be conformed with the defined terms in the Project Agreement once finalised.**]

"**Additional Permitted Borrowing**"

"**Adjusted Estimated Fair Value of the Agreement**"

"**Agreement Year**"

"**Affiliate**"

"**Assets**"

"**Availability Payment**"

"**Base Senior Debt Termination Amount**"

"**Collateral Warranty**"

"**Deductions**"

"**D&C Contractor**"

"**Distribution**"

"**End Date**"

"**Expiry Date**"

"**Final Persistent Breach Warning Notice**"

"**Hold Co**"

"**Joint Insurance Account**"

"**Liquid Market**"

"**O&M Contractor**"

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"Permit to Use Date"

"Permit to Use Requirements"

"Persistent Breach Warning Notice"

"Physical Damage Policies"

"Project"

"Project Co Default"

"Project Documents"

"Project Co Related Party"

"Ramping Factor"

"Required Insurances"

"Revised Senior Debt Termination Amount"

"Senior Financing Agreements"

"Services"

"Sub-Contractor"

"Termination Date"

"Termination Sum"

"Unsuitable Third Party"

"Working Day"

"Works"

1.3 The following terms have the meaning given to them in the Senior Financing Agreements⁶ :

["Direct Agreements"]

["Event of Default"]

["Finance Party"]

["Proceeds Account"]

["Secured Finance Parties"]

["Security Document"]

["Senior Finance Parties"]

⁶ [REDACTED]

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["Senior Funders"]

1.4 **Interpretation** [*Note: this will be updated by Ashurst once the Project Agreement is finalised.*]

In this Agreement, except where the context or the express provisions of this Agreement otherwise require:

- (a) the masculine includes the feminine and vice-versa;
- (b) the singular includes the plural and vice-versa;
- (c) a reference in this Agreement to any clause, sub-clause, paragraph, part, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph or schedule of this Agreement;
- (d) save where expressly stated to the contrary in this Agreement, any reference to this Agreement or to any other document shall include any permitted variation, amendment, or supplement to such document;
- (e) any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- (f) references to any documents being "in the agreed form" means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification;
- (g) a reference to a person includes firms, partnerships and corporations;
- (h) any reference to a public organisation or representative shall be deemed to include reference to any successor to such public organisation or representative or any organisation or entity or representative which has taken over the functions or responsibilities of such public organisation or representative in whole or in part. References to other persons shall include their successors and permitted assignees or transferees;
- (i) headings and sub-headings are for convenience of reference only;
- (j) any obligation on Project Co to do or not to do anything shall be deemed to include an obligation to procure or not to permit or suffer such things to be done by any Project Co Related Party and acts or omissions of any Project Co Related Party shall be deemed to be acts or omissions of Project Co for the purposes of this Agreement;
- (k) the words "include" and "including" are to be construed as meaning "including, without limitation";
- (l) references to "writing" shall include any mode of reproducing words in any legible form; and
- (m) where Project Co is:
 - (i) required to issue a notice or response to TfL and/or the Security Trustee pursuant to this Agreement; and

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- (ii) no express time limit for issuing such notice or response to TfL and/or the Security Trustee is specified,

then Project Co shall issue such notice or response to TfL and/or the Security Trustee as soon as reasonably practicable.

2. CONSENT TO SECURITY

- 2.1 TfL acknowledges notice of, and consents to, the security interests granted over Project Co's rights under the Project Documents, the Ancillary Documents and Relevant Required Insurances effected by Project Co in favour of each Finance Party under the Security Documents.
- 2.2 TfL confirms that it has not received notice of any other security interest granted over Project Co's rights under the Project Documents.
- 2.3 Without prejudice to the provisions of clause 29 (*Change of Ownership*) of the Project Agreement, TfL acknowledges notice of and consents to the security interest granted by Hold Co in favour of each Finance Party over the entire issued share capital of Project Co.
- 2.4 Subject to clause 2.5 and clause 9.2, Project Co and the Security Trustee hereby instruct TfL (and TfL agrees) to pay all sums payable by TfL to Project Co under the Project Documents into the [Proceeds Account].
- 2.5 Following the occurrence of an Event of Default, if so directed by the Security Trustee upon giving reasonable notice, TfL shall, subject to clause 9.2, pay any sum which it is obliged to pay to Project Co under the Project Documents to a bank account specified by the Security Trustee.

3. NOTICE OF TERMINATION AND EXISTING LIABILITIES

- 3.1 TfL shall not terminate or give notice terminating the Project Agreement on the grounds of Project Co Default, corrupt gifts and fraud and breach of the refinancing provisions, without giving to the Security Trustee:
 - (a) at least the relevant Required Period of prior written notice stating:
 - (i) the proposed Termination Date; and
 - (ii) the grounds for termination in reasonable detail; and
 - (b) no later than the date falling twenty (20) Working Days after the date of a Termination Notice or, if earlier, the date falling twenty (20) Working Days after the date on which the Security Trustee informs TfL that an Event of Default has occurred, a notice containing details of any amount owed by Project Co to TfL and any other existing liabilities or unperformed obligations of which TfL is aware (having made reasonable enquiry):
 - (i) at the time of the Termination Notice or the notification of an Event of Default; and
 - (ii) (if relevant) which will fall due on or prior to the end of the relevant Required Period,

under the Project Documents.

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- 3.2 TfL shall notify the Security Trustee in writing as soon as reasonably practicable of:
- (a) any change in the amounts, liabilities or obligations referred to in clause 3.1(b); and
 - (b) any further amounts, liabilities or obligations falling due and payable to TfL but unpaid or falling due for performance or discharge by Project Co and unperformed or not discharged (as the case may be),

in each case, of which TfL is or becomes aware before the earlier of the Step-In Date and (if relevant) the expiry of the relevant Required Period but after the date of a notice given under clause 3.1(b) and, if such details are provided within the last ten (10) Working Days of the relevant Required Period, then the relevant Required Period shall be extended by ten (10) Working Days.

4. NO LIQUID MARKET

- 4.1 If at any time during a Required Period the Security Trustee believes that no Liquid Market exists, the Security Trustee may issue a written notice (the "**No Liquid Market Notice**") to TfL setting out same, including reasons.
- 4.2 On or before the date falling ten (10) Working Days after the date on which a No Liquid Market Notice is received by TfL, TfL shall notify the Security Trustee of its opinion as to whether or not a Liquid Market exists, and where TfL believes that a Liquid Market does exist, such notice shall set out the reasons for TfL's belief.
- 4.3 Following the issue of a notice under clause 4.2:
- (a) if the Parties do not agree whether or not a Liquid Market exists, then any Party may refer the dispute to be determined in accordance with clause 13 (*Dispute Resolution*); and
 - (b) the Parties agree or it is determined in accordance with clause 13 (*Dispute Resolution*) that no Liquid Market exists and the Project Agreement is subsequently terminated the provisions of paragraph 3 (*No Retendering Procedure*) of Part 2 (*Compensation on Termination for Project Co Default*) of Schedule 27 (*Compensation on Termination*) of the Project Agreement shall apply in relation to such termination.
- 4.4 If any dispute relating to this clause 4 (*No Liquid Market*) is determined under clause 13 (*Dispute Resolution*), the relevant Required Period shall be extended by the period of time spent determining such dispute pursuant to such clause.

5. REPRESENTATIVE

- 5.1 Without prejudice to the rights of the Security Trustee under the Security Documents, at any time:
- (a) during which an Event of Default is subsisting (whether or not a Termination Notice has been served); or
 - (b) during a Required Period,

the Security Trustee may procure that a Representative assumes, jointly and severally with Project Co, all of Project Co's rights under the Project Documents.

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5.2 The Security Trustee shall give TfL five (5) Working Days' prior written notice of any action to be taken by it referred to in this clause 5 (*Representative*).

6. **STEP-IN PERIOD**

6.1 Without prejudice to clause 3 (*Notice of Termination and Existing Liabilities*) but subject to clause 6.2, TfL shall not terminate the Project Agreement during a Step-In Period on grounds:

- (a) that the Security Trustee has taken any action referred to in clause 5 (*Representative*) or enforced any Security Document; or
- (b) arising on or prior to the Step-In Date of which TfL is aware (having made reasonable enquiry and whether or not continuing at the Step-In Date); or
- (c) arising solely in relation to Project Co,

unless, in the case of clause 6.1(b):

- (i) the grounds arose prior to the Permit to Use Date and the Permit to Use Requirements are not met on or before the date falling twelve (12) months after the date on which TfL would have been entitled to terminate the Project Agreement for failing to secure the issue of the Permit to Use by the Longstop Permit to Use Date; or
- (ii) the grounds arose on or after the Permit to Use Date and neither the Appointed Representative nor Project Co is using all reasonable endeavours (including implementation of any remedial programme) to remedy any breach of the Project Agreement that:
 - (A) arose prior to the Step-In Date; and
 - (B) is continuing (and capable of remedy); and
 - (C) would have entitled TfL to terminate the Project Agreement.

6.2 TfL shall be entitled to terminate the Project Agreement by written notice to Project Co and the Appointed Representative:

- (a) if permitted by clause 6.1;
- (b) if any amount referred to in clause 3.1(b)(i) has not been paid to TfL on or before the Step-In Date;
- (c) if any amount referred to in clause 3.1(b)(ii) has not been paid on or before the last day of the relevant Required Period;
- (d) if amounts, of which TfL was not aware (having made reasonable enquiry) at the time of the Termination Notice or the Event of Default, subsequently become payable and are not discharged on or before the later of:
 - (i) the date falling twenty (20) Working Days after the date on which the liability for these amounts is notified to the Security Trustee;

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- (ii) the date falling twenty (20) Working Days after the date on which the liability for these amounts falls due; and
- (iii) the last day of the relevant Required Period; or
- (e) on grounds arising after the Step-In Date in accordance with the terms of the Project Agreement provided that, subject to clause 7.3, for the purposes only of termination under the Project Agreement (and without prejudice to the rights of TfL to make Deductions):
 - (i) Deductions, Persistent Breach Warning Notices and Final Persistent Breach Warning Notices that arose prior to the Step-In Date shall not be taken into account during the relevant Step-In Period but shall be taken into account after the relevant Step-Out Date; and
 - (ii) Ramping Factors being applied at the Step-In Date shall be suspended during the relevant Step-In Period but shall be re-applied with effect from the relevant Step-Out Date.

6.3 TfL shall deal with the Appointed Representative and not Project Co during any Step-In Period.

7. STEP-OUT

7.1 The Appointed Representative will, on the Step-Out Date be released from all of its obligations and liabilities to TfL under the Project Documents arising prior to the relevant Step-Out Date and rights of the Appointed Representative against TfL will be cancelled.

7.2 Project Co shall continue to be bound by the terms of the Project Documents, notwithstanding the occurrence of the relevant Step-Out Date.

7.3 If following the Step-Out Date TfL is satisfied (acting reasonably) that the circumstances giving rise to the Security Trustee electing to exercise its rights under clause 5 (*Representative*) have been remedied in full, then for the purposes of termination of the Project Agreement only, and without prejudice to the rights of TfL to make Deductions:

- (a) any Deductions, Persistent Breach Warning Notices and Final Persistent Breach Warning Notices that arose prior to the Step-In Date; or

- (b) Ramping Factors subsisting at the Step-In Date,

shall be immediately cancelled or disregarded, provided that where, during the relevant Step-In Period, Project Co has substituted or replaced the defaulting O&M Contractor, or a defaulting sub-contractor to the O&M Contractor, and has elected to exercise its rights under clause 42.4 (*Replacement of Sub-Contractors*) of the Project Agreement, the provisions of clause 42.4 (*Replacement of Sub-Contractors*) of the Project Agreement will apply from the date of substitution or replacement of that O&M Contractor or sub-contractor to that O&M Contractor.

8. NOVATION

8.1 Subject to TfL confirming the proposed transferee is a Suitable Substitute Project Co, pursuant to clause 8.2, at any time:

- (a) during which an Event of Default is subsisting; or

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(b) during a Step-In Period,

the Security Trustee may, on at least twenty (20) Working Days' prior written notice to TfL and any Appointed Representative, procure the transfer of Project Co's rights and liabilities under the Project Documents to a Suitable Substitute Project Co.

8.2 Following receipt of a notice under clause 8.1, TfL shall notify the Security Trustee as to whether any person to whom the Security Trustee proposes to transfer Project Co's rights and liabilities under the Project Documents is a Suitable Substitute Project Co, on or before the date falling twenty (20) Working Days after the date of receipt of all information reasonably required by TfL to decide whether the proposed transferee is a Suitable Substitute Project Co.

8.3 TfL shall not unreasonably withhold or delay its decision on whether the proposed transferee is a Suitable Substitute Project Co.

8.4 On any transfer referred to in clause 8.1 becoming effective:

(a) Project Co and the Appointed Representative shall be released from any obligations arising under or in connection with this Agreement and the Project Documents from the date of the transfer and the new project company shall become liable for obligations arising on or after that date;

(b) any Deductions, Persistent Breach Warning Notices, Final Persistent Breach Warning Notices and Ramping Factors subsisting shall, for the purposes of clause 34.1 (*Project Co Default*) of the Project Agreement only, and without prejudice to the rights of TfL to make Deductions, be cancelled or disregarded;

(c) any then subsisting ground for termination of the Project Agreement shall be deemed to have no effect and any subsisting Termination Notice shall be automatically revoked; and

(d) TfL shall enter into a direct agreement on substantially the same terms as this Agreement with the Security Trustee.

9. **INSURANCE PROCEEDS**

9.1 Notwithstanding the other provisions of this Agreement and the terms and conditions of the Senior Financing Agreements, the Security Trustee shall only permit amounts to be released from the Joint Insurance Account in accordance with the requirements of clause 32.7 (*Reinstatement*) of the Project Agreement and the Security Trustee agrees for itself and on behalf of the Finance Parties that it shall not exercise any rights under the Senior Financing Agreements or take any other steps to prevent amounts being released from the Joint Insurance Account in accordance with clause 32.7 (*Reinstatement*) of the Project Agreement.

9.2 Notwithstanding any terms of any other document, the Parties agree and shall, to the extent it is within their power, direct that all insurance proceeds in an amount in excess of [REDACTED] (Indexed) receivable or received by Project Co under any Physical Damage Policy in relation to the Works or Project Facilities in respect of a single event (or a series of related events) shall be paid directly into the Joint Insurance Account and applied in accordance with the Project Agreement.

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10. TFL RIGHTS

10.1 Notwithstanding any provision in the Collateral Warranties to the contrary, and without prejudice to clause 10.9, TfL agrees that it will not exercise or seek to exercise any of its rights under or in respect of any Collateral Warranty prior to termination of the Project Agreement until the earlier of:

- (a) the Senior Debt Discharge Date;
- (b) the date on which the Security Trustee has given its written consent to such exercise following a request from TfL or otherwise; and
- (c) the time when in respect of any such Collateral Warranty either:
 - (i) the Security Trustee has failed to exercise any corresponding right to the right that TfL is seeking to exercise under such Collateral Warranty under their own Security Documents and the time for exercising such right has ended in accordance with the terms thereof; or
 - (ii) the Security Trustee has confirmed in writing to TfL (following any request from TfL for such confirmation to which the Security Trustee shall be obliged to respond promptly) that it does not intend to exercise any of its rights under the relevant Security Document or that it has no further claim thereunder; or
 - (iii) the Security Trustee has stepped in to, or otherwise, directly or indirectly, has taken control over the rights of Project Co under the relevant Sub-Contract (in accordance with their rights under the Security Documents) and then stepped out from, or otherwise relinquished control of such rights under or in connection with such agreement.

10.2 TfL shall not, prior to the Senior Debt Discharge Date:

- (a) do anything pursuant to the Collateral Warranties or the Sub-Contracts following the Termination Date (including any act which gives rise to any cross claim, counterclaim, set off, variation or waiver) to prejudice the Accrued Rights relating to the Sub-Contracts;
- (b) claim, recover, retain or receive (or seek to claim, recover, retain or receive) any amounts (including any costs, claims, damages, losses and liabilities) to which the Accrued Rights relate under, pursuant to or in connection with the Collateral Warranties and/or the Sub-Contracts;
- (c) take any action to wind-up, dissolve, appoint an administrator, trustee, receiver (of any type), compulsory manager or similar officer, or sanction a voluntary arrangement or scheme of arrangement (or similar) in relation to Project Co or take any other similar or analogous step relating to the insolvency of Project Co;
- (d) take any action to wind-up, dissolve, appoint an administrator, trustee, receiver (of any type), compulsory manager or similar officer, or sanction a voluntary arrangement or scheme of arrangement (or similar) in relation to any Relevant Sub-Contractor or any of their respective guarantors or take any other similar or analogous step relating to the insolvency of any such person in each case on grounds (whether in whole or in part) relating to the Project; or

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- (e) save with the prior written consent of the Security Trustee, compete with the rights of the Finance Parties on grounds (whether in whole or in part) relating to the Project (by virtue of a claim under any of the Collateral Warranties, the Project Agreement or any other Project Document or otherwise) on any formal insolvency of Project Co, any Relevant Sub-Contractor or any of their respective guarantors, nor claim to be subrogated to any rights of any of the Finance Parties.

10.3 For the purposes of clause 10.2, the Parties agree that:

- (a) the request by TfL that a Relevant Sub-Contractor accept the instructions of TfL to the exclusion of Project Co pursuant to and in accordance with the relevant Collateral Warranty; and
- (b) the exercise by TfL of its rights pursuant to and in accordance with:
 - (i) clause 10.5(a) and clause 10.5(b) to make deductions, retention or set-off against the [Monthly O&M Payment] under and in accordance with the O&M Agreement;
 - (ii) clause 10.5(c) [and clause 10.5(d)] to terminate and claim termination compensation under and in accordance with the O&M Agreement;
 - (iii) clause 10.6(a), clause 10.6(b) and clause [10.6(d)] to make deductions or withholdings against an [Interim Payment] under and in accordance with the D&C Contract; [or]
 - (iv) clause 10.6(c) to terminate and claim compensation under and in accordance with the D&C Contract;
 - (v) [clause 10.7(a) and clause 10.7(b) to make deductions, retention or set-off against the [Monthly] [Payment] under and in accordance with the [x] Agreement; or]
 - (vi) [clause 10.7(c) to terminate and claim termination compensation under and in accordance with the [x] Agreement,]

shall not prejudice the Accrued Rights.

10.4 TfL agrees and undertakes that if it claims, recovers, retains or receives any amount:

- (a) in contravention of the provisions of clause 10.2, clause 10.5 and/or clause 10.6 [and/or clause 10.7]; or
- (b) pursuant to clause 10.5(e)(ii), clause 10.6(e)(ii) [or clause 10.7(d)(ii)] which the final determination of any Accrued Rights Value demonstrates is in excess of the relevant TfL Liability Cap,

it will promptly turn the same over to the Security Trustee and pending such payment, hold the same on trust for the Security Trustee and the Finance Parties.

10.5 In addition to its rights under clause 10.1, and subject to clause 10.2 and clause 10.3, where the Project Agreement has been terminated TfL shall, from the Termination Date, be entitled to exercise any of its step-in rights or other rights under or in respect of the TfL O&M Collateral Warranty, provided that:

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- (a) TfL may not claim, recover, retain or receive (or seek to claim, recover, retain or receive) an amount under, pursuant to or in connection with the TfL O&M Collateral Warranty and/or the O&M Agreement other than the making of deductions, retention, or set-off against (and only up to the amount of) each [Monthly O&M Payment] under and in accordance with [clause [x] and Schedule [x] of the O&M Agreement] in respect of services provided following the Termination Date;
- (b) if and to the extent that realisation of the Accrued Rights would count against the O&M Contractor Liability Cap in the Relevant Year, TfL shall only be entitled to make deductions, retention or set-off in the Relevant Year pursuant to clause 10.5(a) to the extent such deductions, retention or set-off do not exceed the TfL O&M Liability Cap;
- (c) if and to the extent that realisation of the Accrued Rights would count against the O&M Contractor Termination Cap, TfL shall only be entitled to exercise its rights to terminate the O&M Agreement (pursuant to clause [x] thereof) and to claim termination compensation up to a maximum limit of the aggregate Monthly O&M Payments in respect of the Services provided following the Termination Date, less deductions, retentions or set off referred to in clause 10.5(a) to the extent that such compensation does not exceed the TfL O&M Termination Cap;
- (d) [if and to the extent that realisation of the Accrued Rights would count against the [Life Cycle Works Cap], TfL shall only be entitled to claim any termination compensation which relates to the [Life Cycle Works Cap] to the extent that it does not exceed the [TfL O&M Life Cycle Works Cap], subject always to the maximum limit referred to in clause 10.5(c);⁷]
- (e) if TfL and the Security Trustee do not agree the O&M Accrued Rights Value:
- (i) either of TfL or the Security Trustee may refer the dispute for resolution in accordance with clause 13 (*Dispute Resolution*); and
- (ii) pending agreement or determination of the O&M Accrued Rights Value, TfL shall be entitled to exercise its rights under TfL O&M Collateral Warranty subject always to clause 10.4; and
- (f) unless permitted by clause 10.14, TfL shall not be entitled to exercise its rights under the TfL O&M Collateral Warranty where the event giving rise to termination of the Project Agreement is an event of O&M Contractor Default.
- 10.6 In addition to its rights under clause 10.1, and subject to clause 10.2 and clause 10.3, where the Project Agreement has been terminated, TfL shall, from the Termination Date, be entitled to exercise any of its step-in rights or other rights under or in respect of TfL D&C Collateral Warranty, provided that:
- (a) TfL may not claim, recover, retain or receive (or seek to claim recover, retain or receive) an amount under, pursuant to or in connection with the TfL D&C Collateral Warranty and/or the D&C Contract other than the making of deductions or withholdings against (and only up to the amount of) each [Interim Payment and/or Final Statement] under and in accordance with clause [x] and clause [x] of the D&C Contract in respect of works carried out following the Termination Date;

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- (b) if and to the extent that realisation of the Accrued Rights would count against the D&C Contractor's Liability Cap, TfL shall only be entitled to make deductions or withholdings pursuant to clause 10.6(a) to the extent that such deductions or withholdings, when aggregated with any termination compensation claimed pursuant to clause 10.6(c), do not exceed the TfL Construction Liability Cap;
 - (c) if and to the extent that realisation of the Accrued Rights would count against the D&C Contractor's Liability Cap, TfL shall only be entitled to exercise its rights to terminate the D&C Contract (pursuant to clause [x] thereof) and to claim termination compensation up to a maximum limit of the aggregate [interim payments] in respect of the Works provided following the Termination Date, less deductions, retentions or set off referred to in clause 10.6(a) to the extent that such compensation, when aggregated with any deductions or withholdings pursuant to clause 10.6(c), does not exceed the TfL Construction Liability Cap;
 - (d) [if and to the extent that realisation of the Accrued Rights would count against the D&C Contractor's Liquidated Damages Cap, TfL shall only be entitled to make deductions or withholdings pursuant to clause 10.6(a) which relate to the D&C Contractor's Liquidated Damages Cap to the extent that such deductions or withholdings do not exceed the TfL Construction Liquidated Damages Cap; ⁸]
 - (e) if TfL and the Security Trustee do not agree the D&C Accrued Rights Value:
 - (i) either of TfL or the Security Trustee may refer the dispute for resolution in accordance with clause 13 (*Dispute Resolution*); and
 - (ii) pending agreement or determination of the D&C Accrued Rights Value, TfL shall be entitled to exercise its rights under the TfL D&C Collateral Warranty subject always to clause 10.4; and
 - (f) unless permitted by clause 10.14, TfL shall not be able to exercise any of its step-in rights or other rights under or in respect of TfL D&C Collateral Warranty where the event giving rise to termination of the Project Agreement is an event of D&C Contractor Default.
- 10.7 ⁹ In addition to its rights under clause 10.1, and subject to clause 10.2 and clause 10.3, where the Project Agreement has been terminated, TfL shall, from the Termination Date, be entitled to exercise any of its step-in rights or other rights under or in respect of the [x] Collateral Warranty, provided that:
- (a) TfL may not claim, recover, retain or receive (or seek to claim, recover, retain or receive) an amount under, pursuant to or in connection with the [x] Collateral Warranty and or [x] Sub-Contract other than the making of deductions or withholdings against (and only to the amount of) each [monthly payment and/or final statement] under and in accordance with clause [x] and [x] of the [x] Sub-Contract in respect of [Services] carried out following the Termination Date;
 - (b) if and to the extent that realisation of the Accrued Rights would count against the [x] Sub-Contractor's Liability Cap, TfL shall only be entitled to make deductions or withholdings pursuant to clause 10.7(a), to the extent that such deductions or

⁸ [REDACTED]

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withholdings, [when aggregated with any termination compensation claimed pursuant to clause 10.7(c)] do not exceed the TfL [x] Liability Cap;¹⁰

- (c) if and to the extent that realisation of the Accrued Rights would count against the [x] Sub-Contractor's Liability Cap, TfL shall only be entitled to exercise its rights to terminate the [x] Sub-Contract (pursuant to clause [x] thereof) and to claim termination compensation up to a maximum limit of the aggregate [payments] [in respect of the [Works/Services] provided following the Termination Date], less deductions, retentions or set off referred to in clause 10.7(a) to the extent that such compensation, when aggregated with any deductions or withholdings pursuant to clause 10.7(c), does not exceed the TfL [x] Liability Cap;
- (d) if TfL and the Security Trustee do not agree the [x] Accrued Rights Value:
- (i) either of TfL or the Security Trustee may refer the dispute for resolution in accordance with clause 13 (*Dispute Resolution*); and
- (ii) pending agreement or determination of the [x] Accrued Rights Value, TfL shall be entitled to exercise its rights under TfL [x] Collateral Warranty subject always to clause 10.4; and
- (e) unless permitted by clause 10.14, TfL shall not be able to exercise any of its step-in rights or other rights under or in respect of the TfL [x] Collateral Warranty where the event giving rise to termination of the Project Agreement is an event of [x] Default.]
- 10.8 Notwithstanding the terms of the Collateral Warranties or any other provisions of this clause 10 (*TfL Rights*), each of the Relevant Sub-Contractors, together with any guarantors thereof, shall remain responsible, and be liable, to Project Co and the Secured Finance Parties in respect of all costs, claims, damages, losses and liabilities which have arisen out of or in connection with the Sub-Contracts, or the Security Documents and Direct Agreements relating thereto, in respect of the period prior to and including the Termination Date and Project Co and the Finance Parties (and the Security Trustee acting on behalf of Project Co and/or the Finance Parties) shall retain the benefit of all their respective rights to all such costs, claims, damages, losses and liabilities (the "**Accrued Rights**").
- 10.9 In addition to its other rights under this clause 10 (*TfL Rights*) but subject to clause 10.10, where following service of a Termination Notice but before the expiry of the relevant Required Period a Relevant Sub-Contractor has served a notice of termination, discontinuance or suspension on its contracting counterparty (whether Project Co or otherwise) in accordance with the terms of the relevant Sub-Contract, TfL may pay directly, or undertake to make a payment directly, to the Relevant Sub-Contractor, amounts properly due, payable and undisputed (whether as a result of a counterclaim, set-off or otherwise) under or pursuant to the relevant Sub-Contract and may set off such sums after they have been paid against any amounts payable by TfL to Project Co under the Project Agreement, so as to satisfy them pro tanto, provided that TfL shall not be able to exercise its rights pursuant to this clause 10.9 in circumstances where the Finance Parties:

¹⁰ [REDACTED]

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- (a) have stepped-in to, or otherwise, directly or indirectly, taken control over the relevant Sub-Contract and not stepped out of it or otherwise relinquished control; or
- (b) are seeking to preserve continuity of the Project with reasonable diligence.

10.10 To the extent that TfL makes a payment under clause 10.9, TfL shall not be entitled to make double recovery by making a Deduction from the Availability Payment under the Project Agreement in respect of performance failure by the Relevant Sub-Contractor without making an equivalent deduction against the payment made direct by TfL to the Relevant Sub-Contractor.

10.11 On early termination of the Project Agreement for any reason, TfL shall be entitled to set-off any payments made to Sub-Contractors under clause 10.9 (to the extent not previously set-off in accordance with that clause) against any payments made under the Project Agreement (subject to paragraph 2 (*Set-Off on Termination*) of Part 7 (*Calculation and Payment of Early Termination Payments*) of Schedule 27 (*Compensation on Termination*) of the Project Agreement).

10.12 Where following the Termination Date:

- (a) the Finance Parties do not have any Accrued Rights in respect of the Relevant Sub-Contractor;
- (b) all claims which may arise from any Accrued Rights in respect of the Relevant Sub-Contractor have been settled or written off by the Senior Finance Parties or become exhausted; or
- (c) the Security Trustee fails to comply with clause 10.15,

TfL may exercise its rights under the relevant Collateral Warranty without restriction.

10.13 The Security Trustee shall notify TfL as soon as reasonably practicable but in any event within two (2) Working Days after claims arising from the Accrued Rights are settled or written off by the Senior Finance Parties, or become exhausted.

10.14 On and after the earlier of:

- (a) the Senior Debt Discharge Date; and
- (b) the date on which the Security Trustee has given its written consent,

TfL shall be entitled to exercise its rights under the Collateral Warranties in connection with the D&C Contract, O&M Agreement, or other Sub-Contract in accordance with the Collateral Warranties without restriction.

10.15 Following termination of the Project Agreement, the Security Trustee shall, within ten (10) Working Days of receipt of a written request from TfL, provide to TfL written details of all Accrued Rights of which it is aware, having made enquiry of Project Co and the Finance Parties:

- (a) that Project Co may claim against the Relevant Sub-Contractor; and
- (b) that any Finance Party may claim against the Relevant Sub-Contractor,

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together with an indicative non-binding assessment of the O&M Accrued Rights Value, the O&M Accrued Rights Termination Value, [the O&M Accrued Rights Life Cycle Works Value], the D&C Accrued Rights Value and the [D&C Accrued Rights Liquidated Damages Value].

10.16 Prior to the Senior Debt Discharge Date but following termination of the Project Agreement, where the Finance Parties have enforced their security and a receiver appointed by or on behalf of the Finance Parties has made a prescribed part of Project Co's net property available for the satisfaction of unsecured debts (under section 176A of the Insolvency Act 1986), TfL may claim as an unsecured creditor against Project Co for a share of such prescribed part.

10.17 Notwithstanding the terms of the Project Agreement and Security Documents, the Security Trustee agrees that TfL may require the transfer of any Unrestricted Assets to TfL or its nominee following the End Date and the Security Trustee shall not exercise or seek to exercise any enforcement rights and shall, on or before the date any Unrestricted Assets are transferred to TfL or its nominee, as the case may be, each release its security over them.

10.18 Notwithstanding the terms of the Project Agreement, and subject to clause 10.19, TfL agrees that it will not exercise or seek to exercise any of its rights to require a transfer of any revenues or cash balances or rights accrued as at the Termination Date under or pursuant to or in connection with any of the Relevant Required Insurances, any Sub-Contract or any Project Document comprised in the Assets to TfL or its nominee on or following the Termination Date until the Senior Debt Discharge Date.

10.19 TfL may, at its option, and subject to:

- (a) agreement of the value of any such revenues, cash balances, or claims by the Security Trustee in its absolute discretion; and
- (b) payment of such sum to the Security Trustee,

require a transfer of any revenues or cash balances or rights accrued as at the Termination Date under or pursuant to or in connection with any Sub-Contract comprised in the Assets to TfL or its nominee on or following the Termination Date.

11. MISCELLANEOUS

11.1 TfL shall, at Project Co's expense, take whatever action the Security Trustee, an Appointed Representative or a Representative taking a transfer in accordance with clause 8.1 may require for perfecting any transfer or release under clause 5 (*Representative*), clause 7 (*Step-Out*) and clause 8 (*Novation*) including the execution of any transfer or assignment, and the giving of any notice, order or direction and the making of any registration which, in each case, the Security Trustee, Appointed Representative or Representative reasonably requires.

11.2 Subject always to the continuing obligations of the Parties under clause 1 (*Interpretation*), clause 2.4, clause 10 (*TfL Rights*), clause 11.3, clause 11.4, and clause 12 (*Assignment*) to clause 23 (*Governing Law And Jurisdiction*) (inclusive), this Agreement shall remain in effect until:

- (a) the date on which all amounts which may be or become owing by TfL to Project Co under Schedule 27 (*Compensation on Termination*) of the Project Agreement have been irrevocably paid in full; or

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- (b) in the event that TfL elects to pay the Adjusted Estimated Fair Value of the Agreement, the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) in instalments in accordance with paragraph 3.2 (*Instalments*) of Part 7 (*Calculation and Payment of Early Termination Payments*) of Schedule 27 (*Compensation on Termination*) of the Project Agreement, the date on which such election is made,

whereupon the Security Trustee agrees on behalf of itself and the Finance Parties to release any security granted in their favour over any Unrestricted Assets which are at that date subject to security and this Agreement shall terminate.

- 11.3 On the Expiry Date, this Agreement shall expire and the Security Trustee, acting on behalf of itself and the Finance Parties, shall release any security granted in its favour over any Unrestricted Assets which have not previously been assigned to TfL.

- 11.4 On the Senior Debt Discharge Date, the Security Trustee, acting on behalf of itself and the Finance Parties, shall release any security granted in its favour over any Assets which have not previously been assigned to TfL and this Agreement shall terminate in full.

- 11.5 The Security Trustee, in respect of clause 11.5(a), clause 11.5(b) and clause 11.5(c), and Project Co in respect of clause 11.5(d), shall promptly notify TfL of:

- (a) any decisions to accelerate the maturity of any amounts owing by Project Co to the Security Trustee under the Senior Financing Agreements and/or demand repayment;
- (b) the Senior Debt Discharge Date on or before the date falling twenty (20) Working Days after its occurrence;
- (c) the details and amount of any proposed Additional Permitted Borrowing, including:
- (i) the circumstances giving rise to it and reasons for it; and
- (ii) the terms on which it will be borrowed; and
- (d) on the first Working Day of each calendar month during which any Additional Permitted Borrowing is, or may be, subsisting, the amount outstanding under the Senior Financing Agreements (as the same may be amended (whether or not with the approval of TfL)), and, to the extent it is aware (having made reasonable and proper enquiry):
- (i) the amount of any Distribution made by Project Co; and
- (ii) the amount of any credit balance on any account of Project Co.

- 11.6 Project Co joins in this Agreement, inter alia, to acknowledge and consent to the arrangements set out and agrees not knowingly to do or omit to do anything that may prevent any Party from enforcing its rights under this Agreement.

- 11.7 For the avoidance of doubt, if there is any conflict or inconsistency between the provisions of this Agreement and the Project Agreement, the provisions of this Agreement shall prevail.

- 11.8 If TfL elects to pay the Adjusted Estimated Fair Value of the Agreement or the [Senior Debt] element of any Termination Sum in instalments in accordance with paragraph 3.2 of

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Part 7 (*Calculation and Payment of Early Termination Payments*) of Schedule 27 (*Compensation on Termination*) of the Project Agreement, TfL shall not subsequently set off against or make any deduction from any instalment or interest relating thereto in respect of any claim or liability of which TfL becomes aware after the Termination Sum has been finally agreed or determined, save to the extent that after such amount has been set off or deducted, the termination payment made (excluding interest payable pursuant to [x]) would be an amount greater than or equal to the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount, as the case may be at the time.

12. ASSIGNMENT

- 12.1 No Party to this Agreement may assign or transfer any part of its rights or obligations under this Agreement, save as provided in clause 12.2 to clause 12.4 (inclusive).
- 12.2 The Security Trustee may assign or transfer its rights and obligations under this Agreement to a successor security trustee under the Senior Financing Agreements in accordance with the Senior Financing Agreements without the consent of TfL.
- 12.3 Any Finance Party may assign or transfer its rights under the Senior Financing Agreements in accordance with the terms of the Senior Financing Agreements.
- 12.4 TfL shall assign, novate or otherwise transfer its rights and/or obligations under this Agreement to any person to which TfL assigns, novates or otherwise transfers its rights and/or obligations under the Project Agreement in accordance with clause 42.5 (*Assignment by TfL*) of the Project Agreement.
- 12.5 If clause 12.2 applies then TfL shall enter into a direct agreement with the new Security Trustee on substantially the same terms as this Agreement.

13. DISPUTE RESOLUTION

- 13.1 If either Party considers that a dispute has arisen, that Party shall notify the other Party in writing of such dispute, including the nature, background, extent and details of the dispute.
- 13.2 Any dispute arising in relation to this Agreement shall be resolved in accordance with this clause 13 (*Dispute Resolution*).
- 13.3 If a dispute arises in relation to any aspect of this Agreement, the Parties shall use reasonable endeavours to negotiate in good faith to settle the disputed matter.
- 13.4 If a dispute arises in relation to determination of any Accrued Rights Value in accordance with clause 10.15, either of TfL or the Security Trustee may refer the dispute directly to the courts of England for final resolution. If such a reference is made the Parties shall not (unless they agree otherwise) be required to comply with the dispute resolution procedure set out in the remainder of this clause 13 (*Dispute Resolution*).
- 13.5 Subject to clause 13.3 and clause 13.6 to clause 13.16 (inclusive), either of TfL or the Security Trustee may refer a dispute, by notice in writing to the other Party, to:
- (a) in the case of TfL, the project director for the Project; and
 - (b) in the case of the Security Trustee, [x] ,

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(together, the "**Senior Representatives**") who shall meet and endeavour to resolve the dispute between them. The joint written decision of the Senior Representatives shall be binding upon the Parties.

- 13.6 Without prejudice to clause 13.3 or clause 13.5, and subject to clause 13.4 either of TfL or the Security Trustee may at any time give the other Party notice of its intention to refer the dispute to adjudication (the "**Notice of Adjudication**").
- 13.7 When giving its Notice of Adjudication pursuant to clause 13.6, the referring Party shall nominate an adjudicator who must be approved in writing by the non-referring Party. If such approval is not obtained within four (4) Working Days, either Party shall have the right to apply to the Chartered Institute of Arbitrators (or, in the event that the Chartered Institute of Arbitrators ceases to exist, to another nominating body agreed between the Parties within the four (4) Working Day period), directing it to nominate an independent adjudicator within three (3) Working Days. Once appointed, such individual shall be the "**Adjudicator**" for the purposes of this clause 13 (*Dispute Resolution*).
- 13.8 Within five (5) Working Days of the appointment of the Adjudicator, the referring Party shall serve its submission on the Adjudicator and the other Party.
- 13.9 The responding Party shall provide any submission on the dispute to the Adjudicator within five (5) Working Days of the referring Party's submission under clause 13.8.
- 13.10 The Parties shall comply with any request or direction of the Adjudicator in relation to the dispute.
- 13.11 The Adjudicator shall:
- (a) have absolute discretion as to the conduct, procedure and timetable of the adjudication, subject to any limitation within this Agreement;
 - (b) be deemed not to be an arbitrator but shall render his decision as an expert, and the provisions of the Arbitration Act 1996 and the law relating to arbitration shall not apply to the Adjudicator or their determination or the procedure by which the determination is reached;
 - (c) act fairly and impartially; and
 - (d) be entitled to take the initiative in ascertaining the facts and the law.
- 13.12 The Adjudicator shall provide to TfL and the Security Trustee the Adjudicator's written decision on the dispute, and reasons for such decision, within twenty (20) Working Days after the date of receipt of the referring Party's submission (or such other period as the Parties may agree).
- 13.13 The Adjudicator shall have the power to extend the period of twenty (20) days referred to in clause 13.12 by up to ten (10) Working Days, with the consent of the Parties.
- 13.14 The Parties acknowledge and agree that unless and until a dispute is finally determined by the courts in accordance with clause 13.17 or by the agreement of the Parties, the Adjudicator's decision shall be binding on both Parties who shall forthwith give effect to the decision.
- 13.15 The Adjudicator's costs shall be borne as the Adjudicator shall specify or, in the absence of such decision, equally by TfL and the Security Trustee. Each Party shall bear its own

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costs arising out of the referral, including legal costs and the costs and expenses of any witnesses.

13.16 All information, data or documentation disclosed or delivered by a Party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Adjudicator's work.

13.17 Either Party may within twenty (20) Working Days of receipt of the Adjudicator's decision or expiry of the time provided by clause 13.12 (as extended by clause 13.13), as appropriate, give notice to the other Party of its intention to refer the dispute to the courts of England and Wales for final determination.

13.18 The Parties shall continue to comply with, observe and perform all their obligations hereunder regardless of the nature of the dispute and notwithstanding the referral of the dispute for resolution under this clause 13 (*Dispute Resolution*) and shall give effect forthwith to every decision of the Adjudicator and the courts delivered under this clause 13 (*Dispute Resolution*).

14. **NOTICES**

14.1 Any notice, consent, approval, certificate or determination to be given or issued by any person under this Agreement shall be deemed a "notice" and shall be in writing unless otherwise specified and the words "notify", "consent", "approve", "certify" and "determined" shall be construed accordingly.

14.2 Any notice made under or in connection with the matters contemplated by this Agreement shall be deemed duly given if delivered personally or sent by prepaid first-class post or by airmail if posted to or from a place outside the United Kingdom in accordance with the requirements of this clause 13.18 (*Notices*).

14.3 Notices shall be served:

In the case of TfL to:

Address:

Attention:

In the case of the Security Trustee to:

Address:

Attention:

In the case of Project Co to:

Address:

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Attention:

14.4 A notice shall be deemed to have been received:

- (a) if delivered by hand, at the time when the notice is left at the address of the Party to be served;
- (b) if sent by first-class post, on the next Working Day following the day of posting or, if the day of posting was not a Working Day, the next Working Day following the first Working Day after the day of posting; and
- (c) if sent by airmail, five (5) Working Days after the day of posting,

provided that if, in accordance with the above provision, any such notice would otherwise be deemed to be given or made after 5.00 p.m. such notice shall be deemed to be given or made at 9.00 a.m. on the next Working Day. For the purposes of this clause 14.4, all times are to be read as local time in the place of deemed receipt.

14.5 **Change of details**

A Party may notify the other Parties to this Agreement of a change to its name, relevant addressee or postal address to update the information in clause 14.3 provided that any such notification shall only be effective:

- (a) on the date specified in the notification as the date on which the change is to take place; or
- (b) if no date is specified or the date specified is less than five (5) Working Days after the date on which notice is given, the date falling five (5) Working Days after notice of any such change has been given.

15. **ILLEGALITY AND SEVERABILITY**

If at any time any provision of this Agreement (or part thereof) is or becomes illegal or invalid or unenforceable in any respect under the law of any relevant jurisdiction, such illegality, invalidity or unenforceability shall not affect or impair the legality, validity or enforceability in that jurisdiction of any other part of that provision or any other provision of this Agreement or, in any other jurisdiction, of that provision or part thereof or any other provision of this Agreement.

16. **WAIVER AND VARIATION**

16.1 No term or provision of this Agreement shall be considered as waived by any Party to this Agreement unless a waiver is given in writing by such Party.

16.2 No waiver under clause 16.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and then only to the extent) expressly stated in that waiver.

16.3 No variation to this Agreement shall be effective unless recorded in writing by the Parties.

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17. NO PARTNERSHIP OR AGENCY

Nothing in this Agreement and no action taken by the Parties pursuant to this Agreement shall constitute, or be deemed to constitute, a partnership, unincorporated association or other co-operative entity. No Party shall be or be deemed to be the agent of any other Party and no Party shall hold itself out as having authority or power to bind any other Party in any way.

18. ENTIRE AGREEMENT

18.1 This Agreement and the Project Documents constitute the whole agreement and understanding of the Parties in connection with their subject matter and supersede all prior representations, communications, negotiations and understandings concerning the subject matter of such agreements.

18.2 Each of the Parties acknowledges that:

- (a) it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a Party to this Agreement or not) except those expressly repeated or referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Agreement; and
- (b) this clause 18 (*Entire Agreement*) shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Agreement.

19. FURTHER ASSURANCE

Each Party agrees that it shall now or at any time during the subsistence of this Agreement, do or procure the doing of all such acts and/or execute or procure the execution of all such documents in a form satisfactory to the other Parties, as the other Parties may reasonably require for giving full effect to and obtaining the full benefit of the rights, powers and remedies conferred upon such other Parties by this Agreement.

20. THIRD PARTY RIGHTS

A person who is not a Party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce a right expressly or impliedly conferred by this Agreement. This does not affect any right or remedy of a third party which exists or is available apart from under the Contracts (Rights of Third Parties) Act 1999.

21. LANGUAGE

The language of this Agreement is English. All correspondence shall be entirely in English.

22. COUNTERPARTS

This Agreement may be executed in any number of counterparts and by the several Parties hereto on separate counterparts, each of which when so executed and delivered shall be an original, but all the counterparts shall together constitute one (1) and the same instrument.

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Part 1 - Funders' Direct Agreement

23. GOVERNING LAW AND JURISDICTION

23.1 This Agreement and any dispute, controversy, proceedings or claim of whatever nature arising out of or in any way relating to this Agreement or its formation (including any non-contractual disputes or claims), shall be governed by and construed in all respects in accordance with the laws of England.

23.2 Subject to clause 13 (*Dispute Resolution*), the English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement.

IN WITNESS whereof this document is executed as a deed and is delivered on the date stated at the beginning of this deed.

Part 1 - Funders' Direct Agreement

The common seal of **TRANSPORT FOR LONDON** was affixed to this deed in the presence of:)
)
)

.....
Authorised signatory

Executed as a deed, but not delivered until the first date specified on page 1, by [**SECURITY TRUSTEE**] acting by a director in the presence of a witness:)
)
)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address

.....

.....

Schedule 28 - Direct Agreements and Other Contracts and Agreements

Part 1 - Funders' Direct Agreement

Executed as a deed, but not delivered until the)
first date specified on page 1, by [**PROJECT**)
CO] acting by a director in the presence of a)
witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

SCHEDULE 28

DIRECT AGREEMENTS AND OTHER CONTRACTS AND AGREEMENTS

Part 2 - Collateral Warranty from the D&C Contractor



Collateral Warranty from the D&C Contractor

[D&C Contractor]

and

[TfL]

and

[Project Co]

and

[D&C Contractor Guarantor]

relating to the Silvertown Tunnel Project

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and Agreements

Part 2 - Collateral Warranty from the D&C Contractor

THIS DEED (this "**Deed**") is made on [x] 20[x].

BETWEEN:

- (1) [**D&C CONTRACTOR**] (Company No. [x]), whose registered office is at [x] (the "**D&C Contractor**");
- (2) **TRANSPORT FOR LONDON** of Windsor House, 42-50 Victoria Street, London, SW1H 0TL ("**TfL**");
- (3) [**PROJECT CO**] (Company No. [x]), whose registered office is at [x] ("**Project Co**"); and
- (4) [**D&C CONTRACTOR GUARANTOR**] (Company No. [x]), whose registered office is at [x] (the "**Guarantor**").

BACKGROUND

- (A) By a project agreement between TfL and Project Co dated [x] (the "**Project Agreement**") TfL has appointed Project Co to design, construct, finance, operate and maintain a road tunnel and associated connecting roads and facilities alongside the Blackwall Tunnel in London, connecting the Greenwich Peninsula and the Royal Docks as contemplated by the Project Agreement, including the design, construction and carrying out of the Works and the provision of the Services.
- (B) By a design and construction contract between Project Co and the D&C Contractor dated [x] (the "**D&C Contract**") Project Co has appointed the D&C Contractor to carry out, in relation to the Project, the design and construction of the Works.
- (C) The D&C Contractor is obliged under the D&C Contract to give a collateral warranty in this form in favour of TfL.
- (D) The D&C Contractor and Project Co have agreed to execute this Deed in favour of TfL.
- (E) The Guarantor has agreed to guarantee to TfL the performance by the D&C Contractor of its obligations under this Deed.

1. **DEFINITIONS AND INTERPRETATIONS**

1.1 **Definitions**

Unless expressly defined otherwise in this Deed, any capitalised term in this Deed shall have the same meaning given to such term in the D&C Contract.¹¹

1.2 **Interpretation**

In this Deed, except where the context or the express provisions of this Deed otherwise require:

- (a) the masculine includes the feminine and vice-versa;
- (b) the singular includes the plural and vice-versa;

¹¹ [REDACTED]

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Part 2 - Collateral Warranty from the D&C Contractor

- (c) a reference in this Deed to any clause, sub-clause, paragraph, part, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph or schedule of this Deed;
- (d) save where expressly stated to the contrary in this Deed, any reference to this Deed or to any other document shall include any permitted variation, amendment, or supplement to such document;
- (e) any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- (f) references to any documents being "in the agreed form" means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification;
- (g) a reference to a person includes firms, partnerships and corporations;
- (h) any reference to a public organisation or representative shall be deemed to include reference to any successor to such public organisation or representative or any organisation or entity or representative which has taken over the functions or responsibilities of such public organisation or representative in whole or in part. References to other persons shall include their successors and permitted assignees or transferees;
- (i) headings and sub-headings are for convenience of reference only;
- (j) any obligation on a Project Co or the D&C Contractor to do or not to do anything shall be deemed to include an obligation to procure or not to permit or suffer such things to be done by Project Co's or the D&C Contractor's (as applicable) agents, servants, officers or contractors of any tier and acts or omissions of Project Co's or the D&C Contractor's (as applicable) agents, servants, officers or contractors of any tier shall be deemed to be acts or omissions of Project Co or the D&C Contractor (as applicable) for the purposes of this Deed;
- (k) the words "include" and "including" are to be construed as meaning "including, without limitation";
- (l) references to "writing" shall include any mode of reproducing words in any legible form; and
- (m) where any party is:
 - (i) required to issue a notice or response to any other party pursuant to this Deed; and
 - (ii) no express time limit for issuing such notice or response is specified,

then the relevant party shall issue such notice or response to the receiving party as soon as reasonably practicable.

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Part 2 - Collateral Warranty from the D&C Contractor

2. OPERATIVE PROVISIONS

In consideration of the payment of one pound sterling (£1) by TfL to each of the D&C Contractor and the Guarantor, receipt of which the D&C Contractor and the Guarantor acknowledge, the Parties agree to the terms and conditions set out in this Deed.

3. D&C CONTRACTOR'S WARRANTY AND LIABILITY

3.1 The D&C Contractor warrants and covenants to TfL that:

- (a) it has carried out and will continue to carry out its duties and obligations under the D&C Contract in accordance with the D&C Contract;
- (b) that it has exercised and will continue to exercise, in carrying out the design of the Works, the level of skill and care reasonably to be expected from an appropriately qualified and competent professional designer providing those services in relation to a project of a similar size and scope to the Works; and
- (c) without limiting the generality of the foregoing, it has carried out and will carry out and complete the Works in accordance with the D&C Contract and duly observe and perform all its duties and obligations thereunder.

3.2 The D&C Contractor shall have no liability under clause 3.1 or clause 9 (*Standards of products and materials*) of this Deed that is greater or of longer duration than it would have had as if in lieu of this Deed TfL had been a party to the D&C Contract as joint employer and the D&C Contractor shall be entitled in any action or proceedings by TfL to raise equivalent rights in defence of liability (except for set-off or counterclaim).

3.3 Upon the expiration of twelve (12) years from the Permit to Use Date in accordance with the Project Agreement, the liability of the D&C Contractor under this Deed shall cease and determine, save in relation to any claims made by TfL against the D&C Contractor and notified by TfL to the D&C Contractor in writing prior to such date.

3.4 The D&C Contractor shall have no liability to TfL in respect of any delay in the completion of the Works howsoever caused save to the extent that the liability arises under the D&C Contract and TfL has exercised its right to step in under clause 8 (*Step-in rights in favour of TfL*) of this Deed.

3.5 Any claim by TfL against the D&C Contractor in relation to a delay in completion of the Works but not otherwise will be extinguished to the extent that the D&C Contractor has paid (or had deducted) liquidated damages under the relevant clause of the D&C Contract in relation to such delay.

3.6 Nothing in this Deed shall entitle TfL to enforce this clause 3 (*D&C Contractor's Warranty and Liability*) unless:

- (a) the Project Agreement (or Project Co's employment under it) has been terminated; or
- (b) Project Co has not satisfied any potential claim by TfL under this clause 3 (*D&C Contractor's Warranty and Liability*), including addressing and/or remedying the matter or circumstance giving rise to such claim, within a reasonable time of such matter or circumstance arising,

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provided that this clause 3.6 shall not apply where any delay in the exercise of TfL's rights under this Deed might otherwise lead to their becoming statute-barred.

4. INTELLECTUAL PROPERTY

4.1 The D&C Contractor shall make available to TfL free of charge (and hereby irrevocably licences TfL to use) all [Project Data] that might reasonably be required by TfL.

4.2 The D&C Contractor shall obtain all necessary licences, permissions and consents necessary for it to make the [Project Data] available to TfL on the following terms:

- (a) TfL using the Works for the purposes of the Project or for exercising its rights and duties under the Project Agreement and/or any statutory duties that TfL may have; and
- (b) following termination of the Project Agreement or of Project Co's employment under it, the design or construction of the Works and/or the operation, maintenance or improvement of the Works,

(together, the "**Approved Purposes**"), and in this clause "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.

4.3 TfL will not hold the D&C Contractor liable for any use TfL may make of the [Project Data] for any purpose other than the Approved Purposes.

4.4 The D&C Contractor:

- (a) hereby grants to TfL, free of charge, an irrevocable, sub-licensable, non-exclusive and transferable (subject to the restrictions continued in clause 6 (*Assignment*) of this Deed) licence to use the Intellectual Property Rights that are or become vested in the D&C Contractor in relation to the Works or the D&C Contractor's obligations under the D&C Contract; and
- (b) shall (where any Intellectual Property Rights are or become vested in a third party) ensure the grant of a like licence to that referred to in clause 4.4(a) to TfL,

in both cases, solely for the Approved Purposes.

4.5 The D&C Contractor warrants to TfL that the Project Data (save to the extent duly appointed sub-contractors have been used to prepare the same) is its own original work and that in any event its use in connection with the Works will not infringe the rights of any third party.

4.6 Where a claim or proceeding is made or brought against TfL:

- (a) that arises out of the infringement of any Intellectual Property Rights: or
- (b) because the use of any materials, plant, machinery or equipment in connection with the Works infringes, or the Works themselves infringe any Intellectual Property Rights, of a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of TfL otherwise than in accordance with this Deed,

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the D&C Contractor shall release and indemnify TfL and any TfL Related Party (as such term in the Project Agreement) at all times from and against all Losses arising as a result of such claims and proceedings.

5. **INSURANCE**

5.1 The D&C Contractor hereby covenants with TfL to:

(a) either:

(i) take out and maintain professional indemnity insurance cover with a limit of indemnity that shall be a minimum of [REDACTED] either for each and every loss or in the aggregate in relation to the Works (if in the aggregate, then in any one (1) year of insurance a minimum of two (2) automatic reinstatements of the aggregate indemnity limit is required) and that it will maintain such insurance with reputable insurers carrying on business in the United Kingdom or European Union from the date of this Deed until twelve (12) years after the Permit to Use Date pursuant to the Project Agreement, provided that such insurance is generally available in the market to design and build contractors at commercially reasonable rates and terms and provided further that payment of any increased or additional premiums or more onerous terms required by insurers by reason of the D&C Contractor's own claims record or other acts, omissions, matters or things peculiar to the D&C Contractor will be deemed to be within the commercially reasonable rates and terms; or

(ii) take out and maintain professional indemnity insurance cover with a limit of indemnity that shall be a minimum of [REDACTED] [REDACTED] either for each and every loss or in the aggregate if it is to be specific for the Project and that it will maintain such insurance with reputable insurers carrying on business in the United Kingdom or European Union from the date of this Deed until twelve (12) years after the Permit to Use Date pursuant to the Project Agreement, provided that such insurance is generally available in the market to design and build contractors at commercially reasonable rates and terms and provided further that payment of any increased or additional premiums or more onerous terms required by insurers by reason of the D&C Contractor's own claims record or other acts, omissions, matters or things peculiar to the D&C Contractor will be deemed to be within the commercially reasonable rates and terms,

the ("**PI Insurance**").

(b) provide evidence (as and when reasonably required by TfL) satisfactory to TfL of the PI Insurance being in full force and effect from the date of the D&C Contract (such evidence to include details of the cover);

(c) provide TfL with notice of:

(i) any cancellation of the PI Insurance not less than thirty (30) days prior to the relevant cancellation date; and

(ii) any adverse material change to or suspension of cover relevant to the Works not less than thirty (30) days prior to such relevant change or suspension;

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- (d) inform TfL as soon as reasonably practicable of any claim under the PI Insurance in respect of the Works in excess of [REDACTED] and provide such information to TfL as TfL may reasonably require in relation to such claim and provide notice of any potential breach of the aggregate limit of the policy; and
- (e) release and indemnify TfL and any TfL Related Party at all times from and against all Losses arising in respect of any subrogation claim by the insurers brought in connection with any claim made under the PI Insurance.

6. ASSIGNMENT

- 6.1 The benefit of and the rights of TfL under this Deed may be assigned without the consent of the D&C Contractor, Project Co or the Guarantor and TfL will notify the D&C Contractor, Project Co and the Guarantor in writing following any such assignment specifying the name and address of the assignee and the date of the assignment.
- 6.2 The D&C Contractor, Project Co and the Guarantor shall not contend that any such assignee of TfL 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 hereunder 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 Project or that the original beneficiary or any intermediate beneficiary has not suffered any, or as much, Loss.
- 6.3 Subject to clause 6.4, Project Co, the D&C Contractor and the Guarantor shall not sub-contract, assign, underlet, charge, sell, bargain or otherwise deal in any way with the benefit of this Deed in whole or in part, except with the prior written consent of TfL.
- 6.4 Clause 6.3 shall not apply to the grant of any security in favour of Project Co's lenders (including any reassignment on redemption of security).

7. TFL'S REMEDIES

- 7.1 The rights and benefits conferred upon TfL by this Deed are in addition to any other rights and remedies it may have against the D&C Contractor, including without prejudice to the generality of the foregoing any remedies in negligence.

8. STEP-IN RIGHTS IN FAVOUR OF TFL

- 8.1 The D&C Contractor will not exercise or seek to exercise any right which may be or may become available to it to terminate or treat as terminated or repudiated the D&C Contract or its engagement under it or discontinue or suspend the performance of any duties or obligations thereunder without first giving to TfL not less than thirty (30) Working Days' prior written notice specifying the D&C Contractor's ground for terminating or treating as terminated or repudiated the D&C Contract or its engagement under it or discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the D&C Contract.
- 8.2 Within period of notice referred to in clause 8.1:
 - (a) TfL may give written notice to the D&C Contractor that TfL will from the date of the notice become the client under the D&C Contract to the exclusion of Project Co and thereupon the D&C Contractor will admit that TfL is its client under the D&C Contract and the D&C Contract will be and remain in full force and effect notwithstanding any of the said grounds;

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- (b) if TfL has given such notice as aforesaid or under clause 8.4, TfL shall accept liability for Project Co's obligations under the D&C Contract and will as soon as practicable thereafter remedy any outstanding breach by Project Co that properly has been included in the D&C Contractor's specified grounds and which is capable of remedy by TfL; and
 - (c) if TfL has given such notice as aforesaid or under clause 8.4, TfL will from the service of such notice become responsible for all sums properly payable to the D&C Contractor under the D&C Contract accruing due after the service of such notice but TfL will in paying such sums be entitled to the same rights of set-off and deduction as would have applied to Project Co under the D&C Contract.
- 8.3 Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by TfL to the D&C Contractor, TfL will not be under any obligation to the D&C Contractor nor will the D&C Contractor have any claim or cause of action against TfL unless and until TfL has given written notice to the D&C Contractor pursuant to clause 8.2(a) or clause 8.4 of this Deed.
- 8.4 The D&C Contractor further covenants with TfL that if the employment of Project Co under the Project Agreement is terminated or if the Project Agreement is terminated the D&C Contractor, if requested by TfL by notice in writing and subject to clause 8.2(b) and clause 8.2(c), will accept the instructions of TfL to the exclusion of Project Co in respect of its obligations under the D&C Contract upon the terms and conditions of the D&C Contract and will if so requested in writing:
 - (a) enter into a novation agreement in the form set out in Annex 1 (*Form of Deed of Novation*) whereby TfL is substituted for Project Co under the D&C Contract; and
 - (b) take such other action as is required to vest in TfL full legal and equitable title to any retention account, bank guarantee, performance bond, letter of credit or other security held by Project Co to secure the obligations of the D&C Contractor under the D&C Contract.
- 8.5 If the D&C Contractor is requested to enter into a novation agreement pursuant to clause 8.4, Project Co agrees to enter into the same at the request of TfL.
- 8.6 Where the D&C Contractor has given rights in relation to the D&C Contract similar to those contained in this clause 8 (*Step-in rights in favour of TfL*) to the Senior Funders if both TfL and the Senior Funders serve notice under clause 8.2(a) or clause 8.4 or its equivalent, the notice served by TfL will not prevail over any notice served by the Senior Funders but will prevail over any notice served by any other person.
- 8.7 Project Co acknowledges that the D&C Contractor will be entitled to rely on a notice given to the D&C Contractor by TfL under clause 8.4 as conclusive evidence that the employment of Project Co under the Project Agreement has been terminated or that the Project Agreement has been terminated.
- 8.8 TfL may by notice in writing to the D&C Contractor appoint another person to exercise its rights under this clause 8 (*Step-in rights in favour of TfL*) subject to TfL remaining liable to the D&C Contractor as guarantor for its appointee in respect of its obligations under this Deed.
- 8.9 As from the date of service of notice under clause 8.2(a) or clause 8.4 to the extent that the D&C Contract operates by reference to the existence and application of the Project

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Agreement, the D&C Contract shall be administered and construed as though the Project Agreement were continuing and the D&C Contract shall therefore continue, subject to amendment only as necessary to reflect the fact that the Project Agreement may in fact have been terminated and TfL has undertaken the obligations set out in clause 8.2(b).

8.10 Upon request by TfL, the D&C Contractor agrees to co-operate with TfL in determining the duties performed or to be performed by the D&C Contractor and to provide a copy of the D&C Contract and any variations thereto and details of all monies paid and due under the D&C Contract.

9. **GUARANTEE**

9.1 **Guarantee and indemnity**

- (a) The Guarantor hereby irrevocably and unconditionally guarantees to TfL:
- (i) the due and punctual performance by the D&C Contractor of each and all of the obligations, duties and undertakings of the D&C Contractor under and pursuant to this Deed when and if and to the extent that such obligations, duties and undertakings shall properly become due and performable according to the terms of this Deed (the "**Warranty Obligations**"); and
 - (ii) the due payment and discharge of all such sums of money and liabilities due, owing or incurred or payable by the D&C Contractor to TfL pursuant to this Deed,

and the Guarantor undertakes to TfL fully to perform and observe or procure the performance and observance of all of the Warranty Obligations, including the payment of any and all sums of money and liabilities due, owing or incurred or payable by the D&C Contractor to TfL pursuant to this Deed if the D&C Contractor shall fail in any respect to perform, observe and/or pay the same.

- (b) The Guarantor hereby shall release and indemnify TfL and any TfL Related Party at all times from and against all Losses arising as a result of any claim, demand, proceedings or liability, loss, damage, costs and/or expenses arising directly out of any failure by the D&C Contractor to perform any of the Warranty Obligations (whether such failure arises as a result of the D&C Contractor's breach, default, act or omission or as a result of the termination of the D&C Contractor's engagement under this Deed or as a result of the D&C Contractor going into liquidation, administration or receivership or having an administrator appointed or becoming subject to any other form of insolvency or similar proceedings or procedure or arrangement for the protection of creditors or the winding-up of the D&C Contractor), including all expenses, legal fees and taxes incurred by TfL in connection with TfL enforcing any of its rights under this Deed and undertakes to pay to TfL immediately on TfL's first written demand the amount(s) of any such loss, damage, liability, costs, expenses and/or taxes.
- (c) Subject to clause 9.2 (*Savings*), clause 9.4 (*TfL protections*), clause 9.5 (*Waiver of Guarantor's rights*) and clause 9.7 (*Payments to be made without set-off or withholding*) hereof, in no circumstances shall the liability of the Guarantor to TfL under this Deed (except in relation to any expenses, legal fees and taxes referred to in this clause 9.1 (*Guarantee and indemnity*)) exceed the liability of the D&C Contractor to TfL under this Deed and without prejudice to the foregoing, as between the Guarantor and TfL, all the defences available to the D&C Contractor in

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respect of its liabilities under this Deed or otherwise available to the D&C Contractor at Law (if and to the extent that those defences are not specific to the D&C Contractor and would be available to the Guarantor if the Guarantor had been party to this Deed in place of the D&C Contractor) shall be available to the Guarantor in respect of its liabilities under this Deed.

9.2 Savings

Under this Deed the Guarantor shall not be exonerated nor shall the liability of the Guarantor nor the rights, powers and remedies conferred upon TfL be lessened, impaired, discharged, diminished or otherwise adversely affected by virtue of:

- (a) time being given to the D&C Contractor by TfL or by virtue of any concession, forbearance or arrangement granted or made by TfL to or with the D&C Contractor or by any additional or advance payment to the D&C Contractor under or in connection with this Deed; or
- (b) anything that TfL or the D&C Contractor may do or omit or neglect to do (including, without limitation, the assertion or failure or delay to assert any right or remedy or the pursuit of any rights or remedies by TfL or the giving by the D&C Contractor of any security or the release, modification or exchange of any such security or the liability of any person),

which, but for this provision, might exonerate the Guarantor.

9.3 Continuing guarantee

The guarantee set out in this clause 9 (*Guarantee*) is a continuing guarantee and accordingly shall remain in full force and effect until the earlier of:

- (a) all obligations, duties and undertakings now or hereafter to be carried out or performed by the D&C Contractor under this Deed having been satisfied or performed in full; or
- (b) the entry by TfL, Project Co and the Guarantor into a novation agreement in respect of the D&C Contract guarantee as envisaged by clause 9.10 (*D&C Contract guarantee novation agreement*),

provided always that this Deed is in addition to and not in substitution for any other security which TfL may at any time hold for the performance of such obligations and may be enforced by TfL without first having recourse to any such security.

9.4 TfL protections

The liability of the Guarantor and the rights of TfL in relation to this Deed shall not be discharged or impaired by reason of:

- (a) the insolvency, winding up, dissolution, administration receivership or re-organisation of the D&C Contractor or any change in its or their status, function, control or ownership; or
- (b) by any other act, event or omission which might, but for the provisions of this Deed, operate to discharge, impair, diminish or otherwise affect any of the obligations or liabilities of the Guarantor hereunder or any of the rights, remedies or powers conferred upon TfL,

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and any discharge or release by TfL in favour of the Guarantor or agreement between the Guarantor and TfL concerning any obligations or liabilities of the Guarantor hereunder which shall be deemed to have been given or entered into by TfL on the express condition that it would be void if given or entered into in reliance upon any act or thing (including, without limitation, any payment to TfL by the D&C Contractor) which is subsequently avoided or reduced by or in pursuance of any provision or rule of law including (without limitation) any provisions or enactments relating to bankruptcy, insolvency or liquidation for the time being in force.

9.5 Waiver of Guarantor's rights

- (a) The Guarantor shall:
- (i) not by paying any sum due hereunder or by any means or on any ground claim or recover by the institution of proceedings or the threat of proceedings or otherwise recover such sum from the D&C Contractor or claim any set-off or counterclaim against the D&C Contractor or prove in competition with TfL to claim for any money or liabilities due or incurred by the D&C Contractor to TfL or have the benefit of any security which TfL holds or may hold for any money or liabilities due or incurred by the D&C Contractor to TfL; and
 - (ii) in case the Guarantor receives any sums from the D&C Contractor in respect of any payment of the Guarantor hereunder, hold such monies in trust for TfL so long as any sums are payable (contingently or otherwise) under this Deed.
- (b) Until all the Warranty Obligations have been irrevocably satisfied in full, TfL may place and keep any money received or recovered from the Guarantor in relation to the Warranty Obligations in a suspense account.

9.6 Immediate recourse

Without prejudice to clause 9.3 (*Continuing guarantee*), TfL shall not be obliged before enforcing any of its rights or remedies conferred upon it by this Deed or by Law:

- (a) to grant any time or indulgence to the D&C Contractor;
- (b) to take any legal proceedings or action or obtain judgment against the D&C Contractor in any Court;
- (c) to make or file any claim in bankruptcy, liquidation, winding-up or dissolution of the D&C Contractor; or
- (d) to pursue or exhaust any other right or remedy against the D&C Contractor and the liabilities of the Guarantor under this Deed may be enforced by TfL against the Guarantor irrespective of whether any legal proceedings are being or have been taken against the D&C Contractor.

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9.7 Payments to be made without set-off or withholding

Any sums due and payable under this Deed shall be paid in full without set-off or counterclaim and free and clear of and without deduction of or withholding for or on account of any present or future taxes, duties and/or other charges.

9.8 Default Interest

If TfL does not receive, on the due date, any amount due from the Guarantor under this Deed or under any judgment in connection with this Deed, the Guarantor shall pay to TfL on demand interest at the "Default Rate" (as defined in the Financing Agreements) from time to time on the amount due or the subject of the judgment from and including the due date until the date of actual payment.

9.9 Guarantor warranties

The Guarantor hereby warrants and represents that:

- (a) it is a company incorporated in [x] with power and authority to enter into this Deed and to exercise its rights and perform its obligations hereunder;
- (b) the obligations expressed to be assumed by it in this Deed are legal and valid obligations binding on it in accordance with the terms hereof; and
- (c) it has taken all action required to enter into this Deed and to authorise the execution and delivery of this Deed and the performance of its obligation under this Deed.

9.10 D&C Contract guarantee novation agreement

- (a) The Guarantor covenants with TfL that if TfL gives notice to the D&C Contractor requesting the D&C Contractor to enter into a novation agreement in accordance with clause 8.4, then the Guarantor will accept the instructions of TfL to the exclusion of Project Co in respect of its duties under the D&C Contract guarantee upon the terms and conditions of the D&C Contract guarantee and will if so requested in writing enter into a novation agreement substantially in the form set out in Annex 1 (*Form of Deed of Novation*) whereby TfL is substituted for Project Co under the D&C Contract guarantee and such amendments are made to reflect the novation of the D&C Contract guarantee.
- (b) If the Guarantor is requested to enter into a novation agreement pursuant to clause 9.10(a), Project Co agrees to enter into the same at the request of TfL.

10. STANDARDS OF PRODUCTS AND MATERIALS

- (a) The D&C Contractor warrants that it has only used and will only use new materials in carrying out the Works unless TfL agrees otherwise in writing or the contrary is set out in the D&C Requirements and all goods used or included in the Works shall be of satisfactory quality.
- (b) The D&C Contractor warrants that it has not used or included and will not use or include in the Works any of those products and materials not permitted by the D&C Requirements nor any products or materials not in conformity with relevant standards or codes of practice or which, at the time of use, are widely known to building contractors, contractors or members of the relevant design profession to

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be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used.

11. INDEPENDENT ENQUIRY CLAUSE

The liability of the D&C Contractor under this Deed shall not be modified, released, diminished or in any way affected by:

- (a) any independent inspection, investigation or enquiry into any relevant matter which may be made or carried out by or for TfL;
- (b) any failure or omission to carry out any such inspection, investigation or enquiry;
- (c) the appointment by TfL of any independent firm, company, or party whatsoever to review the progress of or otherwise report to TfL in respect of the Services; or
- (d) by any action or omission of any such firm, company or party whether or not such action or omission might give rise to any independent liability of such firm, company or party to TfL.

12. NO VARIATION TO D&C CONTRACT WITHOUT TFL'S CONSENT

Project Co and the D&C Contractor undertake with TfL not to materially vary or depart from the terms and conditions of the D&C Contract without the prior written consent of TfL and agree that no such material variation or departure made without such consent shall be binding upon TfL, or affect or prejudice TfL's rights hereunder, or under the D&C Contract or in any other way.

13. NOTICES

- (a) Any notice to be given by any party will be sufficiently served if sent by hand, by post or by airmail to the registered office or if there is none the last known address of the party to be served.
- (b) Any notice sent by hand will be deemed to be served on the date of delivery, provided that if any notice sent by hand is sent after 4.45 p.m. on any day it will be deemed to be served on the next Working Day.
- (c) Any notice sent by post will be deemed to have been duly served at the expiration of forty eight (48) hours after the time of posting if the end of that period falls before 4.45pm on a Working Day and otherwise on the next Working Day.
- (d) Any notice sent by air mail will be deemed to have been duly served at the expiration of five (5) Working Days after the time of posting if the end of that period falls before 4.45pm on a Working Day and otherwise on the next Working Day.

14. SEVERABILITY

If at any time any provision of this Deed (or part thereof) is or becomes illegal or invalid or unenforceable in any respect under the law of any relevant jurisdiction, such illegality, invalidity or unenforceability shall not affect or impair the legality, validity or enforceability in that jurisdiction of any other part of that provision or any other provision

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of this Deed or, in any other jurisdiction, of that provision or part thereof or any other provision of this Deed.

15. **WAIVER**

15.1 No term or provision of this Deed shall be considered as waived by any party to this Deed unless a waiver is given in writing by that party.

15.2 No waiver under clause 15.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Deed unless (and only to the extent) expressly stated in that waiver.

16. **THIRD PARTY RIGHTS**

(a) No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed.

(b) This clause 16 does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

17. **GOVERNING LAW AND JURISDICTION**

(a) This Deed and any non-contractual obligation arising out of or in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England.

(b) The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

18. **PROJECT CO ACKNOWLEDGEMENT**

Project Co has entered into this Deed in order to acknowledge the arrangements effected hereby and undertakes to each of TfL and the D&C Contractor to observe the provisions of this Deed at all times and not in any way to prejudice or affect the enforcement hereof or to do or permit to be done anything which would be a breach hereof.

19. **COUNTERPARTS**

This Deed may be executed in one (1) or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full and original instrument for all purposes.

IN WITNESS whereof this document is executed by the parties as a deed and is delivered on the date first set out above.

Schedule 28 - Direct Agreements and Other Contracts and Agreements

Part 2 - Collateral Warranty from the D&C Contractor

Executed as a deed, but not delivered until the)
first date specified on page 1, by [**D&C**)
CONTRACTOR] acting by a director in the)
presence of a witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

Executed as a deed, but not delivered until the)
first date specified on page 1, by)
[**GUARANTOR**] acting by a director in the)
presence of a witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

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Part 2 - Collateral Warranty from the D&C Contractor

Executed as a deed, but not delivered until the)
first date specified on page 1, by [**PROJECT**)
CO] acting by a director in the presence of a)
witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

The common seal of **TRANSPORT FOR**)
LONDON)
was affixed to this deed in the presence of:)
)

.....
Authorised signatory

ANNEX 1

Form of Deed of Novation

Schedule 28 - Direct Agreements and Other Contracts
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Part 2 - Collateral Warranty from the D&C Contractor

THIS DEED is made on

201

BETWEEN:

- (1) [**D&C CONTRACTOR**] (Company No.[x]) whose registered office is at [x] (the "**D&C Contractor**");
- (2) **TRANSPORT FOR LONDON** of Windsor House, 42-50 Victoria Street, London, SW1H 0TL ("**TfL**"); and
- (3) [**PROJECT CO**] (Company No. [x]), whose registered office is at [x] ("**Project Co**").

WHEREAS

- (A) By a project agreement between TfL and Project Co dated [x] (the "**Project Agreement**") TfL has appointed Project Co to design, construct, finance, operate and maintain a road tunnel and associated connecting roads and facilities alongside the Blackwall Tunnel in London, connecting the Greenwich Peninsula and the Royal Docks as contemplated by the Project Agreement, including the design, construction and carrying out of the Works and the provision of the Services.
- (B) By a design and construction contract dated [x] (the "**D&C Contract**") Project Co has appointed the D&C Contractor to carry out, in relation to the Project, the design and construction of the Works.
- (C) [The employment of Project Co under the Project Agreement has been terminated] / [The Project Agreement has been terminated.]
- (D) The parties have agreed to novate the D&C Contract to TfL on the terms set out below.

IT IS AGREED

1. **DEFINITIONS AND INTERPRETATIONS**

1.1 **Definitions**

Unless expressly defined otherwise in this Deed any capitalised term in this Deed shall have the same meaning given to such term in the D&C Contract.

1.2 **Interpretations**

In this Deed, except where the context or the express provisions of this Deed otherwise require:

- (a) the masculine includes the feminine and vice-versa;
- (b) the singular includes the plural and vice-versa;
- (c) a reference in this Deed to any clause, sub-clause, paragraph, part, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph or schedule of this Deed;
- (d) save where expressly stated to the contrary provided in this Deed, any reference to this Deed or to any other document shall include any permitted variation, amendment, or supplement to such document;

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- (e) any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- (f) references to any documents being "in the agreed form" means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification;
- (g) a reference to a person includes firms, partnerships and corporations;
- (h) any reference to a public organisation or representative shall be deemed to include reference to any successor to such public organisation or representative or any organisation or entity or representative which has taken over the functions or responsibilities of such public organisation or representative in whole or in part. References to other persons shall include their successors and permitted assignees or transferees;
- (i) headings and sub-headings are for convenience of reference only;
- (j) any obligation on a Project Co or the D&C Contractor to do or not to do anything shall be deemed to include an obligation to procure or not to permit or suffer such things to be done by Project Co's or the D&C Contractor's (as applicable) agents, servants, officers or contractors of any tier and acts or omissions of Project Co's or the D&C Contractor's (as applicable) agents, servants, officers or contractors of any tier shall be deemed to be acts or omissions of Project Co or the D&C Contractor (as applicable) for the purposes of this Deed;
- (k) the words "include" and "including" are to be construed as meaning "including, without limitation";
- (l) references to "writing" shall include any mode of reproducing words in any legible form; and
- (m) where any party is:
 - (i) required to issue a notice or response to any other party pursuant to this Deed; and
 - (ii) no express time limit for issuing such notice or response is specified,

then the relevant party shall issue such notice or response to the receiving party as soon as reasonably practicable.

2. NOVIATION OF THE D&C CONTRACT

The D&C Contract is hereby novated from Project Co and the D&C Contractor to TfL and the D&C Contractor.

3. RELEASE OF PROJECT CO

On and from the date of this Deed, Project Co shall no longer owe any duty or obligation to the D&C Contractor under or in respect of the D&C Contract whether by virtue of its terms or by virtue of any breach or otherwise.

Schedule 28 - Direct Agreements and Other Contracts and Agreements

Part 2 - Collateral Warranty from the D&C Contractor

4. RELEASE OF THE D&C CONTRACTOR

On and from the date of this Deed, the D&C Contractor shall no longer owe any duty or obligation to Project Co under or in respect of the D&C Contract whether by virtue of its terms or by virtue of any breach or otherwise.

5. BINDING OF THE D&C CONTRACTOR TO TFL

5.1 The D&C Contractor binds itself to TfL in the terms of the D&C Contract as if TfL were and always had been named in the D&C Contract in place of Project Co.

5.2 The D&C Contractor warrants to TfL that prior to the date of this Deed it has performed and that it will continue to perform its duties and obligations as required by and in accordance with the terms of the D&C Contract.

5.3 TfL shall not be precluded from recovering any Losses incurred by TfL or Project Co resulting from any breach of clause 5.2 by reason that (if it be the case) the acts or omissions causing such breach occurred before this Deed took effect, or that Project Co will not incur or has not or would not have incurred any such Losses.

5.4 No waiver by Project Co, either express or implied, will affect the D&C Contractor's liability to TfL pursuant to this clause.

5.5 Upon the expiration of twelve (12) years from the Permit to Use Date in accordance with the Project Agreement, the liability of the D&C Contractor under this Deed shall cease and determine, save in relation to any claims made by TfL against the D&C Contractor and notified by TfL to the D&C Contractor in writing prior thereto.

6. BINDING OF TFL TO THE D&C CONTRACTOR

TfL binds itself to the D&C Contractor in the terms of the D&C Contract as if TfL were and always had been named in the D&C Contract in place of Project Co and as if all acts and omissions of Project Co (including any wrongful acts or omissions) under and in respect of the D&C Contract were the acts and omissions of TfL.

7. VESTING OF REMEDIES IN TFL

All rights of action and remedies vested in Project Co against the D&C Contractor under and in respect of the D&C Contract shall hereupon vest in TfL.

8. VESTING OF REMEDIES AGAINST TFL

All rights of action and remedies vested in the D&C Contractor against Project Co under and in respect of the D&C Contract shall hereinafter lie against TfL.

9. AFFIRMATION OF THE D&C CONTRACT

Subject to the terms of this Deed, the D&C Contract shall remain in full force and effect.

10. THIRD PARTY RIGHTS

10.1 No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed.

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10.2 This clause 10 (*Third Party Rights*) does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

11. GOVERNING LAW AND INTERPRETATION

11.1 This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England.

11.2 The English Courts shall have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this Deed.

IN WITNESS of which this document is executed as a deed and is delivered on the date first set out above.

Schedule 28 - Direct Agreements and Other Contracts and Agreements

Part 2 - Collateral Warranty from the D&C Contractor

Executed as a deed, but not delivered until the)
first date specified on page 1, by [**D&C**)
CONTRACTOR] acting by a director in the)
presence of a witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

The common seal of **TRANSPORT FOR**)
LONDON)
was affixed to this deed in the presence of:)
)

.....
Authorised signatory

Schedule 28 - Direct Agreements and Other Contracts and Agreements

Part 2 - Collateral Warranty from the D&C Contractor

Executed as a deed, but not delivered until the)
first date specified on page 1, by [**PROJECT**]
CO] acting by a director in the presence of a)
witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

Schedule 28 - Direct Agreements and Other Contracts
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SCHEDULE 28

DIRECT AGREEMENTS AND OTHER CONTRACTS AND AGREEMENTS

Part 3 - Collateral Warranty from the O&M Contractor¹²

¹²



Collateral Warranty from the O&M Contractor

[O&M Contractor]

and

[TfL]

and

[Project Co]

and

[O&M Guarantor]

relating to the Silvertown Tunnel Project

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Part 3 - Collateral Warranty from the O&M Contractor

THIS DEED OF WARRANTY is made on [x] 201[x]

BETWEEN:

- (1) **[O&M CONTRACTOR]** (Company No. [x]), whose registered office is at [x] (the "**O&M Contractor**");
- (2) **TRANSPORT FOR LONDON** of Windsor House, 42-50 Victoria Street, London, SW1H 0TL ("**TfL**");
- (3) **PROJECT CO** (Company No. [x]), whose registered office is at [x] ("**Project Co**"); and
- (4) **[O&M CONTRACTOR GUARANTOR]** (Company No. [x]), whose registered office is at [x] (the "**Guarantor**").

BACKGROUND

- (A) By a project agreement between TfL and Project Co dated [x] (the "**Project Agreement**") TfL has appointed Project Co to design, construct, finance, operate and maintain a road tunnel and associated connecting roads and facilities alongside the Blackwall Tunnel in London, connecting the Greenwich Peninsula and the Royal Docks as contemplated by the Project Agreement, including the design, construction and carrying out of the Works and the provision of the Services.
- (B) By an operate and maintain contract between Project Co and the O&M Contractor dated [x] (the "**O&M Contract**"), Project Co has appointed the O&M Contractor to carry out the Services.
- (C) The O&M Contractor is obliged under the O&M Contract to give a collateral warranty in this form in favour of TfL.
- (D) The O&M Contractor and Project Co have agreed to execute this Deed in favour of TfL.
- (E) The Guarantor has agreed to guarantee to TfL the performance by the O&M Contractor of its obligations under this Deed.

1. DEFINITIONS AND INTERPRETATIONS

1.1 Definitions

Unless expressly defined otherwise in this Deed, any capitalised term in this Deed shall have the same meaning given to such term in the O&M Contract¹³.

1.2 Interpretation

In this Deed, except where the context or the express provisions of this Deed otherwise require:

- (a) the masculine includes the feminine and vice-versa;

¹³ [REDACTED]

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Part 3 - Collateral Warranty from the O&M Contractor

- (b) the singular includes the plural and vice-versa;
- (c) a reference in this Deed to any clause, sub-clause, paragraph, part, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph or schedule of this Deed;
- (d) save where expressly stated to the contrary in this Deed, any reference to this Deed or to any other document shall include any permitted variation, amendment, or supplement to such document;
- (e) any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- (f) references to any documents being "in the agreed form" means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification;
- (g) a reference to a person includes firms, partnerships and corporations;
- (h) any reference to a public organisation or representative shall be deemed to include reference to any successor to such public organisation or representative or any organisation or entity or representative which has taken over the functions or responsibilities of such public organisation or representative in whole or in part. References to other persons shall include their successors and permitted assignees or transferees;
- (i) headings and sub-headings are for convenience of reference only;
- (j) any obligation on a Project Co or the O&M Contractor to do or not to do anything shall be deemed to include an obligation to procure or not to permit or suffer such things to be done by Project Co's or the O&M Contractor's (as applicable) agents, servants, officers or contractors of any tier and acts or omissions of Project Co's or the O&M Contractor's (as applicable) agents, servants, officers or contractors of any tier shall be deemed to be acts or omissions of Project Co or the O&M Contractor (as applicable) for the purposes of this Deed;
- (k) the words "include" and "including" are to be construed as meaning "including, without limitation";
- (l) references to "writing" shall include any mode of reproducing words in any legible form; and
- (m) where any party is:
 - (i) required to issue a notice or response to any other party pursuant to this Deed; and
 - (ii) no express time limit for issuing such notice or response is specified,then the relevant party shall issue such notice or response to the receiving party as soon as reasonably practicable.

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2. OPERATIVE PROVISIONS

In consideration of the payment of one pound sterling (£1) by TfL to each of the O&M Contractor and the Guarantor, receipt of which the O&M Contractor and the Guarantor acknowledge, the Parties agree to the terms and conditions set out in this Deed.

3. O&M CONTRACTOR'S WARRANTY AND LIABILITY

3.1 The O&M Contractor warrants to TfL that it has carried out and will continue to carry out all its obligations and duties under the O&M Contract in accordance with and to the standard required by the O&M Contract.

3.2 The O&M Contractor shall have no liability under clause 3.1 of this Deed that is greater or of longer duration than it would have had, and shall be entitled in any proceedings by TfL to rely on any limitation in the O&M Contract and to raise equivalent rights in defence of liability (except for set-off or counterclaim) as it would have against Project Co under the O&M Contract.

3.3 Notwithstanding anything in this Deed and notwithstanding any payments which may be made by TfL to the O&M Contractor, TfL and the O&M Contractor will not be under any obligation to each other nor will any party have any claim or cause of action against the others unless and until TfL has given written notice to the O&M Contractor pursuant to clause 7.2(a) or clause 7.4, provided that this clause 3.3 shall not in any way restrict TfL's rights and/or the O&M Contractor's obligations under clause 4 (*Intellectual Property*), clause 5 (*Assignment*), clause 7 (*Step-in rights in favour of TfL*), clause 11 (*No variation to O&M Contract without TfL's consent*) and clause 12 (*Notices*).

4. INTELLECTUAL PROPERTY

4.1 The O&M Contractor shall make available to TfL free of charge (and hereby irrevocably licences TfL to use) all [Project Data] that might reasonably be required by TfL.

4.2 The O&M Contractor shall obtain all necessary licences, permissions and consents necessary for it to make the [Project Data] available to TfL for any purpose whatsoever connected with the Project and such other purposes as are reasonably foreseeable, (the "**Approved Purposes**"), and in this clause "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.

4.3 TfL will not hold the O&M Contractor liable for any use TfL may make of the [Project Data] for any purpose other than the Approved Purposes unless the O&M Contractor authorises such use and confirms that the [Project Data] is suitable for it.

4.4 The O&M Contractor:

(a) hereby grants to TfL, free of charge, an irrevocable, sub-licensable, non-exclusive and transferable (subject to the restrictions continued in clause 5 (*Assignment*) of this Deed) licence to use the Intellectual Property Rights that are or become vested in the O&M Contractor in relation the Services or the O&M Contractor's obligations under the O&M Contract for the Approved Purposes; and

(b) shall (where any Intellectual Property Rights are or become vested in a third party) ensure the grant of a like licence to that referred to in clause 4.4(a) to TfL,

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in both cases, solely for the Approved Purposes.

- 4.5 The O&M Contractor agrees on reasonable request at any time and following reasonable written prior notice to give TfL or those authorised by it access to the [Project Data] and to provide copies thereof at TfL's expense.
- 4.6 The O&M Contractor warrants to TfL that the [Project Data] (save to the extent duly appointed sub-contractors have been used to prepare the same) is its own original work and that in any event its use in connection with the Project will not infringe the rights of any third party.
- 4.7 Where a claim or proceeding is made or brought against TfL:
- (a) that arises out of the infringement of any Intellectual Property Rights; or
 - (b) because the use of any materials, plant, machinery or equipment in connection with the Services infringes any Intellectual Property Rights of a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of TfL otherwise than in accordance with this Deed,

the O&M Contractor shall release and indemnify TfL and any TfL Related Party (as such term in the Project Agreement) at all times from and against all Losses arising as a result of such claims and proceedings.

5. ASSIGNMENT

- 5.1 The benefit of and the rights of TfL under this Deed may be assigned without the consent of the O&M Contractor, Project Co or the Guarantor and TfL will notify the O&M Contractor, Project Co and the Guarantor in writing following any such assignment specifying the name and address of the assignee and the date of the assignment. The O&M Contractor, Project Co and the Guarantor shall 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 hereunder 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 Project or that the original beneficiary or any intermediate beneficiary has not suffered any, or as much, Loss.
- 5.2 The O&M Contractor and the Guarantor shall not sub-contract, assign, underlet, charge, sell, bargain or otherwise deal in any way with the benefit of this Deed in whole or in part, except with the prior written consent of TfL.

6. TFL'S REMEDIES

The rights and benefits conferred upon TfL by this Deed are in addition to any other rights and remedies it may have against the O&M Contractor including without prejudice to the generality of the foregoing any remedies in negligence.

7. STEP-IN RIGHTS IN FAVOUR OF TFL

- 7.1 The O&M Contractor will not exercise or seek to exercise any right which may be or may become available to it to terminate or treat as terminated or repudiated the O&M Contract or its employment under it or discontinue or suspend the performance of any duties or obligations thereunder without first giving to TfL not less than thirty (30) Working Days'

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prior written notice specifying the O&M Contractor's ground for terminating or treating as terminated or repudiated the O&M Contract or its employment under it or discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the O&M Contract.

7.2 Within such period of notice referred to in clause 7.1:

- (a) TfL may give written notice to the O&M Contractor that TfL will from the date of the notice become the client under the O&M Contract to the exclusion of Project Co and thereupon the O&M Contractor will admit that TfL is its client under the O&M Contract and the O&M Contract will be and remain in full force and effect notwithstanding any of the said grounds;
- (b) if TfL has given such notice as aforesaid or under clause 7.4, TfL shall accept liability for Project Co's obligations under the O&M Contract and will as soon as practicable thereafter remedy any outstanding breach by Project Co that properly has been included in the O&M Contractor's specified grounds pursuant to clause 7.1 (and which has been notified to TfL) and which is capable of remedy; and
- (c) if TfL has given such notice as aforesaid or under clause 7.4, TfL will from the service of such notice become responsible for all sums properly payable to the O&M Contractor under the O&M Contract accruing due after the service of the O&M Contractor's notice but TfL will in paying such sums be entitled to the same rights of set-off and deduction as would have applied to Project Co under the O&M Contract.

7.3 Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by TfL to the O&M Contractor, the O&M Contractor will not be under any duty to obey any direction or instruction from TfL unless and until TfL has given notice under clause 7.2(a) and clause 7.4.

7.4 The O&M Contractor further covenants with TfL that if the employment of Project Co under the Project Agreement is terminated or if the Project Agreement is terminated the O&M Contractor, if requested by TfL by notice in writing and subject to clause 7.2(b) and clause 7.2(c), will accept the instructions of TfL to the exclusion of Project Co in respect of its obligations under the O&M Contract upon the terms and conditions of the O&M Contract and will if so requested in writing

- (a) enter into a novation agreement in the form set out in Annex 1 (*Form of Deed of Novation*) whereby TfL is substituted for Project Co under the O&M Contract; and
- (b) take such other action as is required to vest in TfL full legal and equitable title to any retention account, bank guarantee, performance bond, letter of credit or other security held by Project Co to secure the obligations of the O&M Contractor under the O&M Contract.

7.5 If the O&M Contractor is requested to enter into a novation agreement pursuant to clause 7.4, Project Co agrees to enter into the same at the request of TfL.

7.6 Where the O&M Contractor has given rights in relation to the O&M Contract similar to those contained in this clause 7 (*Step-in rights in favour of TfL*) to the Senior Funders if both TfL and the Senior Funders serve notice under clause 7.2(a) or clause 7.4 or its

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equivalent the notice served by TfL will not prevail over any notice served by the Senior Funders but will prevail over any notice served by any other person.

- 7.7 Project Co acknowledges that the O&M Contractor will be entitled to rely on a notice given to the O&M Contractor by TfL under clause 7.4 as conclusive evidence that Project Co's employment under the Project Agreement has been terminated or that the Project Agreement has been terminated by TfL.
- 7.8 TfL may by notice in writing to the O&M Contractor appoint another person to exercise its rights under this clause 7 (*Step-in rights in favour of TfL*) subject to TfL remaining liable to the O&M Contractor as guarantor for its appointee in respect of its obligations under this Deed.
- 7.9 As from the date of service of notice under clause 7.2(a) or clause 7.4 to the extent that the O&M Contract operates by reference to the existence and application of the Project Agreement, the O&M Contract shall be administered and construed as though the Project Agreement were continuing and the O&M Contract shall therefore continue, subject to amendment only as necessary to reflect the fact that the Project Agreement may in fact have been terminated and TfL has undertaken the obligations set out in clause 7.2(b).
- 7.10 Upon request by TfL, the O&M Contractor agrees to co-operate with TfL in determining the duties performed or to be performed by the O&M Contractor and to provide a copy of the O&M Contract and any variations thereto and details of all monies paid and due under the O&M Contract.

8. **GUARANTEE**

8.1 **Guarantee and indemnity**

- (a) The Guarantor hereby irrevocably and unconditionally guarantees to TfL the due and punctual performance by the O&M Contractor of each and all of the obligations, duties and undertakings of the O&M Contractor under and pursuant to this Deed when and if and to the extent that such obligations, duties and undertakings shall properly become due and performable according to the terms of this Deed (the "**Warranty Obligations**") and the due payment and discharge of all such sums of money and liabilities due, owing or incurred or payable by the O&M Contractor to TfL pursuant to this Deed and the Guarantor undertakes to TfL fully to perform and observe or procure the performance and observance of all of the Warranty Obligations, including the payment of any and all sums of money and liabilities due, owing or incurred or payable by the O&M Contractor to TfL pursuant to this Deed if the O&M Contractor shall fail in any respect to perform, observe and/or pay the same.
- (b) The Guarantor hereby shall release and indemnify TfL and any TfL Related Party at all times from and against all Losses arising as a result of any claim, demand, proceedings or liability, loss, damage, costs and/or expenses arising directly out of any failure by the O&M Contractor to perform any of the Warranty Obligations (whether such failure arises as a result of the O&M Contractor's breach, default, act or omission or as a result of the termination of the O&M Contractor's engagement under this Deed or as a result of the O&M Contractor going into liquidation, administration or receivership or having an administrator appointed or becoming subject to any other form of insolvency or similar proceedings or procedure or arrangement for the protection of creditors or the winding-up of the O&M

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Contractor), including all expenses, legal fees and taxes incurred by TfL in connection with TfL enforcing any of its rights under this Deed and undertakes to pay to TfL immediately on TfL's first written demand the amount(s) of any such loss, damage, liability, costs, expenses and/or taxes.

- (c) Subject to clause 8.2 (*Savings*), clause 8.4 (*TfL Protections*), clause 8.5 (*Waiver of Guarantor's rights*) and clause 8.7 (*Payments to be made without set-off or withholding*) hereof, in no circumstances shall the liability of the Guarantor to TfL under this Deed (except in relation to any expenses, legal fees and taxes referred to in this clause 8.1 (*Guarantee and indemnity*)) exceed the liability of the O&M Contractor to TfL under this Deed and without prejudice to the foregoing, as between the Guarantor and TfL, all the defences available to the O&M Contractor in respect of its liabilities under this Deed or otherwise available to the O&M Contractor at Law (if and to the extent that those defences are not specific to the O&M Contractor and would be available to the Guarantor if the Guarantor had been party to this Deed in place of the O&M Contractor) shall be available to the Guarantor in respect of its liabilities under this Deed.

8.2 Savings

Under this Deed the Guarantor shall not be exonerated nor shall the liability of the Guarantor nor the rights, powers and remedies conferred upon TfL be lessened, impaired, discharged, diminished or otherwise adversely affected by virtue of:

- (a) time being given to the O&M Contractor by TfL or by virtue of any concession, forbearance or arrangement granted or made by TfL to or with the O&M Contractor or by any additional or advance payment to the O&M Contractor under or in connection with this Deed; or
- (b) anything that TfL or the O&M Contractor may do or omit or neglect to do (including, without limitation, the assertion or failure or delay to assert any right or remedy or the pursuit of any rights or remedies by TfL or the giving by the O&M Contractor of any security or the release, modification or exchange of any such security or the liability of any person)

which, but for this provision, might exonerate the Guarantor.

8.3 Continuing guarantee

The guarantee set out in this clause 8 (*Guarantee*) is a continuing guarantee and accordingly shall remain in full force and effect until the earlier of:

- (a) all obligations, duties and undertakings now or hereafter to be carried out or performed by the O&M Contractor under this Deed having been satisfied or performed in full; or
- (b) the entry by TfL, Project Co and the Guarantor into a novation agreement in respect of the O&M Contract guarantee as envisaged by clause 8.10,

provided always that this Deed is in addition to and not in substitution for any other security which TfL may at any time hold for the performance of such obligations and may be enforced by TfL without first having recourse to any such security.

8.4 TfL protections

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The liability of the Guarantor and the rights of TfL in relation to this Deed shall not be discharged or impaired by reason of:

- (a) the insolvency, winding up, dissolution, administration receivership or re-organisation of the O&M Contractor or any change in its or their status, function, control or ownership; or
- (b) any other act, event or omission which might, but for the provisions of this Deed, operate to discharge, impair, diminish or otherwise affect any of the obligations or liabilities of the Guarantor hereunder or any of the rights, remedies or powers conferred upon TfL and any discharge or release by TfL in favour of the Guarantor or agreement between the Guarantor and TfL concerning any obligations or liabilities of the Guarantor hereunder which shall be deemed to have been given or entered into by TfL on the express condition that it would be void if given or entered into in reliance upon any act or thing (including, without limitation, any payment to TfL by the O&M Contractor) which is subsequently avoided or reduced by or in pursuance of any provision or rule of law including (without limitation) any provisions or enactments relating to bankruptcy, insolvency or liquidation for the time being in force.

8.5 Waiver of Guarantor's rights

- (a) The Guarantor shall:
 - (i) not by paying any sum due hereunder or by any means or on any ground claim or recover by the institution of proceedings or the threat of proceedings or otherwise recover such sum from the O&M Contractor or claim any set-off or counterclaim against the O&M Contractor or prove in competition with TfL to claim for any money or liabilities due or incurred by the O&M Contractor to TfL or have the benefit of any security which TfL holds or may hold for any money or liabilities due or incurred by the O&M Contractor to TfL; and
 - (ii) in case the Guarantor receives any sums from the O&M Contractor in respect of any payment of the Guarantor hereunder, hold such monies in trust for TfL so long as any sums are payable (contingently or otherwise) under this Deed.
- (b) Until all the Warranty Obligations have been irrevocably satisfied in full, TfL may place and keep any money received or recovered from the Guarantor in relation to the Warranty Obligations in a suspense account.

8.6 Immediate recourse

Without prejudice to clause 8.3 (*Continuing guarantee*), TfL shall not be obliged before enforcing any of its rights or remedies conferred upon it by this Deed or by Law:

- (a) to grant any time or indulgence to the O&M Contractor;
- (b) to take any legal proceedings or action or obtain judgment against the O&M Contractor in any Court;
- (c) to make or file any claim in bankruptcy, liquidation, winding-up or dissolution of the O&M Contractor; or

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- (d) to pursue or exhaust any other right or remedy against the O&M Contractor and the liabilities of the Guarantor under this Deed may be enforced by TfL against the Guarantor irrespective of whether any legal proceedings are being or have been taken against the O&M Contractor.

8.7 Payments to be made without set-off or withholding

Any sums due and payable under this Deed shall be paid in full without set-off or counterclaim and free and clear of and without deduction of or withholding for or on account of any present or future taxes, duties and/or other charges.

8.8 Default Interest

If TfL does not receive, on the due date, any amount due from the Guarantor under this Deed or under any judgment in connection with this Deed, the Guarantor shall pay to TfL on demand interest at the "**Default Rate**" (as defined in the Financing Agreements) from time to time on the amount due or the subject of the judgment from and including the due date until the date of actual payment.

8.9 Guarantor warranties

The Guarantor hereby warrants and represents that:

- (a) it is a company incorporated in [x] with power and authority to enter into this Deed and to exercise its rights and perform its obligations hereunder;
- (b) the obligations expressed to be assumed by it in this Deed are legal and valid obligations binding on it in accordance with the terms hereof; and
- (c) it has taken all action required to enter into this Deed and to authorise the execution and delivery of this Deed and the performance of its obligation under this Deed.

8.10 O&M Contract guarantee novation agreement

- (a) The Guarantor covenants with TfL that if TfL gives notice to the O&M Contractor requesting the O&M Contractor to enter into a novation agreement in accordance with clause 7.4 then the Guarantor will accept the instructions of TfL to the exclusion of Project Co in respect of its duties under the [O&M Contract guarantee] upon the terms and conditions of the [O&M Contract guarantee] and will if so requested in writing enter into a novation agreement substantially in the form set out in Annex 1 (*Form of Deed of Novation*) whereby TfL is substituted for Project Co under the [O&M Contract guarantee] and such amendments are made to reflect the novation of the O&M Contract guarantee.
- (b) If the Guarantor is requested to enter into a novation agreement pursuant to clause 8.10(a), Project Co agrees to enter into the same at the request of TfL.

9. LIMITATION

Without prejudice to the provisions of clause 7.1, TfL shall not be entitled to take any action or proceedings against the O&M Contractor pursuant to this Deed unless and until the Project Agreement has been terminated.

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10. **INDEPENDENT ENQUIRY CLAUSE**

The liability of the O&M Contractor under this Deed shall not be modified released, diminished or in any way affected by:

- (a) any independent inspection investigation, or enquiry into any relevant matter which may be made or carried out by or for TfL;
- (b) any failure or omission to carry out any such inspection, investigation or enquiry;
- (c) the appointment by TfL of any independent firm, company, or party whatsoever to review the progress of or otherwise report to TfL in respect of the Services; nor by
- (d) any action or omission of any such firm, company or party whether or not such action or omission might give rise to any independent liability of such firm, company or party to TfL.

11. **NO VARIATION TO O&M CONTRACT WITHOUT TFL'S CONSENT**

Project Co and the O&M Contractor undertake with TfL not to materially vary or depart from the terms and conditions of the O&M Contract without the prior written consent of TfL and agree that no such material variation or departure made without such consent shall be binding upon TfL, or affect or prejudice TfL's rights hereunder, or under the O&M Contract or in any other way.

12. **NOTICES**

- (a) Any notice to be given by either party hereunder will be sufficiently served if sent by hand, by post or by airmail to the registered office or if there is none the last known address of the party to be served.
- (b) Any notice sent by hand will be deemed to be served on the date of delivery, provided that if any notice sent by hand is sent after 4.45 p.m. on any day it will be deemed to be served on the next Working Day.
- (c) Any notice sent by post will be deemed to have been duly served at the expiration of forty eight (48) hours after the time of posting if the end of that period falls before 4.45 p.m. on a Working Day and otherwise on the next Working Day.
- (d) Any notice sent by air mail will be deemed to have been duly served at the expiration of five (5) Working Days after the time of posting if the end of that period falls before 4.45 p.m. on a Working Day and otherwise on the next Working Day.

13. **SEVERABILITY**

If at any time any provision of this Deed (or part thereof) is or becomes illegal or invalid or unenforceable in any respect under the law of any relevant jurisdiction, such illegality, invalidity or unenforceability shall not affect or impair the legality, validity or enforceability in that jurisdiction of any other part of that provision or any other provision of this Deed or, in any other jurisdiction, of that provision or part thereof or any other provision of this Deed.

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14. **WAIVER**

14.1 No term or provision of this Deed shall be considered as waived by any party to this Deed unless a waiver is given in writing by that party.

14.2 No waiver under clause 14.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Deed unless (and only to the extent) expressly stated in that waiver.

15. **THIRD PARTY RIGHTS**

(a) No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed.

(b) This clause 15 does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

16. **GOVERNING LAW AND JURISDICTION**

(a) This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England.

(b) The English Courts shall have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this Deed.

17. **PROJECT CO ACKNOWLEDGEMENT**

Project Co has entered into this Deed in order to acknowledge the arrangements effected hereby and undertakes to each of TfL and the O&M Contractor to observe the provisions of this Deed at all times and not in any way to prejudice or affect the enforcement hereof or to do or permit to be done anything which would be a breach hereof.

18. **COUNTERPARTS**

This Deed may be executed in one (1) or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full and original instrument for all purposes.

IN WITNESS whereof this document is executed by the parties as a Deed and delivered on the date stated at the beginning of this Deed.

Executed as a deed, but not delivered until the)
first date specified on page 1, by [O&M)
CONTRACTOR] acting by a director in the)
presence of a witness:)

Signature

Name (block capitals)

Director

Witness
signature

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Witness name
(block capitals)

Witness address
.....
.....

Executed as a deed, but not delivered until the)
first date specified on page 1, by)
[**GUARANTOR**] acting by a director in the)
presence of a witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name
(block capitals)

Witness address
.....
.....

Schedule 28 - Direct Agreements and Other Contracts and Agreements

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Executed as a deed, but not delivered until the)
first date specified on page 1, by [**PROJECT**]
CO] acting by a director in the presence of a)
witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

The common seal of **TRANSPORT FOR**)
LONDON)
was affixed to this deed in the presence of:)
)

.....
Authorised signatory

ANNEX 1

Form of Deed of Novation

THIS DEED is made on 201

BETWEEN:

- (1) **[O&M CONTRACTOR]** (Company No.[x]) whose registered office is at [x] (the "**O&M Contractor**");
- (2) **TRANSPORT FOR LONDON** of Windsor House, 42-50 Victoria Street, London, SW1H 0TL ("**TfL**"); and
- (3) **[PROJECT CO]** (Company No. [x]), whose registered office is at [x] ("**Project Co**").

WHEREAS

- (A) By a project agreement between TfL and Project Co dated [x] (the "**Project Agreement**") TfL has appointed Project Co to design, construct, finance, operate and maintain a road tunnel and associated connecting roads and facilities alongside the Blackwall Tunnel in London, connecting the Greenwich Peninsula and the Royal Docks as contemplated by the Project Agreement, including the design, construction and carrying out of the Works and the provision of the Services.
- (B) By an operate and maintain contract dated [x] (the "**O&M Contract**") Project Co has appointed the O&M Contractor to carry out the Services.
- (C) [The employment of Project Co under the Project Agreement has been terminated]/[The Project Agreement has been terminated.]
- (D) The parties have agreed to novate the O&M Contract to TfL on the terms set out below.

IT IS AGREED

1. **DEFINITIONS AND INTERPRETATIONS**

1.1 **Definitions**

Unless expressly defined otherwise in this Deed any capitalised term in this Deed shall have the same meaning given to such term in the O&M Contract.

1.2 **Interpretations**

In this Deed, except where the context or the express provisions of this Deed otherwise require:

- (a) the masculine includes the feminine and vice-versa;
- (b) the singular includes the plural and vice-versa;

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- (c) a reference in this Deed to any clause, sub-clause, paragraph, part, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph or schedule of this Deed;
- (d) save where expressly stated to the contrary in this Deed, any reference to this Deed or to any other document shall include any permitted variation, amendment, or supplement to such document;
- (e) any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- (f) references to any documents being "in the agreed form" means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification;
- (g) a reference to a person includes firms, partnerships and corporations;
- (h) any reference to a public organisation or representative shall be deemed to include reference to any successor to such public organisation or representative or any organisation or entity or representative which has taken over the functions or responsibilities of such public organisation or representative in whole or in part. References to other persons shall include their successors and permitted assignees or transferees;
- (i) headings and sub-headings are for convenience of reference only;
- (j) any obligation on a Project Co or the O&M Contractor to do or not to do anything shall be deemed to include an obligation to procure or not to permit or suffer such things to be done by Project Co's or the O&M Contractor's (as applicable) agents, servants, officers or contractors of any tier and acts or omissions of Project Co's or the O&M Contractor's (as applicable) agents, servants, officers or contractors of any tier shall be deemed to be acts or omissions of Project Co or the O&M Contractor (as applicable) for the purposes of this Deed;
- (k) the words "include" and "including" are to be construed as meaning "including, without limitation";
- (l) references to "writing" shall include any mode of reproducing words in any legible form; and
- (m) where any party is:
 - (i) required to issue a notice or response to any other party pursuant to this Deed; and
 - (ii) no express time limit for issuing such notice or response is specified,

then the relevant party shall issue such notice or response to the receiving party as soon as reasonably practicable.

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Part 3 - Collateral Warranty from the O&M Contractor

2. NOVATION OF O&M CONTRACT

The O&M Contract is hereby novated from Project Co and the O&M Contractor to TfL and the O&M Contractor.

3. RELEASE OF PROJECT CO

On and from the date of this Deed, Project Co shall no longer owe any duty or obligation to the O&M Contractor under or in respect of the O&M Contract whether by virtue of its terms or by virtue of any breach or otherwise.

4. RELEASE OF THE O&M CONTRACTOR

The O&M Contractor shall no longer owe any duty or obligation to Project Co under or in respect of the O&M Contract whether by virtue of its terms or by virtue of any breach or otherwise.

5. BINDING OF THE O&M CONTRACTOR TO TFL

5.1 The O&M Contractor binds itself to TfL in the terms of the O&M Contract as if TfL were and always had been named in the O&M Contract in place of Project Co.

5.2 The O&M Contractor warrants to TfL that prior to the date of this Deed it has performed and that it will continue to perform its duties and obligations as required by and in accordance with the terms of the O&M Contract.

5.3 TfL shall not be precluded from recovering any Losses incurred by TfL or Project Co resulting from any breach of clause 5.2 by reason that (if it be the case) the acts or omissions causing such breach occurred before this Deed took effect, or that Project Co will not incur or has not or would not have incurred any such Losses.

5.4 No waiver by Project Co, either express or implied, will affect the O&M Contractor's liability to TfL pursuant to this clause.

6. BINDING OF TFL TO THE O&M CONTRACTOR

TfL binds itself to the O&M Contractor in the terms of the O&M Contract as if TfL were and always had been named in the O&M Contract in place of Project Co and as if all acts and omissions of Project Co (including any wrongful acts or omissions) under and in respect of the O&M Contract were the acts and omissions of TfL.

7. VESTING OF REMEDIES IN TFL

All rights of action and remedies vested in Project Co against the O&M Contractor under and in respect of the O&M Contract shall hereupon vest in TfL.

8. VESTING OF REMEDIES AGAINST TFL

All rights of action and remedies vested in the O&M Contract against Project Co under and in respect of the O&M Contract shall hereinafter lie against TfL.

9. AFFIRMATION OF O&M CONTRACT

Subject to the terms of this Deed the O&M Contract shall remain in full force and effect.

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10. **THIRD PARTY RIGHTS**

- 10.1 No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed.
- 10.2 This clause 10 (*Third party rights*) does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

11. **GOVERNING LAW AND INTERPRETATION**

- 11.1 This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England.
- 11.2 The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

IN WITNESS of which this document is executed as a deed and is delivered on the date first set out above.

Executed as a deed, but not delivered until the)
first date specified on page 1, by [**O&M**]
CONTRACTOR] acting by a director in the)
presence of a witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

Schedule 28 - Direct Agreements and Other Contracts and Agreements

Part 3 - Collateral Warranty from the O&M Contractor

The common seal of **TRANSPORT FOR LONDON**)
was affixed to this deed in the presence of:)
)
)

.....
Authorised signatory

Executed as a deed, but not delivered until the)
first date specified on page 1, by [**PROJECT**]
CO] acting by a director in the presence of a)
witness:)

Signature
Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

SCHEDULE 28

DIRECT AGREEMENTS AND OTHER CONTRACTS AND AGREEMENTS

Part 4 - Collateral Warranty from the Key Tier 2 Sub-Contractor

ashurst

Collateral Warranty from the Key Tier 2 Sub-Contractor

[Key Tier 2 Sub-Contractor]

and

[TfL]

and

[D&C Contractor]

relating to the Silvertown Tunnel Project

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and Agreements

Part 4 - Collateral Warranty from the Key Tier 2 Sub-Contractor

THIS DEED (this "**Deed**") is made on [x] 20[x].

BETWEEN:

- (1) [KEY TIER 2 SUB-CONTRACTOR] (Company No. [x]), whose registered office is at [x] (the "**Key Tier 2 Sub-Contractor**");
- (2) **TRANSPORT FOR LONDON** of Windsor House, 42-50 Victoria Street, London, SW1H 0TL ("**TfL**");
- (3) [**D&C CONTRACTOR**] (Company No. [x]), whose registered office is at [x] (the "**D&C Contractor**").

BACKGROUND

- (A) By a project agreement between TfL and Project Co dated [x] (the "**Project Agreement**") TfL has appointed Project Co to design, construct, finance, operate and maintain a road tunnel and associated connecting roads and facilities alongside the Blackwall Tunnel in London, connecting the Greenwich Peninsula and the Royal Docks as contemplated by the Project Agreement, including the design, construction and carrying out of the Works and the provision of the Services.
- (B) By a design and construction contract between Project Co and the D&C Contractor dated [x] (the "**D&C Contract**") Project Co has appointed the D&C Contractor to carry out, in relation to the Project, the design and construction of the Works.
- (C) The Key Tier 2 Sub-Contractor has been appointed by the D&C Contractor under a contract dated [x] (the "**Key Tier 2 Sub-Contract**") in relation to the [x]¹⁴ element of the Works (the "**Key Tier 2 Sub-Contract Works**").
- (D) The Key Tier 2 Sub-Contractor and the D&C Contractor have agreed to execute this Deed in favour of TfL.

1. **DEFINITIONS AND INTERPRETATIONS**

1.1 **Definitions**

Unless expressly defined otherwise in this Deed any capitalised term in this Deed shall have the same meaning given to such term in the Key Tier 2 Sub-Contract.

1.2 **Interpretation**

In this Deed, except where the context or the express provisions of this Deed otherwise require:

- (a) the masculine includes the feminine and vice-versa;
- (b) the singular includes the plural and vice-versa;

¹⁴ [REDACTED]

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- (c) a reference in this Deed to any clause, sub-clause, paragraph, part, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph or schedule of this Deed;
- (d) save where expressly stated to the contrary in this Deed, any reference to this Deed or to any other document shall include any permitted variation, amendment, or supplement to such document;
- (e) any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- (f) references to any documents being "in the agreed form" means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification;
- (g) a reference to a person includes firms, partnerships and corporations;
- (h) any reference to a public organisation or representative shall be deemed to include reference to any successor to such public organisation or representative or any organisation or entity or representative which has taken over the functions or responsibilities of such public organisation or representative in whole or in part. References to other persons shall include their successors and permitted assignees or transferees;
- (i) headings and sub-headings are for convenience of reference only;
- (j) any obligation on a Project Co or the Key Tier 2 Sub-Contractor to do or not to do anything shall be deemed to include an obligation to procure or not to permit or suffer such things to be done by Project Co's or the Key Tier 2 Sub-Contractor's (as applicable) agents, servants, officers or contractors of any tier and acts or omissions of Project Co's or the Key Tier 2 Sub-Contractor's (as applicable) agents, servants, officers or contractors of any tier shall be deemed to be acts or omissions of Project Co or the Key Tier 2 Sub-Contractor (as applicable) for the purposes of this Deed;
- (k) the words "include" and "including" are to be construed as meaning "including, without limitation";
- (l) references to "writing" shall include any mode of reproducing words in any legible form; and
- (m) where any party is:
 - (i) required to issue a notice or response to any other party pursuant to this Deed; and
 - (ii) no express time limit for issuing such notice or response is specified,then the relevant party shall issue such notice or response to the receiving party as soon as reasonably practicable.

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2. OPERATIVE PROVISIONS

In consideration of the payment of one pound sterling (£1.00) by TfL to each of the D&C Contractor and Key Tier 2 Sub-Contractor, receipt of which the D&C Contractor and Key Tier 2 Sub-Contractor acknowledge, the parties agree to the terms and conditions set out in this Deed.

3. KEY TIER 2 SUB-CONTRACTOR'S WARRANTY AND LIABILITY

3.1 The Key Tier 2 Sub-Contractor warrants to TfL that:

- (a) it has carried out and will continue to carry out its duties and obligations under the Key Tier 2 Sub-Contract in accordance with the Key Tier 2 Sub-Contract;
- (b) that it has exercised and will continue to exercise, in carrying out the design of the Key Tier 2 Sub-Contract Works, the level of skill and care reasonably to be expected from an appropriately qualified and competent professional designer providing those services in relation to a project of a similar size and scope to the Works; and
- (c) without limiting the generality of the foregoing, that it has carried out and will carry out and complete the Key Tier 2 Sub-Contract Works in accordance with the Key Tier 2 Sub-Contract and duly observe and perform all its duties and obligations thereunder.

3.2 The Key Tier 2 Sub-Contractor shall have no liability under clause 3.1 or clause 9 (*Standards of products and materials*) of this Deed that is greater or of longer duration than it would have had as if in lieu of this Deed TfL had been a party to the Key Tier 2 Sub-Contract as joint employer and the Key Tier 2 Sub-Contractor shall be entitled in any action or proceedings by TfL to raise equivalent rights in defence of liability (except for set off or counterclaim).

3.3 Upon the expiration of twelve (12) years from the Permit to Use Date in accordance with the Project Agreement, the liability of the Key Tier 2 Sub-Contractor under this Deed shall cease and determine, save in relation to any claims made by TfL against the Key Tier 2 Sub-Contractor and notified by TfL to the Key Tier 2 Sub-Contractor in writing prior thereto.

3.4 Nothing in this Deed shall entitle TfL to exercise its rights under this clause 3 (*Key Tier 2 Sub-Contractor's Warranty and Liability*) unless:

- (a) the Project Agreement (or Project Co's employment under it) has been terminated; or
- (b) Project Co has not satisfied any potential claim by TfL under this clause 3 (*Key Tier 2 Sub-Contractor's Warranty and Liability*), including addressing and/or remedying the matter or circumstance giving rise to such claim, within a reasonable time of such matter or circumstance arising,

provided that this clause 3.4 shall not apply where any delay in the exercise of TfL's rights under this Deed might otherwise lead to their becoming statute-barred.

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4. **INTELLECTUAL PROPERTY**

4.1 The Key Tier 2 Sub-Contractor shall make available to TfL free of charge (and hereby irrevocably licences TfL to use) all [Project Data] that might reasonably be required by TfL.

4.2 The Key Tier 2 Sub-Contractor shall obtain all necessary licences, permissions and consents necessary for it to make the [Project Data] available to TfL on the following terms:

- (a) TfL using the Works for the purposes of the Project or for exercising its rights and duties under the Project Agreement and/or any statutory duties that TfL may have; and
- (b) following termination of the Project Agreement or of Project Co's employment under it, the design or construction of the Works and/or the operation, maintenance or improvement of the Works,

(together, the "**Approved Purposes**"), and in this clause "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.

4.3 TfL will not hold the Key Tier 2 Sub-Contractor liable for any use it may make of the [Project Data] for any purpose other than the Approved Purposes.

4.4 The Key Tier 2 Sub-Contractor:

- (a) hereby grants to TfL, free of charge, an irrevocable, sub-licensable, non-exclusive and transferable (subject to the restrictions continued in clause 6 (*Assignment*) of this Deed) licence to use the Intellectual Property Rights that are or become vested in the Key Tier 2 Sub-Contractor for the Approved Purposes; and
- (b) shall (where any Intellectual Property Rights are or become vested in a third party) ensure the grant of a like licence to that referred to in clause 4.2(a) to TfL,

in both cases, solely for the Approved Purposes.

4.5 The Key Tier 2 Sub-Contractor warrants to TfL that the Project Data (save to the extent duly appointed Key Tier 2 Sub-Contractors have been used to prepare the same) is its own original work and that in any event its use in connection with the Key Tier 2 Sub-Contract Works will not infringe the rights of any third party.

4.6 Where a claim or proceeding is made or brought against TfL:

- (a) that arises out of the infringement of any Intellectual Property Rights; or
- (b) because the use of any materials, plant, machinery or equipment in connection with the Works infringes, or the Works themselves infringe any Intellectual Property Rights, of a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of TfL otherwise than in accordance with this Deed, the Key Tier 2 Sub-Contractor shall release and indemnify TfL and any TfL Related Party (as such term in the Project Agreement) at all times from and against all Losses arising as a result of such claims and proceedings.

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5. INSURANCE

5.1 The Key Tier 2 Sub-Contractor hereby covenants with TfL to:

- (a) take out and maintain professional indemnity insurance cover with a limit of indemnity that shall be a minimum of [REDACTED] [REDACTED] either each and every loss or in the aggregate in relation to the Key Tier 2 Sub-Contract Works (if in the aggregate then in any one (1) year of insurance a minimum of two (2) automatic reinstatements of the aggregate indemnity limit is required) ("**PI Insurance**") and that it will maintain such insurance with reputable insurers carrying on business in the United Kingdom or the European Union from the date of this Deed until twelve (12) years after the Permit to Use Date pursuant to the Project Agreement, provided that such insurance is generally available in the market to members of the Key Tier 2 Sub-Contractor's profession at commercially reasonable rates and terms and provided further that payment of any increased or additional premiums or more onerous terms required by insurers by reason of the Key Tier 2 Sub-Contractor's own claims record or other acts, omissions, matters or things peculiar to the Key Tier 2 Sub-Contractor will be deemed to be within the commercially reasonable rates and terms;
- (b) provide evidence (as and when reasonably required by TfL) satisfactory to TfL of the PI Insurance being in full force and effect from the date of the Key Tier 2 Sub-Contract (such evidence to include details of the cover);
- (c) provide TfL with notice of:
 - (i) any cancellation of the PI Insurance not less than thirty (30) days prior to the relevant cancellation date; and
 - (ii) any adverse material change to or suspension of cover relevant to the Key Tier 2 Sub-Contract Works not less than thirty (30) days prior to such relevant change or suspension; and
- (d) inform TfL as soon as reasonably practicable of any claim under the PI Insurance in respect of the Key Tier 2 Sub-Contract Works in excess of [REDACTED] [REDACTED] and provide such information to TfL as TfL may reasonably require in relation to such claim and provide notice of any potential breach of the aggregate limit of the policy; and
- (e) release and indemnify TfL and any TfL Related Party at all times from and against all Losses arising in respect of any subrogation claim by the insurers brought in connection with any claim made under the PI Insurance.

6. ASSIGNMENT

6.1 The benefit of and the rights of TfL under this Deed may be assigned without the consent of the Key Tier 2 Sub-Contractor and TfL will notify the Key Tier 2 Sub-Contractor in

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writing following any such assignment specifying the name and address of the assignee and the date of the assignment.

- 6.2 The Key Tier 2 Sub-Contractor shall not contend that any such assignee of TfL 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 hereunder 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 Project or that the original beneficiary or any intermediate beneficiary has not suffered any, or as much, Loss.
- 6.3 The Key Tier 2 Sub-Contractor shall not, assign, underlet, charge, sell, bargain or otherwise deal in any way with the benefit of this Deed in whole or in part, except with the prior written consent of TfL.

7. TFL'S REMEDIES

The rights and benefits conferred upon TfL by this Deed are in addition to any other rights and remedies it may have against the Key Tier 2 Sub-Contractor, including without prejudice to the generality of the foregoing any remedies in negligence.

8. STEP-IN RIGHTS IN FAVOUR OF TFL

- 8.1 The Key Tier 2 Sub-Contractor 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 Key Tier 2 Sub-Contract or its engagement under it or discontinue or suspend the performance of any duties or obligations thereunder without first giving to TfL not less than thirty (30) Working Days' prior written notice specifying the Key Tier 2 Sub-Contractor's ground for terminating or treating as terminated or repudiated the Key Tier 2 Sub-Contract or its engagement under it or discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the Key Tier 2 Sub-Contract.
- 8.2 Within such period of notice referred to in clause 8.1:
- (a) TfL may give written notice to the Key Tier 2 Sub-Contractor that TfL will from the date of the notice become the client under the Key Tier 2 Sub-Contract to the exclusion of the D&C Contractor and thereupon the Key Tier 2 Sub-Contractor will admit that TfL is its client under the Key Tier 2 Sub-Contract and the Key Tier 2 Sub-Contract will be and remain in full force and effect notwithstanding any of the said grounds;
 - (b) if TfL has given such notice as aforesaid or under clause 8.4, TfL shall accept liability for the D&C Contractor's obligations under the Key Tier 2 Sub-Contract and will as soon as practicable thereafter remedy any outstanding breach by the previous client which properly has been included in the Key Tier 2 Sub-Contractor's specified grounds and which is capable of remedy by TfL; and
 - (c) if TfL has given such notice as aforesaid or under clause 8.4, TfL will from the service of such notice become responsible for all sums properly payable to the Key Tier 2 Sub-Contractor under the Key Tier 2 Sub-Contract accruing due after the service of such notice but TfL will in paying such sums be entitled to the same rights of set-off and deduction as would have applied to the D&C Contractor under the Key Tier 2 Sub-Contract.

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- 8.3 Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by TfL to the Key Tier 2 Sub-Contractor, TfL will not be under any obligation to the Key Tier 2 Sub-Contractor nor will the Key Tier 2 Sub-Contractor have any claim or cause of action against TfL unless and until TfL has given written notice to the Key Tier 2 Sub-Contractor pursuant to clause 8.2(a) or clause 8.4 of this Deed.
- 8.4 The Key Tier 2 Sub-Contractor further covenants with TfL that if the employment of the D&C Contractor under the D&C Contract is terminated or if the D&C Contract is terminated the Key Tier 2 Sub-Contractor, if requested by TfL by notice in writing and subject to clause 8.2(b) and clause 8.2(c), will accept the instructions of TfL to the exclusion of the D&C Contractor in respect of its obligations under the Key Tier 2 Sub-Contract upon the terms and conditions of the Key Tier 2 Sub-Contract and will if so requested in writing:
- (a) enter into a novation agreement in the form set out in Appendix 1 (*Form of Deed of Novation*) whereby TfL is substituted for the D&C Contractor under the Key Tier 2 Sub-Contract; and
 - (b) take such other action as is required to vest in TfL full legal and equitable title to any retention account, bank guarantee, performance bond, letter of credit or other security held by Project Co to secure the obligations of the D&C Contractor under the D&C Contract.
- 8.5 Where the Key Tier 2 Sub-Contractor has given rights in relation to the Key Tier 2 Sub-Contract similar to those contained in this clause to the Senior Funders if both TfL and the Senior Funders serve notice under clause 8.2(a) or clause 8.4 or its equivalent the notice served by TfL will not prevail over any notice served by the Senior Funders but will prevail over any notice served by any other person.
- 8.6 The D&C Contractor acknowledges that the Key Tier 2 Sub-Contractor will be entitled to rely on a notice given to the Key Tier 2 Sub-Contractor by TfL under clause 8.4 as conclusive evidence that the employment of the D&C Contractor under the D&C Contract has been terminated.
- 8.7 TfL may by notice in writing to the Key Tier 2 Sub-Contractor appoint another person to exercise its rights under this clause 8 (*Step-in rights in favour of TfL*) subject to TfL remaining liable to the Key Tier 2 Sub-Contractor as guarantor for its appointee in respect of its obligations under this Deed.
- 8.8 Upon request by TfL the Key Tier 2 Sub-Contractor agrees to co-operate with TfL in determining the duties performed or to be performed by the Key Tier 2 Sub-Contractor and to provide a copy of the Key Tier 2 Sub-Contract and any variations thereto and details of all monies paid and due under the Key Tier 2 Sub-Contract.
- 8.9 As from the date of service of notice under clause 8.2(a) or clause 8.4 to the extent that the Key Tier 2 Sub-Contract operates by reference to the existence and application of the D&C Contract and/or the Project Agreement, the Key Tier 2 Sub-Contract shall be administered and construed as though the D&C Contract and the Project Agreement were continuing and the Key Tier 2 Sub-Contract shall therefore continue, subject to amendment only as necessary to reflect the fact that the D&C Contract and the Project Agreement may in fact have been terminated and TfL has undertaken the obligations set out in clause 8.2(b).

9. STANDARDS OF PRODUCTS AND MATERIALS

- 9.1 The Key Tier 2 Sub-Contractor warrants that it has not specified for use or used and it will not specify for use or use and (as appropriate) it has not authorised or approved and it will not authorise the use by others, of any products or materials not in conformity with relevant Standards or Codes of Practice or which, at the time of specification, are widely known to members of the Key Tier 2 Sub-Contractor's profession within the European Union to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used.
- 9.2 If in the performance of its duties under the Key Tier 2 Sub-Contract the Key Tier 2 Sub-Contractor 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 material the Key Tier 2 Sub-Contractor will notify TfL in writing forthwith. This clause does not create any additional duty for the Key Tier 2 Sub-Contractor to inspect or check the work of others which is not required by the Key Tier 2 Sub-Contract.

10. INDEPENDENT ENQUIRY CLAUSE

The liability of the Key Tier 2 Sub-Contractor under this Deed shall not be modified released, diminished or in any way affected by:

- (a) any independent inspection investigation, or enquiry into any relevant matter which may be made or carried out by or for TfL;
- (b) any failure or omission to carry out any such inspection, investigation or enquiry;
- (c) the appointment by TfL of any independent firm, company, or party whatsoever to review the progress of or otherwise report to TfL in respect of the Services;
- (d) any action or omission of any such firm, company or party whether or not such action or omission might give rise to any independent liability of such firm, company or party to TfL.

11. NO VARIATION TO KEY TIER 2 SUB-CONTRACT WITHOUT TFL'S CONSENT

The D&C Contractor and the Key Tier 2 Sub-Contractor undertake with TfL not to materially vary or depart from the terms and conditions of the Key Tier 2 Sub-Contract without the prior written consent of TfL and agree that no such material variation or departure made without such consent shall be binding upon TfL, or affect or prejudice TfL's rights hereunder, or under the Key Tier 2 Sub-Contract or in any other way.

12. NOTICES

- 12.1 Any notice to be given by any party will be sufficiently served if sent by hand by post or by airmail to the registered office or if there is none the last known address of the party to be served.
- 12.2 Any notice sent by hand will be deemed to be served on the date of delivery provided that if any notice sent by hand is sent after 4.45 p.m. on any day it will be deemed to be served on the next Working Day.

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12.3 Any notice sent by post will be deemed to have been duly served at the expiration of forty eight (48) hours after the time of posting if the end of that period falls before 4.45 p.m. on a Working Day and otherwise on the next Working Day.

12.4 Any notice sent by air mail will be deemed to have been duly served at the expiration of five (5) Working Days after the time of posting if the end of that period falls before 4.45 p.m. on a Working Day and otherwise on the next Working Day.

13. **SEVERABILITY**

If at any time any provision of this Deed (or part thereof) is or becomes illegal or invalid or unenforceable in any respect under the law of any relevant jurisdiction, such illegality, invalidity or unenforceability shall not affect or impair the legality, validity or enforceability in that jurisdiction of any other part of that provision or any other provision of this Deed or, in any other jurisdiction, of that provision or part thereof or any other provision of this Deed.

14. **WAIVER**

14.1 No term or provision of this Deed shall be considered as waived by any party to this Deed unless a waiver is given in writing by that party.

14.2 No waiver under clause 14.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Deed unless (and only to the extent) expressly stated in that waiver.

15. **THIRD PARTY RIGHTS**

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This clause does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

16. **GOVERNING LAW AND JURISDICTION**

16.1 This Deed and any non-contractual obligation arising out of or in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England.

16.2 The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

17. **D&C CONTRACTOR ACKNOWLEDGEMENT**

The D&C Contractor has entered into this Deed in order to acknowledge the arrangements effected hereby and undertakes to each of TfL and the Key Tier 2 Sub-Contractor to observe the provisions of this Deed at all times and not in any way to prejudice or affect the enforcement hereof or to do or permit to be done anything which would be a breach hereof.

18. **COUNTERPARTS**

This Deed may be executed in one (1) or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full and original instrument for all purposes.

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IN WITNESS whereof this document is executed by the parties as a deed and is delivered on the date first set out above.

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Executed as a deed, but not delivered until the)
first date specified on page 1, by [**KEY TIER 2**)
SUB-CONTRACTOR] acting by a director in)
the presence of a witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

Executed as a deed, but not delivered until the)
first date specified on page 1, by [**D&C**)
CONTRACTOR] acting by a director in the)
presence of a witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

The common seal of **TRANSPORT FOR**)
LONDON)
was affixed to this deed in the presence of:)
)

.....
Authorised signatory

APPENDIX 1

Form of Deed of Novation

THIS DEED is made on

201

BETWEEN:

- (1) **[KEY TIER 2 SUB-CONTRACTOR]** (Company No.[x]) whose registered office is at [x] (the "**Key Tier 2 Sub-Contractor**");
- (2) **TRANSPORT FOR LONDON** of Windsor House, 42-50 Victoria Street, London, SW1H 0TL ("**TfL**"); and
- (3) **[D&C CONTRACTOR]** (Company No. [x]), whose registered office is at [x] (the "**D&C Contractor**").

WHEREAS

- (A) By a project agreement between TfL and Project Co dated [x] (the "**Project Agreement**") TfL has appointed Project Co to design, construct, finance, operate and maintain a road tunnel and associated connecting roads and facilities alongside the Blackwall Tunnel in London, connecting the Greenwich Peninsula and the Royal Docks as contemplated by the Project Agreement, including the design, construction and carrying out of the Works and the provision of the Services.
- (B) By a design and construction contract dated [x] (the "**D&C Contract**") Project Co has appointed the D&C Contractor to carry out, in relation to the Project, the design and construction of the Works.
- (C) The Key Tier 2 Sub-Contractor has been appointed by the D&C Contractor under a contract dated [x] (the "**Key Tier 2 Sub-Contract**") in relation to the [x]¹⁶ element of the Works (the "**Key Tier 2 Sub-Contract Works**").
- (D) [The employment of the D&C Contractor under the D&C Contract has been terminated] / [The D&C Contract has been terminated.]
- (F) The parties have agreed to novate the Key Tier 2 Sub-Contract to TfL on the terms set out below.

IT IS AGREED

1. **DEFINITIONS AND INTERPRETATIONS**

1.1 **Definitions**

Unless expressly defined otherwise in this Deed any capitalised term in this Deed shall have the same meaning given to such term in the Key Tier 2 Sub-Contract.

1.2 **Interpretations**

In this Deed, except where the context or the express provisions of this Deed otherwise require:

- (a) the masculine includes the feminine and vice-versa;

¹⁶ [REDACTED]

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- (b) the singular includes the plural and vice-versa;
- (c) a reference in this Deed to any clause, sub-clause, paragraph, part, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph or schedule of this Deed;
- (d) save where expressly stated to the contrary in this Deed, any reference to this Deed or to any other document shall include any permitted variation, amendment, or supplement to such document;
- (e) any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- (f) references to any documents being "in the agreed form" means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification;
- (g) a reference to a person includes firms, partnerships and corporations;
- (h) any reference to a public organisation or representative shall be deemed to include reference to any successor to such public organisation or representative or any organisation or entity or representative which has taken over the functions or responsibilities of such public organisation or representative in whole or in part. References to other persons shall include their successors and permitted assignees or transferees;
- (i) headings and sub-headings are for convenience of reference only;
- (j) any obligation on a Project Co or the Key Tier 2 Sub-Contractor to do or not to do anything shall be deemed to include an obligation to procure or not to permit or suffer such things to be done by Project Co's or the Key Tier 2 Sub-Contractor's (as applicable) agents, servants, officers or contractors of any tier and acts or omissions of Project Co's or the Key Tier 2 Sub-Contractor's (as applicable) agents, servants, officers or contractors of any tier shall be deemed to be acts or omissions of Project Co or the Key Tier 2 Sub-Contractor (as applicable) for the purposes of this Deed;
- (k) the words "include" and "including" are to be construed as meaning "including, without limitation";
- (l) references to "writing" shall include any mode of reproducing words in any legible form; and
- (m) where any party is:
 - (i) required to issue a notice or response to any other party pursuant to this Deed; and
 - (ii) no express time limit for issuing such notice or response is specified,

then the relevant party shall issue such notice or response to the receiving party as soon as reasonably practicable.

2. NOVATION OF THE KEY TIER 2 SUB-CONTRACT

The Key Tier 2 Sub-Contract is hereby novated from the D&C Contractor and the Key Tier 2 Sub-Contractor to TfL and the Key Tier 2 Sub-Contractor.

3. RELEASE OF THE D&C CONTRACTOR

On and from the date of this Deed, the D&C Contractor shall no longer owe any duty or obligation to the Key Tier 2 Sub-Contractor under or in respect of the Key Tier 2 Sub-Contract whether by virtue of its terms or by virtue of any breach or otherwise.

4. RELEASE OF THE KEY TIER 2 SUB-CONTRACTOR

On and from the date of this Deed, the Key Tier 2 Sub-Contractor shall no longer owe any duty or obligation to the D&C Contractor under or in respect of the Key Tier 2 Sub-Contract whether by virtue of its terms or by virtue of any breach or otherwise.

5. BINDING OF THE KEY TIER 2 SUB-CONTRACTOR TO TFL

5.1 The Key Tier 2 Sub-Contractor binds itself to TfL in the terms of the Key Tier 2 Sub-Contract as if TfL were and always had been named in the Key Tier 2 Sub-Contract in place of the D&C Contractor.

5.2 The Key Tier 2 Sub-Contractor warrants to TfL that prior to the date of this Deed it has performed and that it will continue to perform its duties and obligations as required by and in accordance with the terms of the Key Tier 2 Sub-Contract.

5.3 TfL shall not be precluded from recovering any Losses incurred by TfL resulting from any breach of clause 5.2 by reason that (if it be the case) the acts or omissions causing such breach occurred before this Deed took effect, or that the D&C Contractor will not incur or has not or would not have incurred any such Losses. No waiver by the D&C Contractor, either express or implied, will affect the Key Tier 2 Sub-Contractor's liability to TfL pursuant to this clause.

5.4 Upon the expiration of twelve (12) years from the Permit to Use Date in accordance with the Project Agreement, the liability of the Key Tier 2 Sub-Contractor under this Deed shall cease and determine, save in relation to any claims made by TfL against the Key Tier 2 Sub-Contractor and notified by TfL to the Key Tier 2 Sub-Contractor in writing prior thereto.

6. BINDING OF TFL TO THE KEY TIER 2 SUB-CONTRACTOR

TfL binds itself to the Key Tier 2 Sub-Contractor in the terms of the Key Tier 2 Sub-Contract as if TfL were and always had been named in the Key Tier 2 Sub-Contract in place of the D&C Contractor and as if all acts and omissions of the D&C Contractor (including any wrongful acts or omissions) under and in respect of the Key Tier 2 Sub-Contract were the acts and omissions of TfL.

7. VESTING OF REMEDIES IN TFL

All rights of action and remedies vested in the D&C Contractor against the Key Tier 2 Sub-Contractor under and in respect of the Key Tier 2 Sub-Contract shall hereupon vest in TfL.

Schedule 28 - Direct Agreements and Other Contracts and Agreements

Part 4 - Collateral Warranty from the Key Tier 2 Sub-Contractor

8. VESTING OF REMEDIES AGAINST TFL

All rights of action and remedies vested in the Key Tier 2 Sub-Contractor against the D&C Contractor under and in respect of the Key Tier 2 Sub-Contract shall hereinafter lie against Tfl.

9. AFFIRMATION OF THE KEY TIER 2 SUB-CONTRACT

Subject to the terms of this Deed the Key Tier 2 Sub-Contract shall remain in full force and effect.

10. THIRD PARTY RIGHTS

10.1 No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed.

10.2 This clause 10 (*Third Party Rights*) does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

11. GOVERNING LAW AND INTERPRETATION

11.1 This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England.

11.2 The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

IN WITNESS of which this document is executed as a deed and is delivered on the date first set out above.

Executed as a deed, but not delivered until the)
first date specified on page 1, by [**KEY TIER 2**)
SUB-CONTRACTOR] acting by a director in)
the presence of a witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

Schedule 28 - Direct Agreements and Other Contracts and Agreements

Part 4 - Collateral Warranty from the Key Tier 2 Sub-Contractor

The common seal of **TRANSPORT FOR LONDON**)
was affixed to this deed in the presence of:)
)
)

.....
Authorised signatory

Executed as a deed, but not delivered until the)
first date specified on page 1, by [**D&C**])
CONTRACTOR] acting by a director in the)
presence of a witness:)

Signature
Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

SCHEDULE 28

DIRECT AGREEMENTS AND OTHER CONTRACTS AND AGREEMENTS

Part 5 - Collateral Warranty from Project Co¹⁷

¹⁷ [REDACTED]

ashurst

Collateral Warranty from Project Co

[Beneficiary]

and

[TfL]

and

[Project Co]

relating to the Silvertown Tunnel Project

THIS DEED (this "**Deed**") is made on [x] 20[x].

BETWEEN:

- (1) [INSERT BENEFICIARY] (Company No. [x]), whose registered office is at [x] (the "**Beneficiary**").
- (2) **TRANSPORT FOR LONDON** of Windsor House, 42-50 Victoria Street, London, SW1H 0TL ("**TfL**"); and
- (3) **PROJECT CO** (Company No. [x]), whose registered office is at [x] ("**Project Co**").

BACKGROUND

- (A) By a project agreement dated [x] (the "**Project Agreement**") TfL has appointed Project Co to construct, design, finance, operate and maintain a road tunnel and associated connecting roads and facilities alongside the Blackwall Tunnel in London, connecting the Greenwich Peninsula and the Royal Docks as contemplated by the Project Agreement, including the design, construction and carrying out of works associated with the Nominated Assets.
- (C) Project Co is obliged under the Project Agreement to give a collateral warranty in this form in favour of the Beneficiary.
- (D) Project Co has agreed to execute this Deed in favour of the Beneficiary.

1. DEFINITIONS AND INTERPRETATIONS

1.1 Definitions

Unless expressly defined otherwise in this Deed the following words and expressions shall have the following meanings:

"D&C Requirements" has the meaning given to it in the Project Agreement;

"Default Rate" means the six (6) month LIBOR prevailing when the amount became overdue or disputed plus one per cent (1%) per annum;

"Defect" means in relation to the Nominated Asset:

- (a) any defect, error, failure or omission that is the result of Project Co's defective design, defective materials or defective workmanship;
- (b) any defect, error, failure or omission that is the result of Project Co's failure to comply with Project Co's obligations under the Project Agreement; or
- (c) any failure of the Nominated Asset to meet, or to continue to meet, the D&C Requirements or Project Co's Works Proposals,

other than to the extent that such Defect was caused by:

- (i) fair wear and tear; or

Schedule 28 - Direct Agreements and Other Contracts
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Part 5 - Collateral Warranty from Project Co

- (ii) a failure by the Beneficiary to operate or maintain the Nominated Asset in accordance with Good Industry Practice;

"Defects Rectification Period" means the period:

- (a) commencing on the issuance of the Handover Certificate for the Nominated Asset in accordance with clause 17.1(e)(i) of the Project Agreement; and
- (b) ending twelve (12) months after the issuance of the Handover Certificate for the Nominated Asset;

"Emergency" has the meaning given to it in the Project Agreement;

"Further Defects Rectification Period" means in relation to any Defect in any Nominated Asset or any damage cause by any Defect in any Nominated Asset which Project Co is required to rectify pursuant to clause 4 (*Defect rectification process*), the period:

- (a) commencing on the date of completion of such rectification works by Project Co; and
- (b) ending twelve (12) months after the date of completion of the rectification works;

"Good Industry Practice" means, at any time, the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected at such time from a skilled and experienced person seeking in good faith to comply with its contractual obligations, complying with all laws and engaged in the same type of undertaking and under the same or similar circumstances and conditions;

"Handover Certificate" has the meaning given to it in the Project Agreement;

"Loss" or **"Losses"** means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses) and charges whether arising under statute, contract, or at common law or in connection with judgements, proceedings, internal costs or demands;

"Nominated Asset" means those assets and facilities to be constructed and/or adapted by Project Co as part of the works under the Project Agreement, more particularly described in [Schedule 1];

"Project Agreement" has the meaning given to it in recital A;

"Project Co's Works Proposals" has the meaning given to it in the Project Agreement;

"Rectification Programme" has the meaning given to it in clause 4.1(a)(ii);

"VAT" means any value added taxes;

"Works" means the design, construction, testing, commissioning and any other activities involved in completion of the Nominated Assets, prior to the commencement of the Defects Rectification Period.

1.2 Interpretation

TfL Reference: tfl_scp_001527

Schedule 28 - Direct Agreements and Other Contracts
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Part 5 - Collateral Warranty from Project Co

In this Deed, except where the context or the express provisions of this Deed otherwise require:

- (a) the masculine includes the feminine and vice-versa;
- (b) the singular includes the plural and vice-versa;
- (c) a reference in this Deed to any clause, sub-clause or schedule is, except where it is expressly stated to the contrary in this Deed, a reference to such clause, sub-clause or schedule of this Agreement;
- (d) save where expressly stated to the contrary in this Deed, any reference to this Deed or to any other document shall include any permitted variation, amendment, or supplement to such document;
- (e) any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- (f) a reference to a person includes firms, partnerships and corporations;
- (g) headings and sub-headings are for convenience of reference only;
- (h) any obligation on Project Co to do or not to do anything shall be deemed to include an obligation to procure or not to permit or suffer such things to be done by any Project Co Related Party and acts or omissions of any Project Co Related Party shall be deemed to be acts or omissions of Project Co for the purposes of this Deed;
- (i) the words "include" and "including" are to be construed as meaning "including, without limitation";
- (j) references to "writing" shall include any mode of reproducing words in any legible form; and
- (k) where any party is:
 - (i) required to issue a notice or response to any other party pursuant to this Deed; and
 - (ii) no express time limit for issuing such notice or response is specified,

then the relevant party shall issue such notice or response to the receiving party as soon as reasonably practicable.

2. OPERATIVE PROVISIONS

In consideration of the payment of one pound sterling (£1) by Project Co to each of TfL and the Beneficiary, receipt of which TfL and the Beneficiary acknowledge:

3. PROJECT CO'S WARRANTY AND LIABILITY

- 3.1 Project Co covenants with the Beneficiary that it shall be liable for the rectification of any Defects in relation the Nominated Asset which arise during the Defects Rectification Period.

Schedule 28 - Direct Agreements and Other Contracts
and AgreementsPart 5 - Collateral Warranty from Project Co

3.2 Project Co shall have no liability under this Deed that is greater or of longer duration than it would have had as if in lieu of this Deed the Beneficiary had been a party to the Project Agreement as joint employer and Project Co shall be entitled in any action or proceedings by the Beneficiary to raise equivalent rights in defence of liability (except for set-off or counterclaim). Upon the expiration of twelve (12) years from the date of the Handover Certificate issued in accordance with the Project Agreement, the liability of Project Co under this Deed shall cease and determine, save in relation to any claims made by the Beneficiary against Project Co and notified by the Beneficiary to Project Co in writing prior thereto.

4. DEFECT RECTIFICATION PROCESS**4.1 Notification and access**

- (a) The Beneficiary may notify Project Co of any Defects in the Nominated Asset of which the Beneficiary becomes aware during the Defects Rectification Period (or any Further Defects Rectification Period). Following receipt of such notice Project Co shall promptly provide the Beneficiary with:
- (i) a summary of the work required to rectify the Defect and any damage caused by the Defect; and
 - (ii) a proposed rectification programme for the rectification of the Defect and any damage caused by the Defect, which includes access arrangements and the intended date of commencement of any works, for the approval of the Beneficiary (the "**Rectification Programme**").
- (b) Where the Beneficiary does not approve the proposed Rectification Programme referred to in clause 4.1(a)(ii) (or any updated proposed Rectification Programme provided pursuant to this clause 4.1(b)), Project Co shall provide the Beneficiary with an updated Rectification Programme for approval, taking into account any comments raised by the Beneficiary (acting reasonably).
- (c) Project Co shall rectify all Defects in the Nominated Assets (and any damage caused by such Defects) which arise during the Defects Rectification Period as soon as reasonably practicable, and in any event within any time period specified in a Rectification Programme approved by the Beneficiary pursuant to this clause 4 (*Defect rectification process*).
- (d) Subject to clause 4.1(e), in carrying out any rectification work in relation to a Defect Project Co shall:
- (iii) be responsible for obtaining any required access to the relevant area for the purpose of complying with its Defect rectification obligations pursuant to this clause 4; and
 - (iv) have regard to the usage of the Nominated Asset and shall carry out all rectification work at times and in a manner which causes as little inconvenience to the Beneficiary, the road network (if applicable) and any other affected third parties as is reasonably possible.

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- (e) If, after using all reasonable endeavours, Project Co is unable to obtain the access required for the purpose of complying with its Defect rectification obligations pursuant to this clause 4:
- (i) Project Co shall notify TfL and the Beneficiary as soon as reasonably practicable, including details of the specific area for which access is required; and
 - (ii) within twenty (20) Working Days:
 - (A) the Beneficiary shall notify Project Co if it is relieved of its Defect rectification in relation to the area identified in Project Co's notice under clause 4.2(e)(i); or
 - (B) TfL shall, where possible, exercise its powers under Article [30(1)]¹⁸ (*Temporary use of land for maintaining the authorised development*) of the DCO and provide access to Project Co to the relevant area for the rectification of the specified Defect.
- (f) Project Co acknowledges and agrees that where TfL provides access to Project Co in accordance with clause 4.1(e)(ii)(B):
- (iii) any such rights granted shall be limited:
 - (A) to the access rights TfL is able to obtain pursuant to the powers contained in Article 30 (*Temporary use of land for maintaining the authorised development*) of the DCO;
 - (B) by the other conditions and limitations in the DCO on the exercise of powers contained in Article 30 (*Temporary use of land for maintaining the authorised development*);
 - (C) to the purpose of rectification of the specified Defect; and
 - (D) to the duration required to rectify the Defects in accordance with the proposed Rectification Programme approved by the Beneficiary pursuant to this clause 4 (*Defect rectification process*); and
 - (iv) Project Co shall be liable to reimburse TfL for the payment of all compensation paid by TfL pursuant to Article 30(9) of the DCO in respect of the exercise of such power.

4.2 Beneficiary Rectification

- (a) If Project Co does not complete any rectification work by the date required by clause 4, the Beneficiary may carry out or have the rectification works carried out at Project Co's expense (but without prejudice to any other rights that the Beneficiary may have against Project Co with respect to the Defect) and the costs of the rectification works (including any irrecoverable VAT payable thereon) incurred by the Beneficiary will be a debt due from Project Co to the Beneficiary which is payable thirty (30) days from the Beneficiary's written demand.

¹⁸ [REDACTED]

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- (b) Without prejudice to clause 4.2(a), if in the opinion of the Beneficiary it is necessary to urgently rectify any Defect (or any damage caused by such Defects) in relation to any Nominated Asset during the Defects Rectification Period by reason of the occurrence of any Emergency, the Beneficiary may at any time carry out or procure the carrying out of such measures as the Beneficiary may consider necessary to rectify such Defect (or any damage caused by such Defect), and the reasonable costs of the rectification works (including any irrecoverable VAT payable thereon) incurred by the Beneficiary will be a debt due from Project Co to the Beneficiary which is payable thirty (30) days from the Beneficiary's written demand.

4.3 Further Defects Rectification Period

- (a) A Further Defects Rectification Period will apply to all Defects in the Nominated Assets which Project Co is required to rectify pursuant to clause 4.1 (*Notification and access*).
- (b) Clause 4.1 (*Notification and access*) to clause 4.4 (*Rectification of Defects following termination*) (inclusive) will apply to any Defects (and any damage caused by such Defects) which arise during the Further Defects Rectification Period *mutatis mutandis* as though references in those clauses to the Defects Rectification Period were references to the Further Defects Rectification Period.

4.4 Rectification of Defects following termination

If the Project Agreement has terminated prior to the end of the Defects Rectification Period or any Further Defects Rectification Period, Project Co shall remain liable for carrying out any rectification required by clause 4.1 (*Notification and access*) to 4.4 (*Rectification of Defects following termination*).

5. ASSIGNMENT

- (a) The benefit of and the rights of the Beneficiary under this Deed may be assigned without the consent of Project Co and the Beneficiary will notify TfL and Project Co in writing following any such assignment specifying the name and address of the assignee and the date of the assignment.
- (b) Project Co shall 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 hereunder 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 this Deed or that the original beneficiary or any intermediate beneficiary has not suffered any, or as much, Loss.
- (c) Subject to clause 5(d), Project Co shall not assign or otherwise transfer the benefit of this Deed in whole or in part, except with the prior written consent of the Beneficiary.
- (d) Clause 5(c) shall not apply to the grant of any security in favour of Project Co's lenders (including any reassignment on redemption of security).

6. BENEFICIARY'S REMEDIES**6.1 Rights in addition to other rights**
TfL Reference: tfl_scp_001527

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

6.2 Payments to be made without set-off or withholding

Any sums due and payable under this Deed shall be paid in full without set-off or counterclaim and free and clear of and without deduction of or withholding for or on account of any present or future taxes, duties and/or other charges.

6.3 Default Interest

If the Beneficiary does not receive, on the due date, any amount due from Project Co under this Deed or under any judgment in connection with this Deed, Project Co shall pay to the Beneficiary on demand interest at the Default Rate from time to time on the amount due or the subject of the judgment from and including the due date until the date of actual payment.

7. INDEPENDENT ENQUIRY CLAUSE

The liability of Project Co under this Deed shall not be modified, released, diminished or in any way affected by any independent inspection, investigation or enquiry into any relevant matter which may be made or carried out by or for the Beneficiary nor by any failure or omission to carry out any such inspection, investigation or enquiry nor by the appointment by the Beneficiary of any independent firm, company, or party whatsoever to review the progress of or otherwise report to the Beneficiary in respect of the Works nor by any action or omission of any such firm, company or party whether or not such action or omission might give rise to any independent liability of such firm, company or party to the Beneficiary.

8. NOTICES

Any notice to be given by any party 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 4.45 p.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 forty eight (48) hours after the time of posting if the end of that period falls before 4.45 p.m. on a Working Day and otherwise on the next Working Day.

9. SEVERABILITY

If at any time any provision of this Deed (or part thereof) is or becomes illegal or invalid or unenforceable in any respect under the law of any relevant jurisdiction, such illegality, invalidity or unenforceability shall not affect or impair the legality, validity or enforceability in that jurisdiction of any other part of that provision or any other provision of this Deed or, in any other jurisdiction, of that provision or part thereof or any other provision of this Deed.

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Part 5 - Collateral Warranty from Project Co

10. **WAIVER**

10.1 No term or provision of this Deed shall be considered as waived by any party to this Deed unless a waiver is given in writing by that party.

10.2 No waiver under clause 10.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Deed unless (and only to the extent) expressly stated in that waiver.

11. **THIRD PARTY RIGHTS**

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This clause does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

12. **GOVERNING LAW AND JURISDICTION**

This Deed and any non-contractual obligation arising out of or in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England. The English Courts shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed.

13. **TFL ACKNOWLEDGEMENT**

TfL has entered into this Deed in order to acknowledge the arrangements effected hereby and shall not have any liability whatsoever under this Deed.

14. **COUNTERPARTS**

This Deed may be executed in one (1) or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full and original instrument for all purposes.

IN WITNESS of which this document is executed as a deed and is delivered on the date first set out above.

Schedule 28 - Direct Agreements and Other Contracts and Agreements

Part 5 - Collateral Warranty from Project Co

Executed as a deed, but not delivered until the)
first date specified on page 1, by the)
BENEFICIARY acting by a director in the)
presence of a witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

Executed as a deed, but not delivered until the)
first date specified on page 1, by **PROJECT CO**)
acting by a director in the presence of a)
witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

Schedule 28 - Direct Agreements and Other Contracts
and Agreements

Part 5 - Collateral Warranty from Project Co

The common seal of **TRANSPORT FOR**)
LONDON)
was affixed to this deed in the presence of:)
)

.....
Authorised signatory

Schedule 1

Nominated Assets

SCHEDULE 28

DIRECT AGREEMENTS AND OTHER CONTRACTS AND AGREEMENTS

Part 6 - Independent Certifier's Deed of Appointment

ashurst

Independent Certifier's Deed of Appointment

[TfL]

and

[Project Co]

and

[Independent Certifier]

relating to the Silvertown Tunnel Project

Schedule 28 - Direct Agreements and Other Contracts
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Part 6 - Independent Certifier's Deed of Appointment

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Part 6 - Independent Certifier's Deed of Appointment

THIS DEED dated 201[x]

BETWEEN

- (1) **TRANSPORT FOR LONDON** of Windsor House, 42 – 50 Victoria Street, London, SW1H 0TL ("**TfL**"); and
- (2) [**PROJECT CO**] (company number [x]) whose registered office is at [x] ("**Project Co**"); and
- (3) [**INDEPENDENT CERTIFIER**] (company number [x]) whose registered office is at [x] (the "**Independent Certifier**"),

each a "Party" and together the "Parties".

RECITALS

- (A) Project Co has entered into a Project Agreement on or about the date of this Deed with TfL relating to the design, construction, finance, maintenance and operation of a road tunnel and associated connecting roads and facilities in London (the "**Project Agreement**").
- (B) TfL and Project Co have jointly agreed to engage the Independent Certifier as an independent certifier to carry out the duties and obligations of the Independent Certifier described in the Project Agreement in accordance with this Deed.

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Deed unless the context otherwise requires, words and expressions defined in the Project Agreement shall have the same meanings in this Deed and the following expressions shall have the following meanings:

"**Commercially Sensitive Information**" means the information contained in Schedule 1 (*Services*) and Schedule 2 (*Fee*);

"**Default Notice**" has the meaning given to it in clause 4.3(a);

"**Due Date for Payment**" has the meaning given to it in clause 4.1(b);

"**Fee**" means the sum or sums referred to in Schedule 2 (*Fee*) payable in relation to the performance of the Services subject to any adjustment in accordance with this Deed;

"**Final Date for Payment**" has the meaning given to it in clause 4.2(a);

"**IG Insurance**" has the meaning given to it in clause 12.1;

"**Joint Notice**" has the meaning given to it in clause 9.1(a);

"**Key Personnel**" means those persons named in Schedule 3 (*Key Personnel*) and any person nominated by the Independent Certifier and approved by TfL and Project Co from time to time;

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"Payment Application" has the meaning given to it in clause 4.1(b);

"Pre-Emption Notice" has the meaning given to it in clause 4.3(b);

"Project Agreement" has the meaning given to it in Recital A; and

"Services" means the services to be provided by the Independent Certifier as described in Schedule 1 (*Services*) as may be amended in accordance with this Deed.

1.2 Interpretation

In this Deed, except where the context or the express provisions of this Deed otherwise require:

- (a) the masculine includes the feminine and vice-versa;
- (b) the singular includes the plural and vice-versa;
- (c) a reference in this Deed to any clause, sub-clause, paragraph, part, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph or schedule of this Deed;
- (d) save where expressly stated to the contrary in this Deed, any reference to this Deed or to any other document shall include any permitted variation, amendment, or supplement to such document;
- (e) any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- (f) references to any documents being "in the agreed form" means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification;
- (g) a reference to a person includes firms, partnerships and corporations;
- (h) any reference to a public organisation or representative shall be deemed to include reference to any successor to such public organisation or representative or any organisation or entity or representative which has taken over the functions or responsibilities of such public organisation or representative in whole or in part. References to other persons shall include their successors and permitted assignees or transferees;
- (i) headings and sub-headings are for convenience of reference only;
- (j) any obligation on Project Co or the Independent Certifier to do or not to do anything shall be deemed to include an obligation to procure or not to permit or suffer such things to be done by any Project Co Related Party or the Independent Certifier's (as applicable) agents, servants, officers or contractors of any tier and acts or omissions of any Project Co Related Party or the Independent Certifier's (as applicable) agents, servants, officers or contractors of any tier shall be deemed to be acts or omissions of Project Co or the Independent Certifier (as applicable) for the purposes of this Deed;

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- (k) the words "include" and "including" are to be construed as meaning "including, without limitation";
- (l) references to "writing" shall include any mode of reproducing words in any legible form; and
- (m) where any party is:
 - (i) required to issue a notice or response to any other party pursuant to this Deed; and
 - (ii) no express time limit for issuing such notice or response is specified,

then the relevant party shall issue such notice or response to the receiving party as soon as reasonably practicable.

2. APPOINTMENT

- (a) Each of Project Co and TfL hereby jointly appoint the Independent Certifier under this Deed to perform the Services.
- (b) The Independent Certifier confirms its acceptance of the appointment referred to in clause 2(a) and agrees to carry out and complete the Services and all other obligations and tasks which are ascribed to the Independent Certifier under this Deed and the Project Agreement.

3. INDEPENDENT CERTIFIER ROLE

- (a) In performing its obligations under this Deed, the Independent Certifier shall exercise the level of reasonable skill, care and diligence to be expected from a competent and properly qualified professional independent certifier experienced in providing services of a similar scope, type, scale and complexity to the Services in relation to a project and works of a similar scope, type, scale and complexity as the Project and the Works and in accordance with all Applicable Requirements and any other criteria, standards or codes relevant to the performance of the Services.
- (b) The Independent Certifier acknowledges that Project Co and TfL have relied on, and shall continue to rely upon, the professional skill and judgement of the Independent Certifier in the performance of the Services.
- (c) The Independent Certifier shall:
 - (i) carry out the Services (including without limitation the exercise of any discretion in the performance of the Services) independently, fairly and impartially to and as between Project Co and TfL and while the Independent Certifier may take account of any representations made by Project Co or TfL, the Independent Certifier shall not be bound to comply with any representations made by any of them in connection with any matter on which the Independent Certifier is required to exercise its professional judgement;
 - (ii) employ the Key Personnel throughout the duration of this Deed to direct and control the overall performance and delivery of the Services and changes to

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any of the Key Personnel shall only be made with the consent of Project Co and TfL, such consent not to be unreasonably withheld or delayed; and

- (iii) comply with all reasonable instructions given to it by Project Co or TfL, except and to the extent that the Independent Certifier reasonably considers that any such instructions vary or might vary the Services or its authority or responsibilities under this Deed or prejudice or might prejudice the exercise by the Independent Certifier of its professional judgement in accordance with clause 3(a) and clause 3(c)(i).
- (d) All instructions to the Independent Certifier shall be given in writing by Project Co or TfL, as the case may be, and such person shall provide a copy of the same to the other, immediately following issue.
- (e) Project Co agrees to co-operate with, and provide reasonable assistance to, the Independent Certifier to familiarise the Independent Certifier with all necessary aspects of the Works and the Project to enable the Independent Certifier to carry out its obligations under this Deed.
- (f) The Independent Certifier shall familiarise itself with and shall be deemed to have full knowledge of the provisions of the Project Agreement and shall be deemed to be aware of and to have taken full account of all the obligations, both expressed and implied, on the part of Project Co and TfL which are set out in the Project Agreement.
- (g) The Independent Certifier shall perform the Services in such manner and at such times that no act, omission or default of the Independent Certifier shall constitute or cause any breach by Project Co and/or TfL of any requirements and/or obligations in the Project Agreement.
- (h) The Independent Certifier shall promptly and efficiently perform the Services as soon as reasonably practicable consistent with the requirements specified in clause 3(a) and clause 3(c)(i).
- (i) The Independent Certifier shall in providing the Services comply with all Applicable Requirements and, without limiting the generality of the foregoing, shall comply with all lawful and reasonable directions, instructions or requests relating to or in pursuance of the same given or made by and/or on behalf of Project Co or TfL whilst the Independent Certifier is present on the Project Land, and/or any adjoining property.
- (j) The Independent Certifier shall liaise and co-operate with Project Co and TfL and provide each of them with all such information as they may from time to time reasonably require promptly and in good time so as not to delay or disrupt the progress of the Works or cause Project Co and TfL to be in breach of any of their respective obligations under the Project Agreement.
- (k) Copies of all notices and documents issued by TfL or Project Co to the Independent Certifier shall be provided by the issuing Party to the other Party on or before issuing such notice to the Independent Certifier and the Independent Certifier shall have due regard to any written representations made to it by TfL and Project Co, in respect of any matter connected with the Services.

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4. FEE**4.1 Payment application**

- (a) Project Co shall pay to the Independent Certifier, in full satisfaction of its performance of the Services, the Fee in the instalments and at the intervals set out in Schedule 2 (*Fee*).
- (b) The Independent Certifier shall submit to Project Co a payment application (together with all supporting documentation reasonably requested by Project Co and TfL) in respect of the instalments of the Fee due in accordance with Schedule 2 (*Fee*) (the "**Payment Application**") not more than once a month.
- (c) The due date for payment shall be ten (10) Working Days after Project Co's receipt of the Payment Application (the "**Due Date for Payment**").
- (d) If applicable, the Payment Application should also separately identify any additional fee for any varied services (agreed in accordance with clause 5 (*Alterations to this Deed and Instructions*)) performed in that relevant month.

4.2 Payments

- (a) Subject to Project Co taking reasonable steps to satisfy itself that the relevant instalment or instalments is, or are, so due, Project Co shall make payment against each Payment Application within twenty (20) Working Days of the Due Date for Payment (the "**Final Date for Payment**").
- (b) Payment by Project Co shall be subject to clause 15 (*Set-off*) and shall be without prejudice to any claims or rights which Project Co may have against the Independent Certifier and shall not constitute any admission by Project Co as to performance by the Independent Certifier of its obligations under this Deed.
- (c) All sums stated in this Deed are exclusive of VAT unless stated otherwise.
- (d) Not later than five (5) Working Days after the applicable Due Date for Payment, Project Co shall give notice to the Independent Certifier specifying the sum considered to be or to have been due to the Independent Certifier at the applicable Due Date for Payment and the basis on which that sum is calculated. It is immaterial that such sum may be zero (0).
- (e) If Project Co intends to pay less than the sum stated as due from it in the notice issued under clause 4.2(d), Project Co shall give the Independent Certifier a notice not later than two (2) days prior to the Final Date for Payment specifying:
 - (i) the sum Project Co considers to be due on the date the notice is served; and
 - (ii) the basis on which that sum is calculated.
- (f) Subject to the provisions of clause 4.3(a) to clause 4.3(c) (inclusive), TfL shall have no liability whatsoever for payment of the Fee or any other fee charged by the Independent Certifier.

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4.3 Payment Default

- (a) In the event of non-payment of the Fee or part thereof by Project Co by the relevant Final Date for Payment set out in clause 4.2 (*Payments*), the Independent Certifier agrees that it will not exercise any right it may have to terminate this Deed or to treat the same as having been repudiated by Project Co or to discontinue the performance of any duties to be performed by the Independent Certifier by reason of non-payment of fees by Project Co until the expiry of ten (10) Working Days after serving a notice on TfL (a "**Default Notice**").
- (b) Subject to this clause 4 (*Fee*), TfL shall have a right to serve notice on the Independent Certifier (a "**Pre-Emption Notice**") at any time within ten (10) Working Days of receipt of the Default Notice.
- (c) Upon receipt of a Pre-Emption Notice:
 - (i) the Independent Certifier's right to terminate this Deed or to treat the same as having been repudiated or to discontinue performance shall cease; and
 - (ii) TfL will pay any amounts due to the Independent Certifier under this Deed that remain unpaid within a reasonable time.
- (d) Payment by TfL pursuant to clause 4.3(c)(ii) shall be subject to clause 15 (*Set-off*) and shall be without prejudice to any claims or rights which TfL may have against the Independent Certifier and shall not constitute any admission by TfL as to performance by the Independent Certifier of its obligations under this Deed.

5. ALTERATIONS TO THIS DEED AND INSTRUCTIONS**5.1 Scope variations**

- (a) Project Co and TfL acting jointly may by notice in writing to the Independent Certifier give notice of their intention to vary the scope of the Services by the omission from or addition to the Services.
- (b) The Independent Certifier shall notify Project Co and TfL in writing if, in addition to the Services, there are services which the Independent Certifier considers should be performed by the Independent Certifier to enable Project Co or TfL to perform their obligations under the Project Agreement.
- (c) Within ten (10) Working Days of receiving a notification under clause 5.1(a) or issuing a notice under clause 5.1(b) and at no additional cost to Project Co or TfL, the Independent Certifier shall advise Project Co and TfL in writing of:
 - (i) in the case of additions to the Services, any increase in the Fee which it considers is fairly and reasonably required; or
 - (ii) in the case of omissions from the Services, any decrease in the Fee which is fairly and reasonably required.
- (d) Following the receipt of the advice from the Independent Certifier in accordance with clause 5.1(c), Project Co and TfL may vary the Services on such terms as Project Co and TfL consider appropriate and thereafter the Independent Certifier shall perform the Services so varied in accordance with the terms of this Deed.

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- (e) The Fee payable in accordance with Schedule 2 (*Fee*) shall be adjusted to reflect the additional or reduced cost to the Independent Certifier of providing the Services as varied (such adjustment to be agreed between the parties or determined in accordance with clause 16.3 (*Dispute Resolution Procedure*)).

5.2 Variations

- (a) Subject to clause 5.1 (*Scope variations*), no alteration shall be made to this Deed or to any of the Services without the written consent of each of TfL, Project Co and the Independent Certifier.
- (b) For the avoidance of doubt, where the Independent Certifier is required to perform any re-inspections because Project Co has failed to achieve the Permit to Use Requirements any costs associated with such re-inspection shall be borne by Project Co.

6. DISCLOSURE AND CONFIDENTIALITY

6.1 Restrictions on publicity and public relations

The Independent Certifier shall not by itself, its employees or agents, communicate with representatives of the press, television, radio or other communications media on any matter concerning the Project without the prior written approval of TfL.

6.2 Independent Certifier's obligations as to confidentiality

- (a) Subject to clause 6.2(b), the Independent Certifier shall:
 - (i) keep confidential all matters relating to this and use all reasonable endeavours to prevent its employees and agents from making any disclosure to any person of any matter relating to this Deed;
 - (ii) treat as secret and confidential and not at any time for any reason disclose or permit to be disclosed to any person or otherwise make use of any unpublished information relating to Project Co's or TfL's technology or other knowhow, business plans or finances or any such information relating to a subsidiary, supplier, customer or client of Project Co and or TfL where the information was received during the period of this Deed;
 - (iii) upon termination of this Deed for whatever reason, deliver up to Project Co and TfL (as appropriate) all working papers, computer disks and tapes or other material and copies provided to or prepared by the Independent Certifier in connection with this Deed.
- (b) The Independent Certifier's obligations under clause 6.2(a), shall not apply to:
 - (i) any disclosure of information that is reasonably required in the performance of its obligations set out in this Deed;
 - (ii) any disclosure to enable a determination to be made under the Dispute Resolution Procedure;
 - (iii) any disclosure which is required by any Applicable Requirement; or

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- (iv) any disclosure of information which is already lawfully in the possession of the receiving Party, prior to its disclosure by the disclosing Party.
- (c) Where disclosure is permitted under clause 6.2(b), the discloser of such information shall ensure that the recipient of the information shall be subject to the same obligations of confidentiality as those contained in this Deed.

6.3 Disclosure by TfL

TfL may publish or disclose (on the internet or otherwise) any document or information arising under, out of or in connection with this Deed (including any Commercially Sensitive Information).

6.4 Continuing obligations

The obligations of the Independent Certifier under this clause 6 (*Disclosure and Confidentiality*) shall continue in full force and effect notwithstanding termination of this Deed.

7. OBLIGATIONS OF PROJECT CO

- (a) Throughout the period of this Deed, during normal business hours and on reasonable prior notice, Project Co shall provide the Independent Certifier with all access to the Active Site and any other areas and relevant information and other written material in the possession of Project Co as the Independent Certifier requires to carry out the Services.
- (b) Project Co shall provide reasonable prior notice to the Independent Certifier of, and permit the Independent Certifier to attend, all testing and commissioning activities (and any meetings associated with planning such activities), to be conducted by or on behalf of Project Co prior to the Permit to Use Date.
- (c) Project Co shall appoint one (1) or more appropriate person to liaise with the Independent Certifier.
- (d) Project Co shall be responsible for ensuring that the Independent Certifier is kept informed of any variations to the Project Agreement, and any updates to the Project Co Detailed Works Programme.
- (e) Project Co shall ensure that the Independent Certifier is provided with all documents and other evidence the Independent Certifier requires in order to assess whether the Permit to Use Requirements have been achieved.

8. LIMITATIONS ON THE AUTHORITY OF THE INDEPENDENT CERTIFIER

- (a) The Independent Certifier shall not:
 - (i) make or purport to make any alteration or addition to or omission from the design of the Works (including without limitation, the setting of performance standards) or issue any instruction or direction to any contractor or professional consultant employed or engaged in connection with the Works; or

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- (ii) consent or agree to any waiver or release of any obligation of Project Co or TfL under the Project Agreement or of any contractor or professional consultant employed or engaged in connection with the Works.
- (b) The Independent Certifier shall not express an opinion on and shall not interfere with or give any advice, opinion or representation in relation to any matters which are beyond its role and responsibilities under this Deed.

9. **TERMINATION**

9.1 **Notice of Termination**

- (a) Project Co and TfL may by joint notice in writing (a "**Joint Notice**") immediately terminate this Deed if the Independent Certifier:
 - (i) is in breach of any of the terms of this Deed which, in the case of a breach capable of remedy, has not been remedied by the Independent Certifier within fifteen (15) Working Days of receipt by the Independent Certifier of a notice specifying the breach and requiring its remedy;
 - (ii) is incompetent, guilty of gross misconduct and/or any material negligence or delay in the provision of the Services;
 - (iii) fails or refuses after written warning to provide the Services reasonably and properly required;
 - (iv) has any receiver or manager appointed in respect of it, or possession is taken by or on behalf of any creditor of any property of the Independent Certifier that is the subject of a charge;
 - (v) has any voluntary arrangement made for a composition of debts or a scheme of arrangement approved under the Insolvency Act 1986 or the Companies Act 2006 in respect of it; or
 - (vi) has an administration order made, or an administrator is appointed in respect of it.
- (b) If the Project Agreement is rescinded, terminated or repudiated for any reason and, notwithstanding that the validity of such rescission, termination or repudiation may be disputed, TfL may terminate this Deed by notice to the Independent Certifier (with a copy to Project Co) and this Deed shall terminate with immediate effect.

9.2 **Effect of termination**

- (a) Following any termination of this Deed, but subject to any set-off or deductions which Project Co or TfL may be entitled properly to make as a result of any breach of this Deed by the Independent Certifier, the Independent Certifier shall be entitled to be paid by Project Co in full and final settlement of any claim which the Independent Certifier may have in consequence thereof, any fees due under clause 4 (*Fee*) in respect of Services carried out in accordance with this Deed prior to the date of termination.

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- (b) For the avoidance of doubt, neither Project Co nor TfL shall have any liability to the Independent Certifier for loss of profit, loss of contracts or other costs, losses and/or expenses (in each case, whatsoever howsoever) arising out of or in connection with such termination.
- (c) Termination of this Deed shall be without prejudice to any accrued rights and obligations under this Deed as at the date of termination (including the right of Project Co and TfL to recover damages from the Independent Certifier).
- (d) If this Deed is terminated in accordance with clause 9.1, Project Co and TfL shall use reasonable endeavours to engage an alternative independent certifier within twenty five (25) Working Days, subject to any relevant legal requirements and public procurement rules.
- (e) The costs incurred in procuring an alternative Agreement pursuant to clause 9.2(d) shall be borne by the Independent Certifier.
- (f) If within such period referred to in clause 9.2(d) Project Co and TfL are unable to procure the agreement of an alternative independent certifier on reasonable commercial terms and termination is caused by the Independent Certifier's default of this Deed, the Independent Certifier shall pay Project Co and TfL, as the case may be, any reasonable additional loss, damage or extra costs suffered by each of them.
- (g) Termination of this Deed shall not affect the continuing rights and obligations of the parties under clause 6 (*Disclosure and Confidentiality*), clause 12 (*Insurance*), clause 14 (*Limitation of Liabilities*), clause 16.3 (*Dispute Resolution Procedure*) and this clause or under any other clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.
- (h) In the event that an alternative independent certifier is appointed, the Independent Certifier shall co-operate fully with such replacement for the orderly transfer of the Services.
- (i) Neither Project Co nor TfL shall be entitled to terminate this Deed for any reason whatsoever except as expressly set out in this Deed.
- (j) The Independent Certifier shall not be entitled to terminate this Deed for any reason whatsoever.

10. ASSIGNMENT BY INDEPENDENT CERTIFIER

The Independent Certifier shall not assign, novate, sub-contract or otherwise transfer the benefits or obligations of this Deed or any part thereof without the prior written consent of Project Co and TfL.

11. ASSIGNMENT BY PROJECT CO AND/OR TFL

- (a) Subject to clause 11(b), Project Co and/or TfL may assign or transfer any of their rights and obligations under this Deed to any other person, firm, corporate body or company provided that it gives notice in writing of such assignment or transfer as soon as possible thereafter to the other parties to this Deed.

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- (b) While the Independent Certifier is still providing services under this Deed no such assignment or transfer by Project Co (other than by way of security) shall be permitted without the consent of TfL and the Independent Certifier (such consent not to be unreasonably withheld or delayed).
- (c) The Independent Certifier will not contend that any assignee under this Deed 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 hereunder 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 Project or that that original beneficiary or any intermediate beneficiary has not suffered any or as much loss.

12. **INSURANCE**

12.1 **Insurance Requirements**

- (a) The Independent Certifier shall take out and maintain:
 - (i) professional indemnity insurance with an indemnity limit of not less than [REDACTED] for each and every one claim arising under or in connection with this Deed and with the option of reinstating the [REDACTED] indemnity limit on at least one (1) occasion in any one (1) year of insurance;
 - (ii) public liability insurance with an indemnity limit of not less than [REDACTED] for any one claim arising under or in connection with this Deed,

(together, the "**IC Insurances**").

- (b) The Independent Certifier shall maintain such IC Insurances with reputable insurers who are acceptable to Project Co and TfL (such acceptance not to be unreasonably withheld or delayed) for a period of not less than twelve (12) years from the date of the completion of the Independent Certifier's duties under this Deed, provided that each such insurance is available at reasonable commercial rates.
- (c) Any increased or additional premium required by insurers by reason of the Independent Certifier's own claims record or other acts or omissions particular to the Independent Certifier shall be deemed to be within commercially reasonable rates.

12.2 **Evidence of Insurance**

- (a) The Independent Certifier shall provide to Project Co and TfL at their reasonable request, written confirmation by an independent company of insurance brokers that it has the IC Insurances in force for the ensuing twelve (12) months.
- (b) The Independent Certifier shall immediately inform Project Co and TfL if either of the IC Insurances cease to be available at commercially reasonable rates in order that the Independent Certifier, Project Co and TfL can discuss means of best protecting their respective positions in the absence of such insurance.

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13. COLLATERAL WARRANTIES

Within fourteen (14) days of receipt of a written request from time to time from Project Co, the Independent Certifier shall execute as a deed one (1) or more collateral warranties in the form annexed as Schedule 4 (*Draft Collateral Warranty*) in favour of the Senior Funders, the D&C Contractor and the O&M Contractor and any other person having an interest in, or providing financing in respect of, the Works.

14. LIMITATION OF LIABILITIES

Save in respect of death or personal injury or fraud, the maximum aggregate liability of the Independent Certifier under or in connection with this Deed shall be [REDACTED]

15. SET-OFF

The Independent Certifier shall not be entitled to retain or set-off any amount due to TfL or Project Co by the Independent Certifier, but TfL or Project Co may retain or set-off any amount owed to it by the Independent Certifier under this Deed which has fallen due and payable against any amount due to the Independent Certifier under this Deed.

16. MISCELLANEOUS**16.1 Entire agreement**

- (a) This Deed constitutes the whole agreement and understanding of the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Deed.
- (b) Each of the parties acknowledges that:
 - (i) it does not enter into this Deed on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a party to this Deed or not) except those expressly repeated or referred to in this Deed and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Deed; and
 - (ii) this clause 16.1 (*Entire agreement*) shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Deed which was induced by fraud, for which the remedies available shall be all those available under the law governing this Deed.

16.2 Further assurance

Each Party agrees that it shall now or at any time during the subsistence of this Deed, do or procure the doing of all such acts and/or execute or procure the execution of all such documents in a form satisfactory to the other parties, as the other parties may reasonably require for giving full effect to and obtaining the full benefit of the rights powers and remedies conferred upon such other parties by this Deed.

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16.3 Dispute Resolution Procedure

- (a) All disputes shall be resolved in accordance with terms equivalent (*mutatis mutandis*) to the Dispute Resolution Procedure set out in the Project Agreement.
- (b) The parties shall co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this Deed.

16.4 Waiver

- (a) No term or provision of this Deed shall be considered as waived by a Party to this Deed unless a waiver is given in writing by such Party.
- (b) No waiver under this clause 16.4 (*Waiver*) shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Deed unless (and then only to the extent) expressly stated in that waiver.

16.5 No partnership or agency

Nothing in this Deed and no action taken by the parties pursuant to this Deed shall constitute, or be deemed to constitute, a partnership, unincorporated association or other co-operative entity.

16.6 Illegality and severability

If at any time any provision of this Deed (or part thereof) is or becomes illegal or invalid or unenforceable in any respect under the law of any relevant jurisdiction, such illegality, invalidity or unenforceability shall not affect or impair the legality, validity or enforceability in that jurisdiction of any other part of that provision or any other provision of this Deed or, in any other jurisdiction, of that provision or part thereof or any other provision of this Deed.

16.7 Contracts (Rights of Third Parties) Act (1999)

The parties agree that, notwithstanding any other provision of this Deed, this Deed shall not purport to confer on any third party any right to enforce any term of this Deed for the purposes of the Contracts (Rights of Third Parties) Act 1999 save that (for the avoidance of doubt) nothing contained herein shall prejudice any claim under any collateral warranty given pursuant to this Deed.

16.8 Governing Law and Jurisdiction

- (a) This Deed and any non-contractual obligation arising out of or in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England.
- (b) The parties agree to submit to the exclusive jurisdiction of the English Courts as regards any claim or matter arising in relation to this Deed.

16.9 Counterparts

This Deed may be executed in any number of counterparts and by the several Parties hereto on separate counterparts, each of which when so executed and delivered shall be

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an original, but all the counterparts shall together constitute one (1) and the same instrument.

IN WITNESS whereof the parties hereto have executed this Deed as a deed on the day and year first before written.

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The common seal of **TRANSPORT FOR LONDON**)
was affixed to this deed in the presence of:)
)
)

.....
Authorised signatory

Executed as a deed, but not delivered until the)
first date specified on page 1, by [**PROJECT**]
CO] acting by a director in the presence of a)
witness:)

Signature
Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

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Executed as a deed, but not delivered until the)
first date specified on page 1, by)
[**INDEPENDENT CERTIFIER**] acting by a)
director in the presence of a witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

Schedule 1

Services

1. FAMILIARISATION OF THE PROJECT AGREEMENT

The Independent Certifier shall:

- (a) become familiar with the terms of the Project Agreement, the DCO and the Third Party Agreements and the role (express or implied) under the Project Agreement of the "Independent Certifier"; and
- (b) review information made available to the Independent Certifier by the Parties in order to become fully acquainted with the Project, including any variations to the Project Agreement, DCO or the Third Party Agreements made from time to time (and any other relevant documentation or information referred to in or connected with the Project Agreement),

to the extent necessary to be in a position to carry out its obligations pursuant to this Deed.

2. SITE VISITS

- 2.1 The Independent Certifier shall visit the Active Site to monitor the activities of Project Co during the carrying out of the Works as and any other areas required to ensure it is able to discharge the functions which the Project Agreement contemplates will be discharged by the Independent Certifier.
- 2.2 The Independent Certifier shall give Project Co reasonable advance notice of the dates upon which it intends to visit the Active Site.
- 2.3 The Independent Certifier shall provide, within five (5) Working Days after each visit contemplated by paragraph 2.2, a report to TfL and Project Co documenting the activities carried out during the relevant visit.

3. LIAISON WITH TFL AND PROJECT CO

The Independent Certifier shall liaise with TfL and Project Co in anticipation of carrying out such activities as are necessary, including the procurement of any third party services, for it to determine whether or not the Permit to Use Requirements have been satisfied.

4. TESTING AND COMMISSIONING

- 4.1 The Independent Certifier shall attend all testing and commissioning activities (and any meetings associated with planning such activities) as may be required to ensure it is able to discharge the functions which the Project Agreement contemplates will be discharged by the Independent Certifier.

5. MEETING AND REPORTING

- 5.1 Without prejudice to paragraph 4, the Independent Certifier may, to the extent it considers necessary:

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- (a) attend any relevant meetings before the Permit to Use Date in order to perform its obligations pursuant to this Deed; and
- (b) report to TfL and Project Co on matters that in its opinion may impact compliance with the Permit to Use Requirements.

6. PROJECT CO NOTICE TO INSPECT

On or as soon as reasonably practicable following the proposed PTU Inspection Date, the Independent Certifier shall carry out an inspection of the Works and take such other measures as are required to ascertain whether the Permit to Use Requirements have been achieved.

7. PERMIT TO USE

7.1 The Independent Certifier shall be responsible for confirming that Project Co has complied with the Permit to Use Requirements in accordance with Part 5 (*Permit to Use*) of Schedule 17 (*Handover and Permit to Use Requirements*) of the Project Agreement.

7.2 The Independent Certifier shall within forty (40) Working Days of the PTU Inspection Date either:

- (a) issue the Permit to Use to Project Co, with a copy to TfL; or
- (b) notify Project Co and TfL of its decision not to issue the Permit to Use on the grounds that Project Co has failed to achieve the Permit to Use Requirements, and state the reasons for such decision.

7.3 In the event of service of a notice under paragraph 7.2(b) that the Permit to Use will not be issued, the Independent Certifier shall, as soon as reasonably practicable following receipt of a notice from Project Co, inspect any works or measures performed by Project Co to remedy the grounds stated in the notice under paragraph 7.2(b).

7.4 Upon such inspection being concluded, the provisions of paragraph 2 (*Site Visits*) and paragraph 7.1 shall thereafter apply to such notice *mutatis mutandis*, except that the forty (40) Working Day period referred to in paragraph 7.2 shall be reduced to twenty (20) Working Days.

8. SNAGGING ITEMS

On the Permit to Use Date, the Independent Certifier shall:

- (a) issue the Snagging List to Project Co in accordance with clause 18.3(a) of the Project Agreement and provide a copy to TfL;
- (b) following receipt, review and, if applicable, comment on Project Co's proposed programme for completing the Snagging Items;
- (c) carry out an inspection of the Snagging Items in accordance with clause 18.3(i) of the Project Agreement; and
- (d) issue the Snagging Completion Certificate in accordance with clause 18.3(j) to clause 18.3(n) (inclusive) of the Project Agreement.

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9. **PARTICIPATE IN DISPUTE RESOLUTION**

As and when required by TfL or Project Co, the Independent Certifier shall participate in the Dispute Resolution Procedure of the Project Agreement to the extent that issues under the Project Agreement which have been referred to the Dispute Resolution Procedure relate to the Services.

10. **ADDITIONAL ASSETS**

For the avoidance of doubt, the Independent Certifier's responsibilities shall exclude inspections or certification of Works associated with:

- (a) the Additional Assets; and
- (b) any Sections of the Site that have been the subject of a Handover Certificate.

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Schedule 2

Fee

Subject to clause 5 (*Alterations to this Deed and instructions*), the Fee is the fixed fee of [REDACTED] for the provision of the Services identified in Schedule 1 (*The Services*) together with any services necessary or reasonably incidental to such Services.

The Schedule of Payments is as follows:

[x]

Schedule 3

Key Personnel²⁰

²⁰ [REDACTED]

Schedule 4

Collateral Warranty

Independent Certifier's Warranty

[Beneficiary]

and

[Independent Certifier]

and

[Project Co]

relating to the Silvertown Tunnel Project

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TfL Restricted

201[x]

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THIS DEED dated 201[x]

BETWEEN:

- (1) **[BENEFICIARY]** (company number [x]) whose registered office is at [x] (the "**Beneficiary**");
 - (2) **[INDEPENDENT CERTIFIER]** (company number [x]) whose registered office is at [x] (the "**Independent Certifier**");
 - (3) **[PROJECT CO]** (company number [x]) whose registered office is at [x] ("**Project Co**"),
- each a "party" and together the "parties".

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this deed unless the context otherwise requires; the following expressions shall have the following meanings:

"Appointment" means the agreement made between TfL, Project Co and the Independent Certifier for services to be carried out by the Independent Certifier;

"IC Insurances" means the insurances required to be taken out by the Independent Certifier under the Appointment;

"Project" has the meaning given to it in the Project Agreement;

"Project Agreement" means the agreement dated on or about the date of the Appointment between TfL and Project Co relating to the design, construction, finance, maintenance and operation of the Project;

"Services" means the general and specific duties and obligations of the Independent Certifier under the Appointment;

"TfL" means Transport for London of Windsor House, 42 – 50 Victoria Street, London, SW1H 0TL; and

"Works" means the works as more particularly described in the Project Agreement.

1.2 Interpretation

In this deed, except where the context or the express provisions of this deed otherwise require, this deed shall be interpreted in accordance with clause 1.2 (*Interpretation*) of the Project Agreement.

2. DUTY OF CARE

- 2.1 The Independent Certifier warrants and undertakes that it has exercised and will continue to exercise in the performance and discharge of the Services and all other obligations and tasks which are ascribed to the Independent Certifier under the Appointment with the reasonable skill, care and diligence to be expected from a competent and properly qualified independent certifier experienced in providing services of a similar scope, type,

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scale and complexity to the Services in relation to a project and works of a similar scope, type, scale and complexity as the Project and the Works.

- 2.2 For the avoidance of doubt, the Independent Certifier shall owe no obligation or liability to the Beneficiary by virtue of this deed which is greater than or of longer duration than it would owe to the Beneficiary under the Appointment if the Beneficiary had been named as joint employer under the Appointment and the Independent Certifier shall be entitled in any action or proceedings by the Beneficiary under this deed to raise equivalent rights in defence of liability (but excluding set-offs or counterclaims) as it would have had if the Beneficiary had been named as the joint employer under the Appointment.
- 2.3 The Independent Certifier warrants and undertakes that it has and will continue to act fairly, reasonably and impartially as between all interested parties in fulfilling its obligations under this deed.

3. **INSURANCE**

The Independent Certifier shall:

- (a) take out and maintain the IC Insurances for a period of twelve (12) years from the date of completion of the Independent Certifier's duties under the Appointment provided such insurance is available in the market at commercially reasonable rates;
- (b) inform the Beneficiary or its assignees in writing immediately if any failure or inability to maintain such insurance cover in accordance with clause 3(a) in order that the parties can discuss means of best protecting their respective positions in the absence of such insurance; and
- (c) when requested by the Beneficiary (but not more often than is reasonable) produce written evidence of the IC Insurances cover and confirmation from the IC Insurances provider that the last premium has been paid.

4. **ASSIGNMENT**

- 4.1 The benefit of this deed may be assigned by the Beneficiary to any other person having an interest in the Works provided that:
- (a) the number of assignments under this clause 4 (*Assignment*) is limited to two (2) only;
 - (b) the Independent Certifier shall be entitled to receive notice of such assignment in writing upon the assignment taking place; and
 - (c) the Independent Certifier shall at the reasonable cost and expense of the Beneficiary do all things as may be reasonably necessary to effect any such assignment.
- 4.2 The Independent Certifier will not contend that any assignee is precluded from recovering any loss 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 hereunder or by reason that the original beneficiary or any intermediary beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Works or that that original beneficiary or any intermediate beneficiary has not suffered any or as much loss.

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5. INDEPENDENT ENQUIRY CLAUSE

The liability of the Independent Certifier under this deed shall not be modified, released, diminished or in any way affected by:

- (a) any independent inspection, investigation or enquiry into any relevant matter which may be made or carried out by or for the Beneficiary;
- (b) any failure or omission to carry out any such inspection, investigation or enquiry;
- (c) the agreement by the Beneficiary of any independent firm, company, or party whatsoever to review the progress of or otherwise report to the Beneficiary in respect of the Works;
- (d) any action or omission of any such firm, company or party whether or not such action or omission might give rise to any independent liability of such firm, company or party to the Beneficiary

provided always that nothing in this clause 5 (*Independent Enquiry Clause*) shall modify or affect any rights which the Independent Certifier might have but for the existence of this clause 5 (*Independent Enquiry Clause*) to claim contribution from any third party whether under statute or at common law.

6. ENTIRE AGREEMENT

6.1 This deed constitutes the whole agreement and understanding of parties in connection with their subject matter and supersede all prior representations, communications, negotiations and understandings concerning the subject matter of such agreements.

6.2 Each of the parties acknowledge that:

- (a) it does not enter into this deed on the bases of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a party to this deed or not) except those expressly repeated or referred to in this deed and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this deed; and
- (b) this clause 6 (*Entire Agreement*) shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this deed which was induced by fraud, for which the remedies available shall be all those available under the law governing this deed.

7. FURTHER ASSURANCE

The parties agree that it shall now or at any time during the subsistence of this deed, do or procure the doing of all such acts and/or execute or procure the execution of all such documents in a form satisfactory to the other parties, as the other parties may reasonably require for giving full effect to and obtaining the full benefit of the rights powers and remedies conferred upon such other parties by this deed.

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8. **WAIVER**

8.1 No term or provision of this deed shall be considered as waived by a party to this deed unless a waiver is given in writing by such party.

8.2 No waiver under clause 8.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this deed unless (and then only to the extent) expressly stated in that waiver.

9. **NO PARTNERSHIP OR AGENCY**

Nothing in this deed and no action taken by the parties pursuant to this deed shall constitute, or be deemed to constitute, a partnership, unincorporated association or other co-operative entity.

10. **ILLEGALITY AND SEVERABILITY**

If at any time any provision of this deed (or part thereof) is or becomes illegal or invalid or unenforceable in any respect under the law of any relevant jurisdiction, such illegality, invalidity or unenforceability shall not affect or impair the legality, validity or enforceability in that jurisdiction of any other part of that provision or any other provision of this deed or, in any other jurisdiction, of that provision or part thereof or any other provision of this deed.

11. **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

The parties agree that, notwithstanding any other provision of this deed, this deed shall not purport to confer on any third party any right to enforce any term of this deed for the purposes of the Contracts (Rights of Third Parties) Act 1999 save that (for the avoidance of doubt) nothing contained herein shall prejudice any claim under any collateral warranty given pursuant to this deed.

12. **GOVERNING LAW AND JURISDICTION**

12.1 This deed and any non-contractual obligation arising out of or in connection with this deed shall be governed by and construed in all respects in accordance with the laws of England.

12.2 The Parties agree to submit to the non-exclusive jurisdiction of the English Courts as regards any claim or matter arising in relation to this deed.

13. **COUNTERPARTS**

This deed may be executed in any number of counterparts and by the several parties hereto on separate counterparts, each of which when so executed and delivered shall be an original, but all the counterparts shall together constitute one (1) and the same instrument.

IN WITNESS whereof this document is executed as a deed and is delivered on the date stated at the beginning of this deed.

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Executed as a deed, but not delivered until the)
first date specified on page 1, by the)
[**BENEFICIARY**] acting by a director in the)
presence of a witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

Executed as a deed, but not delivered until the)
first date specified on page 1, by)
[**INDEPENDENT CERTIFIER**] acting by a)
director in the presence of a witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....

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Executed as a deed, but not delivered until the)
first date specified on page 1, by [**PROJECT**)
CO] acting by a director in the presence of a)
witness:)

Signature

Name (block capitals)

Director

Witness signature

Witness name (block capitals)

Witness address
.....
.....