

ACE Collateral Warranty Agreements

2020 Edition

ACE COLLATERAL WARRANTY AGREEMENTS

PREFACE

The advantage of using standard forms of Agreement are recognised as beneficial to all within the supply chain. This document includes two forms of Collateral Warranty drafted for use with ACE Agreements where such warranties are required, one for where the Beneficiary is a tenant/purchaser and the other where the Beneficiary is a funder. They can be used where the applicable law is that of either England, Wales and Northern Ireland or Scotland.

ABOUT ACE

ACE represents the business interests of the consultancy and engineering industry in the UK with members of all sizes operating across many different disciplines. For more information on ACE, its activities and its membership see www.acenet.co.uk or contact:

Association for Consultancy and Engineering
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Tel: 020 7222 6557 or consult@acenet.co.uk

Acknowledgments

We would like to thank the ACE Legal and Commercial Group for their expertise and assistance in producing these Agreements.

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For details of amendments and updates contact ACE as above.

ACE can accept no liability in respect of any use to which the Agreement is put.

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EVALUATION

EVALUATION

ACE COLLATERAL WARRANTY AGREEMENTS – NOTE

The ACE Professional Services Agreement 2017 makes provision for the Client to request the Consultant to provide or obtain collateral warranties for the benefit of third parties. Clause 14 states: *“If stated in this Agreement and when requested by the Client the Consultant shall provide or obtain collateral warranties for the benefit of third parties as specified in Part 1 of the Schedule in the form stated in the Schedule. Such collateral warranties shall not confer any greater benefit on those to whom they are provided in quantum, duration or otherwise than is given to the Client under the terms of this Agreement. It is a condition of the provision of such collateral warranties that all fees due to the Consultant at the date of execution of any collateral warranty have been paid.”*

Should the Client request that identified third parties receive benefits under the Agreement forms of collateral warranty have been drafted to mirror the Consultant’s duty of care and other obligations under the Agreement. On occasions the Beneficiary of the collateral warranty may require “step in” rights to be included thereby allowing the Beneficiary (often but not exclusively a funder) to step into the role of the Client if there is a serious or fundamental breach of the Agreement.

Two forms of standard ACE collateral warranty are included in this document to cater for both situations namely (1) where the Beneficiary is a tenant/purchaser and (2) where the Beneficiary is a funder.

In order to be effective under English law both collateral warranties provide for nominal consideration of £1 to be paid by the Beneficiary to the Consultant although if executed as a deed this is not strictly required.

The funder’s collateral warranty is similar to the purchaser/tenant collateral warranty but includes “step in” rights which allow the Beneficiary to step into the role of the Client, as indicated above, if there is a serious breach on the part of the Client, or any other reason under the Agreement (including insolvency) which may provide for the Consultant to terminate its employment or discontinue performance of the Services, once certain steps as set out are taken by the Beneficiary in due time. In such circumstances the Agreement remains in full force and effect as if it had been entered into between the Consultant and the Beneficiary (to the exclusion of the Client). The time limit for exercising the right is 14 days and the Beneficiary is obliged to undertake to pay any unpaid sums due and payable under the Agreement both at the time of “stepping in” together with all future sums due and payable.

The two collateral warranty agreements included in this document are intended to be used with the ACE Agreements should such a warranty be required and are intended to go “back to back” with the documents concerned. They are designed to place no greater obligation on the Consultant than that which is undertaken in the appointment itself. They can be used where the applicable law is that of England, Wales and Northern Ireland or that of Scotland and include separate attestation clauses to enable this.

EVALUATION

ACE COLLATERAL WARRANTY AGREEMENT

[CONSULTANT]

[BENEFICIARY]

WARRANTY AGREEMENT

FROM CONSULTANT

relating to consultancy design services

for.....

THEDAY OF.....20....*

THIS AGREEMENT IS MADE BETWEEN:

- (1) (“the Consultant”) and
- (2) (“the Beneficiary”)

WHEREAS

- A. [The Client] (“the Client”) has entered or may enter into a construction contract (“the Construction Contract”) with [The Contractor] (“Contractor”) for the construction of [.....] (“the Works”) at [.....].
- B. The Client by a contract (“the Appointment”) (which definition includes any variation to the contract which from time to time may be agreed between the Client and the Consultant) dated [.....] has appointed the Consultant to carry out services as defined in the Appointment in relation to the design of the Works (“Services”).
- C. The Consultant has agreed to enter into this warranty agreement with the Beneficiary and/or is obliged to issue a warranty under the Appointment.

THE PARTIES AGREE that in consideration of the payment of £1.00 by the Beneficiary to the Consultant, receipt of which is hereby confirmed by the Consultant**

1 WARRANTIES

- 1.1 The Consultant warrants to the Beneficiary that it has exercised and shall continue to exercise in carrying out the Services (as defined in the Appointment) the reasonable skill, care and diligence to be expected from a consultant qualified in providing such Services for works of a similar size, scope and complexity as the Works.

2 INTELLECTUAL PROPERTY

- 2.1 The Consultant’s Intellectual Property Rights, as defined in clause 2.6, remain vested in the Consultant.
- 2.2 The Beneficiary has a licence to use the drawings, documents and information issued pursuant to the Appointment by the Consultant for any purpose relating to completion of the Works and the operation of the Project.
- 2.3 The licence shall enable the Beneficiary to use the Consultant’s drawings, documents and information and to grant sub-licences for an extension to the Project but not to reproduce the designs contained within it for any extension of the Project
- 2.4 Except as stated above the Beneficiary shall not make copies of any of the Consultant’s drawings, designs or other documents or information nor use any of them in connection with any other projects or works without the Consultant’s prior written approval.

**Not required if Agreement executed in Scotland.*

***Omit if Agreement executed in Scotland.*

- 2.5 The Consultant shall not be liable for the use by any person of any of the Consultant's drawings, documents and information produced other than for the purpose for which they were prepared by or on behalf of the Consultant.
- 2.6 The "Consultant's Intellectual Property Rights" shall mean: Any and all intellectual and industrial property rights, including (without limitation) patents, trademarks, service marks, registered designs, copyrights, database rights, design rights, moral rights or know-how, howsoever arising, whether or not registered and any other similar protected rights in any country and any applications for the registration or protection of such rights and all extensions thereof throughout the world, created, developed, embodied in or in connection with any drawing or other document and information prepared by or on behalf of the Consultant in the performance of the Services for delivery to the Client.

3 INSURANCE

- 3.1 The Consultant shall maintain professional indemnity insurance in the amount and for the period of time required under the Appointment in relation to its liabilities arising under this Agreement provided always that such insurance is and remains available to the Consultant at reasonable rates and terms. Such insurance shall be obtained from a reputable insurance company carrying on insurance business in the UK market.
- 3.2 The Consultant shall produce to the Beneficiary, whenever requested and without delay such documentary evidence as the Beneficiary may reasonably require that the insurance required is in force, and in any event notify the Beneficiary forthwith upon its inability to obtain cover, or the cancellation of the insurance, or its inability to renew the insurance.

4 ASSIGNMENT/ASSIGNATION*

- 4.1 Where the Beneficiary is a funder, the Beneficiary may assign by way of absolute legal assignment/assignment** only the benefit of this Agreement to a third party who is also providing finance in connection with the Works. Any such assignment/assignment** shall only be effective if written notice is given to the Consultant. No further assignment/assignment** shall be permitted.
- 4.2 Where the Beneficiary is a tenant/purchaser of the Works the Beneficiary may assign by way of absolute legal assignment/assignment** only the benefit of this Agreement to a third party who also takes an assignment/assignment** of the tenant's/purchaser's interest in the Works. Any such assignment/assignment** shall only be effective if written notice is given to the Consultant. No further assignment/assignment** shall be permitted.

5 GENERAL

- 5.1 The Consultant shall in relation to this Agreement, have no greater liability to the Beneficiary in quantum duration or otherwise than if the Beneficiary were named as a co-client under the Appointment and accordingly the Consultant shall be entitled in any action or proceeding by the Beneficiary to rely on any limitation or exclusion in the Appointment and to raise equivalent rights in defence of liability as it would have against the Client under the Appointment.
- 5.2 Further and without prejudice to this clause 5 if the Consultant is considered to be liable with third parties to the Beneficiary the Consultant's liability shall be limited solely to a just and equitable proportion of such liability and any compensation payable to the Beneficiary for such liability which is attributable to the Consultant's breach on the assumption that such third parties have themselves paid a just and equitable proportion of compensation attributable to their liability. The Consultant's liability and compensation payable under this clause 5.2 shall be subject to and form a part of the total aggregate sum(s) stated in the Appointment.

**To apply if the applicable law is Scotland.*

***Delete as appropriate.*

- 5.3 The Beneficiary acknowledges that the Consultant has or may enter into other warranty agreements of any description in relation to the Works pursuant to the terms of the Appointment. Without prejudice to this clause 5 of this Agreement, the Beneficiary further accepts that the Consultant's total liability for all claims howsoever arising to any and all parties under or in connection with the Appointment and any or all warranties of any description issued pursuant to the Appointment (for the avoidance of doubt including this Agreement) taken in any combination during any and for all periods of liability shall not exceed the sum(s) stated in the Appointment in the aggregate for all such claims.
- 5.4 Further without prejudice to this clause 5, no action or proceedings for any breach of this Agreement shall be commenced against the Consultant after the expiry of the period of liability specified in the Appointment.
- 5.5 Further without prejudice to Clause 5.1 neither party shall under any circumstances whatsoever be liable to the other for any direct or indirect loss of profit, loss of business or anticipated saving or special, indirect or consequential damage suffered by the other party that arises under or in connection with this Agreement.

6 SEPARATE OBLIGATIONS

- 6.1 No approval or inspection of the documents prepared by the Consultant in relation to design of the Works and no approval inspection or testing of any of the Works or any attendance at site meetings by or on behalf of the Beneficiary or any other party shall wholly or partly relieve the Consultant from its obligations under this Agreement.

7 NOTICE

Any notice given hereunder shall be made in writing and shall be sent by pre-paid first class post, registered post, recorded delivery or delivered by hand addressed to the Beneficiary or the Consultant (as the case may be) at the address or place of business referred to herein or such other address or place of business last notified in writing by the Beneficiary or the Consultant (as the case may be) to the other.

8 THIRD PARTY RIGHTS

Where the applicable law is that of England, Wales or Northern Ireland:

The Beneficiary and the Consultant do not intend to confer and nothing in this Agreement shall be construed as conferring, on a third party a benefit or a right to enforce a term of this Agreement pursuant to the Contracts (Rights of Third Parties) Act 1999.*

Where the applicable law is that of Scotland:

This Agreement does not confer on any person other than the parties or their permitted assignees or successors any right to enforce or otherwise invoke any terms of this Agreement under the Contract (Third Party Rights) (Scotland) Act 2017.*

9 GOVERNING LAW AND JURISDICTION

This Agreement is governed by the laws of England and Wales/Northern Ireland** and the courts of that country shall have exclusive jurisdiction.

This Agreement is governed by the Law of Scotland and each party submits to the non-exclusive jurisdiction of the courts of Scotland.***

10 INTERPRETATION

By entering into this Agreement the Beneficiary hereby is deemed to be aware of the terms of the Appointment.

**Delete as appropriate.*

***Delete as appropriate.*

****Delete as appropriate.*

IN WITNESS whereof the parties have executed this Agreement on the date shown on the first page.

SIGNED by the BENEFICIARY

.....

Director

In the presence of

.....

SIGNED by the CONSULTANT

.....

Director

In the presence of

.....

ALTERNATIVE FOR EXECUTION IN SCOTLAND

IN WITNESS WHEREOF these presents consisting of this and the preceding [] pages, and comprising [list any other annexures] referred to and annexed hereto

Under declaration that any insertions and deletions are made prior to execution, are executed as follows:

They are executed for and on behalf of the Beneficiary at on 20....
by (print full name)
who is a Director/Company Secretary/Person Authorised/Member/Proper Officer/ Partner in Firm name/
Partner/Individual authorised to sign these presents for and on behalf of the Beneficiary
..... (signature)

Before this witness:

Signature of witness:

Full name of witness:

Address of witness:

Occupation:

They are executed for and on behalf of the Consultant at.....on.....20....
by (print full name)
who is a Director/Company Secretary/Person Authorised/Member/Proper Officer/ Partner in Firm name/
Partner/Individual authorised to sign these presents for and on behalf of the Consultant

(signature)

Before this witness:

Signature of witness:

Full name of witness:

Address of witness:

Occupation:

EVALUATION

ACE FUNDER’S COLLATERAL WARRANTY

[CONSULTANT]

[CLIENT]

[BENEFICIARY]

WARRANTY AGREEMENT

FROM CONSULTANT

relating to consultancy design services

for.....

THEDAY OF.....20...*

THIS AGREEMENT IS MADE BETWEEN:

- (1) (“the Consultant”)
- (2) (“the Client”) and
- (3) (“the Beneficiary”)

WHEREAS

- A. [The Client] (“the Client”) has entered or may enter into a construction contract (“the Construction Contract”) with [The Contractor] (“Contractor”) for the construction of [.....] (“the Works”) at [.....].
- B. The Client by a contract (“the Appointment”) (which definition includes any variation to the contract which from time to time may be agreed between the Client and the Consultant) dated [.....] has appointed the Consultant to carry out services as defined in the Appointment in relation to the design of the Works (“Services”).
- C. The Beneficiary and the Client have entered into an agreement for the provision of finance in connection with the carrying out of the Works.
- D. The Consultant has agreed to enter into this warranty agreement with the Beneficiary and/or is obliged to issue a warranty under the Appointment.

THE PARTIES AGREE that in consideration of the payment of £1.00 by the Beneficiary to the Consultant, receipt of which is hereby confirmed by the Consultant**

1 WARRANTIES

- 1.1 The Consultant warrants to the Beneficiary that it has exercised and shall continue to exercise in carrying out the Services (as defined in the Appointment) the reasonable skill, care and diligence to be expected from a consultant qualified in providing such Services for works of a similar size, scope and complexity as the Works.

2 INTELLECTUAL PROPERTY

- 2.1 The Consultant’s Intellectual Property Rights, as defined in clause 2.6, remain vested in the Consultant.
- 2.2 The Beneficiary has a licence to use the drawings, documents and information issued pursuant to the Appointment by the Consultant for any purpose relating to completion of the Works and the operation of the Project.
- 2.3 The licence shall enable the Beneficiary to use the Consultant’s drawings, documents and information and to grant sub-licences for an extension to the Project but not to reproduce the designs contained within it for any extension of the Project
- 2.4 Except as stated above the Beneficiary shall not make copies of any of the Consultant’s drawings, designs or other documents or information nor use any of them in connection with any other projects or works without the Consultant’s prior written approval.

**Not required if Agreement executed in Scotland.*

***Omit if Agreement executed in Scotland.*

- 2.5 The Consultant shall not be liable for the use by any person of any of the Consultant's drawings, documents and information produced other than for the purpose for which they were prepared by or on behalf of the Consultant.
- 2.6 The "Consultant's Intellectual Property Rights" shall mean: Any and all intellectual and industrial property rights, including (without limitation) patents, trademarks, service marks, registered designs, copyrights, database rights, design rights, moral rights or know-how, howsoever arising, whether or not registered and any other similar protected rights in any country and any applications for the registration or protection of such rights and all extensions thereof throughout the world, created, developed, embodied in or in connection with any drawing or other document and information prepared by or on behalf of the Consultant in the performance of the Services for delivery to the Client.

3 INSURANCE

- 3.1 The Consultant shall maintain professional indemnity insurance in the amount and for the period of time required under the Appointment in relation to its liabilities arising under this Agreement provided always that such insurance is and remains available to the Consultant at reasonable rates and terms. Such insurance shall be obtained from a reputable insurance company carrying on insurance business in the UK market.
- 3.2 The Consultant shall produce to the Beneficiary, whenever requested and without delay such documentary evidence as the Beneficiary may reasonably require that the insurance required is in force, and in any event notify the Beneficiary forthwith upon its inability to obtain cover, or the cancellation of the insurance, or its inability to renew the insurance.

4 ASSIGNMENT/ASSIGNATION*

- 4.1 Where the Beneficiary is a funder, the Beneficiary may assign by way of absolute legal assignment/assignment** only the benefit of this Agreement to a third party who is also providing finance in connection with the Works. Any such assignment/assignment** shall only be effective if written notice is given to the Consultant. No further assignment/assignment** shall be permitted.

5 GENERAL

- 5.1 The Consultant shall in relation to this Agreement, have no greater liability to the Beneficiary in quantum duration or otherwise than if the Beneficiary were named as a co-client under the Appointment and accordingly the Consultant shall be entitled in any action or proceeding by the Beneficiary to rely on any limitation or exclusion in the Appointment and to raise equivalent rights in defence of liability as it would have if the Beneficiary were named jointly with the client as a co-client under the Appointment.
- 5.2 Further and without prejudice to this clause 5 if the Consultant is considered to be liable with third parties to the Beneficiary the Consultant's liability shall be limited solely to a just and equitable proportion of such liability and any compensation payable to the Beneficiary for such liability which is attributable to the Consultant's breach on the assumption that such third parties have themselves paid a just and equitable proportion of compensation attributable to their liability. The Consultant's liability and compensation payable under this clause 5.2 shall be subject to and form a part of the total aggregate sum(s) stated in the Appointment.
- 5.3 The Beneficiary acknowledges that the Consultant has or may enter into other warranty agreements of any description in relation to the Works pursuant to the terms of the Appointment. Without prejudice to this clause 5 of this Agreement, the Beneficiary further accepts that the Consultant's total liability for all claims howsoever arising to any and all parties under or in connection with the Appointment and any or all warranties of any description issued pursuant to the Appointment (for the avoidance of doubt including this Agreement) taken in any combination during any and for all periods of liability shall not exceed the sum(s) stated in the Appointment in the aggregate for all such claims.

**To apply if the applicable law is Scotland.*

***Delete as appropriate.*

- 5.4 Further without prejudice to this clause 5, no action or proceedings for any breach of this Agreement shall be commenced against the Consultant after the expiry of the period of liability specified in the Appointment.
- 5.5 Further without prejudice to Clause 5.1 neither party shall under any circumstances whatsoever be liable to the other for any direct or indirect loss of profit, loss of business or anticipated saving or special, indirect or consequential damage suffered by the other party that arises under or in connection with this Agreement.

6 BENEFICIARY'S STEP-IN RIGHT

- 6.1 The Consultant shall not exercise, or seek to exercise, any right to terminate its employment under the Appointment for any reason (including any breach on the part of the Client) without giving the Beneficiary at least 14 days' written notice of its intention to do so. Any notice from the Consultant shall specify the grounds for the Consultant's proposed termination or discontinuance.
- 6.2 If the Appointment allows the Consultant a shorter notice period for the exercise of a right referred to in clause 6.1, the notice period in the Appointment shall be extended to take account of the notice period required under clause 6.
- 6.3 The Consultant's right to terminate its employment under the Appointment shall cease if, within the period referred to in clause 6.1, the Beneficiary gives notice to the Consultant, copied to the Client:
- (a) requiring the Consultant not to terminate its employment;
 - (b) acknowledging that the Beneficiary (or its nominee) will assume all the Client's obligations under the Appointment; and
 - (c) undertaking that the Beneficiary or its nominee will pay to the Consultant:
 - (i) any sums due and payable to the Consultant under the Appointment in future; and
 - (ii) any sums then due and payable to the Consultant under the Appointment that are unpaid.
- 6.4 If the Beneficiary (or its nominee) serves notice on the Consultant under clause 6, then, from the date of service of the notice, the Appointment shall continue in full force and effect, as if it had been entered into between the Consultant and the Beneficiary (to the exclusion of the Client).
- 6.5 In complying with this clause 6, the Consultant:
- (a) does not waive any breach of the Appointment or default under the Appointment by the Client; and
 - (b) may exercise its right to terminate its employment under the Appointment after the expiry of the notice period referred to in clause 6.1, unless the Consultant's right to terminate or discontinue has ceased under clause 6.3.
- 6.6 The Consultant shall not incur any liability to the Client by acting in accordance with this clause 6.
- 6.7 The Client has entered into this Agreement to confirm its consent to the provisions of this clause 6.
- 6.8 If a Beneficiary's notice under this clause 6 refers to the Beneficiary's nominee, the Beneficiary shall be liable to the Consultant, as guarantor, for the payment of any sums due and payable from time to time to the Consultant from the Beneficiary's nominee.
- 6.9 Unless the Beneficiary has stepped-in under this clause 6, the Beneficiary may not give instructions to the Consultant under this Agreement.

7 SEPARATE OBLIGATIONS

- 7.1 No approval or inspection of the documents prepared by the Consultant in relation to design of the Works and no approval inspection or testing of any of the Works or any attendance at site meetings by or on behalf of the Beneficiary or any other party shall wholly or partly relieve the Consultant from its obligations under this Agreement.

8 NOTICE

Any notice given hereunder shall be made in writing and shall be sent by pre-paid first class post, registered post, recorded delivery or delivered by hand addressed to the Beneficiary or the Consultant (as the case may be) at the address or place of business referred to herein or such other address or place of business last notified in writing by the Beneficiary or the Consultant (as the case may be) to the other.

9 THIRD PARTY RIGHTS

Where the applicable law is that of England, Wales or Northern Ireland:

The Beneficiary and the Consultant do not intend to confer and nothing in this Agreement shall be construed as conferring, on a third party a benefit or a right to enforce a term of this Agreement pursuant to the Contracts (Rights of Third Parties) Act 1999.*

Where the applicable law is that of Scotland:

This Agreement does not confer on any person other than the parties or their permitted assignees or successors any right to enforce or otherwise invoke any terms of this Agreement under the Contract (Third Party Rights) (Scotland) Act 2017.

10 GOVERNING LAW AND JURISDICTION

This Agreement is governed by the laws of England and Wales/Northern Ireland** and the courts of that country shall have exclusive jurisdiction.

This Agreement is governed by the Law of Scotland and each party submits to the non-exclusive jurisdiction of the courts of Scotland.***

11 INTERPRETATION

By entering into this Agreement the Beneficiary hereby is deemed to be aware of the terms of the Appointment.

IN WITNESS whereof the parties have executed this Agreement on the date shown on the first page.

SIGNED by the BENEFICIARY

.....

Director

**Delete as appropriate.*

***Delete as appropriate.*

****Delete as appropriate.*

In the presence of

.....

SIGNED by the CONSULTANT

.....

Director

In the presence of

.....

SIGNED by the CLIENT

.....

Director

In the presence of

.....

ALTERNATIVE FOR EXECUTION IN SCOTLAND

IN WITNESS WHEREOF these presents consisting of this and the preceding [] pages, and comprising.....[list any other annexures] referred to and annexed hereto

Under declaration that any insertions and deletions are made prior to execution, are executed as follows:

They are executed for and on behalf of the Beneficiary at on.....20

by.....(print full name)

who is a Director/Company Secretary/Person Authorised/Member/Proper Officer/Partner in Firm name/ Partner/Individual authorised to sign these presents for and on behalf of the Beneficiary

.....(signature)

Before this witness:

Signature of witness:

Full name of witness:

Address of witness:

Occupation:

They are executed for and on behalf of the Consultant at.....on.....20
by.....(print full name)

who is a Director/Company Secretary/Person Authorised/Member/Proper Officer/ Partner in Firm name/Partner/
Individual authorised to sign these presents for and on behalf of the Consultant

.....(signature)

Before this witness:

Signature of witness:

Full name of witness:

Address of witness:

Occupation:

They are executed for and on behalf of the Client at.....on.....20
by.....(print full name)

who is a Director/Company Secretary/Person Authorised/Member/Proper Officer/ Partner in Firm name/Partner/
Individual authorised to sign these presents for and on behalf of the Consultant

.....(signature)

Before this witness:

Signature of witness:

Full name of witness:

Address of witness:

Occupation: