

MINUTE OF VARIATION



between

[] Limited

and

[] Limited

[with the consent of [] Limited]

Property: []



MINUTE OF VARIATION

between

[] **LIMITED** incorporated under the Companies Acts (Registered Number []) and having its Registered Office at [], and includes, where the context so requires, its successors as landlord under the Lease ("**Landlord**")

and

[] **LIMITED** incorporated under the Companies Acts (Registered Number []) and having its Registered Office at [], and includes, where the context so requires, its permitted assignees as tenant under the Lease ("**Tenant**")

[with the consent of the Guarantor]

WHEREAS:

- (A) The Landlord is the landlord under the Lease;
- (B) The Tenant is the tenant under the Lease; [and]
- (C) The Landlord and the Tenant have agreed to vary the terms of the Lease; and] [.]
- (D) [The Guarantor is the guarantor of the Tenant's obligations under the Lease and has agreed to the variation of the Lease.]

IT IS AGREED as follows:**1 Definitions and Interpretation****1.1 Definitions¹**

Words which are defined in clause [] of the Lease have the same meanings in this Minute of Variation, unless other meanings are assigned to them below. In this Minute of Variation:

"**Effective Date**" means [] (notwithstanding the dates of this Minute of Variation);

["**Guarantee**" means the guarantee between [] and [] dated [] [and registered in the Books of Council and Session on []]] [incorporated in the Lease];]

["**Guarantor**" means [], incorporated under the Companies Acts (Registered Number []) and having its Registered Office at []];

"**Lease**" means the lease of the Property between [] and [] dated [] and registered in the Books of Council and Session on [] [and also recorded in the Division of the General Register of Sasines for the County of [] on []]] [and the tenant's right to which is registered in the Land Register of Scotland under Title Number []]] [as subsequently varied and/or amended];

"**Parties**" means the Landlord [,] [and] the Tenant [and the Guarantor];

"**Property**" means ALL and WHOLE [] as more particularly described in the Lease [and the landlord's title to which is registered in the Land Register of Scotland under Title Number []]; and

"**Schedule**" means the schedule annexed to this Minute of Variation.

¹ Users should ensure that the definitions are the same as those used in the lease in question. New definitions should be included as required.

1.2 Interpretation

The interpretation provisions of clause [] of the Lease apply, where applicable, to this Minute of Variation.²

1.3 Headings

The headings in this Minute of Variation are included for convenience only and are to be ignored in construing this Minute of Variation.

1.4 Schedule

The Schedule forms part of this Minute of Variation.

2 Variation of Lease

The Landlord and the Tenant agree that the Lease is varied with effect from the Effective Date³ in accordance with the provisions of [Part 1 of] the Schedule.

3 Costs [and VAT]

3.1 [Each of the Parties will bear their own costs and expenses in connection with this Minute of Variation.] [The Tenant will pay the costs and expenses reasonably and properly incurred by the Landlord in connection with this Minute of Variation within five Business Days after written demand].

3.2 The Tenant will be responsible for any Land and Buildings Transaction Tax chargeable on varying the Lease.

3.3 The [[Tenant] [Landlord] will pay] [Parties will each meet an equal share of] the cost of registering this Minute of Variation in the Books of Council and Session and obtaining an electronic extract where possible, otherwise an extract for each of the Parties] [[with the Tenant paying its share] [within five Business Days of demand].

3.3 [The Tenant will pay the cost of registering this Minute of Variation in the Land Register of Scotland.]

3.4 [All sums payable, or consideration given, or the value of any supplies made by any party to this Minute of Variation are exclusive of VAT (unless otherwise stated), which, if properly chargeable, will be payable by the recipient of the supply for VAT purposes in addition, upon production of a valid VAT invoice addressed to the recipient of the supply.]⁴

4 [Guarantor's Consent

The Guarantor:

4.1 consents to the terms of this Minute of Variation; and

4.2 acknowledges that the guarantees and undertakings given by it in the Guarantee will be enforceable not only in relation to the performance of the Tenant's obligations under the Lease but also in relation to the performance of the Tenant's obligations under this Minute of Variation.]

5 Contract (Third Party Rights)(Scotland) Act 2017

This Minute of Variation does not create any rights in favour of third parties under the Contract (Third Party Rights) (Scotland) Act 2017 to enforce or otherwise invoke any provision of this Minute of Variation.

² Check whether the interpretation provisions in the Lease will apply (without modification).

³ It may not necessarily be the case that all lease variations will crystallise on the same date.

⁴ Tax advice should be taken as required in relation to the liability for VAT or other taxes.

6 Ratification of Lease

Except as amended by this Minute of Variation, the Parties confirm that the whole provisions of the Lease will remain in full force and effect.

7 Applicable Law and Jurisdiction

This Minute of Variation is governed by and is to be construed in accordance with the law of Scotland and in so far as not already subject to it, the parties irrevocably submit to the exclusive jurisdiction of the Scottish Courts.

8 Consent to Registration

The Parties consent to the registration of this Minute of Variation for preservation and execution:
IN WITNESS WHEREOF

SCHEDULE

This is the Schedule referred to in the foregoing Minute of Variation between [] and []
[with consent of []]

[Part 1] Lease Variations⁵

1. Defined Terms⁶

This [Part of the] Schedule uses the following definitions:

["Additional Premises"	means ALL and WHOLE the property [known as []] [shown outlined in [red] on the plan annexed and executed as relative to this Minute of Variation forming Part [2] of the Schedule] and [forming part of] [being] the property [described in [] by [] in favour of [] recorded in the Division of the General Register of Sasines for the County of [] on []] [registered in the Land Register of Scotland under Title Number []];
["Additional Rent"	means [] POUNDS STERLING (£[]) per annum exclusive of VAT;
["Break Date"	means [];
["Extended Period"	means the period from (and including) [] to (and including) [];
["Rent"	means [the rent payable in terms of the Lease] [[] POUNDS STERLING (£[]) per annum exclusive of VAT] [the aggregate of the rent payable in term of the Lease and the Additional Rent being [] POUNDS STERLING (£[]) per annum exclusive of VAT];
["Rent Commencement Date"	means [<i>insert date or description</i>];
["Rent Review Provisions"	means the provisions for the review of the annual rent payable under the Lease set out in [clause [] of] [part [] of the schedule to] the Lease] [[Part 3] of the Schedule ⁷]; [and]
["Term"⁸	means the term of the Lease [as varied by this Minute of Variation.]

2. [Variation of Property Extent

2.1 In consideration of the Additional Rent and other provisions of the Lease as amended by this Minute of Variation, the Landlord lets the Additional Premises to the Tenant:

2.1.1 for the Term⁹ [subject to the Tenant's right to terminate in paragraph [8] of [this Part of] the Schedule;

⁵ These are just examples of possible variations with suggested wording to cater for them - the Schedule should be tailored to particular transactional circumstances.

⁶ Additional defined terms only required if not already catered for in the Lease or in Clause 1 of this draft.

⁷ Use this option where the Lease does not contain any rent review provisions or new rent review provisions are being incorporated. The rent review provisions contained in [Part 3] of the Schedule are taken from the PSG Lease based on the Model Commercial Lease of Whole Building (Office) (MCL-OFFICE-01) Version 1.7 – refer to Guidance Notes for further detail. Client instructions and valuation advice should be taken as appropriate prior to the incorporation of these provisions.

⁸ If the Lease uses a different definition for the term of the lease, use that definition.

⁹ See FN9.

2.1.2 together with the [Tenant's Rights]¹⁰; and

2.1.3 excepting and reserving to the Landlord the [Reservations].¹¹

2.2 The Tenant accepts the Additional Premises in their condition at the Effective Date as being in good and substantial repair and condition and fit for the purpose let. All implied warranties as to fitness for purpose and all common law obligations on the Landlord for ordinary and/or extraordinary repair, replacement, renewal or reinstatement of the Additional Premises are excluded.

2.3 The definition of the ["Premises"]["Property"] contained in [clause [] of] [part [] of the schedule to] the Lease will include the Additional Premises and the definition of ["Rent"] in the Lease will include the Additional Rent.]

3 [Extension of Lease Term]

3.1 The Lease will be extended (and the Parties' obligations under it will continue) for the Extended Period [and from month to month after the end of the Extended Period until terminated by either Party giving not less than [one] month's prior written notice to the other Party] on the terms and conditions contained in the Lease and this Minute of Variation [but subject to the Tenant's right to terminate at paragraph [8] of this [Part of the] Schedule].

3.2 The expression [*insert definition of duration used in the lease*] as [defined] [used] in the Lease or any other expression used to refer to the term of the Lease will be deemed to include the period of extension documented in this Minute of Variation.]

4. [Rent]

2.1 The Tenant must pay to the Landlord from and including the [first day of the Extended Period] [the Effective Date] the Rent with all VAT properly chargeable on it. The Tenant must not make any retention, deduction, set-off or counterclaim from any payment due under the Lease, unless required to do so by law.¹²

2.2 The Rent is payable by equal [monthly] [quarterly] payments in advance on the [Rent Days] in every year. The first payment will be a proportionate payment for the period starting on (and to be paid on) the [Effective Date][Rent Commencement Date] and ending on the last day of that [month] [quarter].

2.3 The Tenant undertakes to pay interest on any late payment of rent as provided in the Lease.]

3. [Rent Review]¹³

[The Rent will [continue to] be reviewed on a [five] yearly basis as set out in the Rent Review Provisions.]¹⁴ [The Rent Review Provisions will not apply for the Extended Period].]

4. [Rent Free Period]

Starting on the [Effective Date] [first day of the Extended Period] and ending on the day immediately preceding the Rent Commencement Date, no Rent, other than £1.00 (if asked only), is payable.]

5. [Reduced Rent Period]

Starting on the [Effective Date] [first day of the Extended Period] [Rent Commencement Date] and ending on [], the Rent will be reduced to [] POUNDS STERLING (£[]) per annum exclusive of VAT.]

¹⁰ If the Lease uses a different definition for the Tenant's Rights use that definition.

¹¹ If the Lease uses a different definition for the (Landlord's) reserved rights use that definition.

¹² The Landlord may wish to reflect on the efficacy of this drafting in the light of the Trustees of the Buchanan House Unit Trust –v- Scott Wilson Railways Limited [2020] GLA 45, and the application of the common law right of abatement.

¹³ This paragraph only likely to be required if the term is being extended.

¹⁴ Consider if you need to set new rent review dates or if the rent review pattern needs to be amended as a result of the extended term.

6. [Tenant Break Option]

- 6.1 The Tenant may terminate the Lease on the Break Date by giving the Landlord formal notice to that effect of not less than [*insert length*] months following which the Term will end on the Break Date [if:¹⁵
- 6.1.1 on the Break Date the Rent due on or before that Break Date and any VAT payable on it has been paid in full; [and]
 - 6.1.2 on the Break Date the Premises are free of the Tenant's occupation and the occupation of any other lawful occupier and there are no continuing subleases¹⁶ [; and
 - 6.1.3 the Tenant has on or before the Break Date paid to the Landlord an amount equal to [*insert figure/proportion of the Rent*] (plus any VAT payable on that amount).]
- 7.2 The Landlord may waive any of the pre-conditions in paragraphs 8.1.1 to 8.1.3 at any time before the Break Date by notifying the Tenant. A waiver by the Landlord of any of those pre-conditions will not affect the Tenant's liability for the matters set out in those pre-conditions. [If the Landlord waives the pre-condition in paragraph 8.1.3 and the Lease ends on the Break Date, the Tenant must pay to the Landlord immediately after the Break Date the sum specified in that paragraph].
- 7.3 [The break right in this paragraph 8 is personal to the Tenant (here meaning [] Limited (registered number [])) and will end on the effective date of any permitted assignment of the Lease or on the date when the said [] Limited ceases to exist.]
- 7.4 If the Lease ends under this paragraph 8, this will not affect the rights of any party for any prior breach of an obligation in the Lease.
- 7.5 The Landlord must refund any Rent paid in advance by the Tenant relating to the period falling after the date of termination within [15] Business Days of that date.¹⁷
- 7.6 Time is of the essence for the purposes of paragraph 8.1.

OR¹⁸

The Tenant will have no right to invoke the break option contained in clause [] of the Lease which would otherwise receive effect on the break date in the Lease.]

7. Monthly Rent Payment

Notwithstanding clause [] of the Lease, the [Rent] will be payable by equal monthly payments in advance on or before the first calendar day of each calendar month. The first payment will be a proportionate payment for the period starting on (and to be paid on) the [Rent Commencement Date] and ending on the last day of the month in which the [Effective Date] [Rent Commencement Date] occurs.

¹⁵ The conditions in this break clause are consistent with the RICS professional standard "Code for Leasing Business Premises First Edition (February 2020)".

¹⁶ This wording is intended to ensure that the Tenant has given physical possession (ie removed itself and all of its fittings, furniture and equipment from the Premises) and that there are no subsisting occupation rights. However, the wording, in Scotland, may also be considered to include legal (vacant) possession where if the Tenant has not completely removed everything from the Premises by the Break Date (eg left behind some internal partitioning or furniture), it may lose its right to terminate the lease on the Break Date (Riverside Park Ltd v NHS Property Services Limited [2016] EWHC 1313 (Ch)). The Code for Leasing Business Premises in England & Wales published in March 2007 recommends that "The only pre-conditions to tenants exercising any break clauses should be that they are up to date with the main rent, give up occupation and leave behind no continuing subleases. Disputes about the state of the premises, or what has been left behind or removed, should be settled later (like with normal lease expiry)". The Tenant may, therefore, want to consider deleting this wording so that there can be no doubt that the right to break is preserved, leaving the Landlord with the usual remedies against the Tenant in the event that the Tenant has not given full legal and physical possession to the Landlord on the Break Date.

¹⁷ Check the Lease to establish whether there is an existing obligation to repay any rent relating to the period after the Break Date.

¹⁸ Use this alternative if the original break clause in the Lease is to be removed.

**[Part 2
Plan]**

**[Part 3]
Rent Review¹⁹**

1. Defined Terms²⁰

This Part of the Schedule uses the following definitions:

"Assumptions" means that:

- (a) if the Property has been damaged or destroyed, it has been reinstated before the Rent Review Date;
- (b) the Property is fit for immediate occupation and use by the willing tenant;²¹
- (c) the Property may lawfully be let to and used for the [Permitted Use]²² by any person throughout the term of the Hypothetical Lease;
- (d) the Tenant has complied with the Tenant's obligations in the Lease and (except to the extent that there has been a material and persistent breach by the Landlord) the Landlord has complied with the Landlord's obligations in the Lease; and
- (e) the willing tenant has received the benefit of either:
 - (i) a rent-free period of such length as is required by the willing tenant to reflect the time required in order to carry out its fitting-out works at the Property, that rent-free period having expired immediately prior to the commencement of the Hypothetical Lease; or
 - (ii) a rent concession or any other inducement of equal value to that rent-free period.²³

"Disregards" means the following:

- (a) any effect on rent of the Tenant (and the Tenant's predecessors in title and lawful occupiers) having been in occupation of the Property;
- (b) any goodwill accruing to the Property because of the Tenant's business (and that of the Tenant's predecessors in title and lawful occupiers);
- (c) any special bid that the Tenant or any other party with a special interest in the Property might make by reason of its occupation of any adjoining premises;
- (d) any increase in rent attributable to any improvement, including any tenant's initial fitting-out works[and any Prior Lease Alterations]²⁴, whether or not within the Property:
 - (i) carried out by and at the cost of the Tenant or the Tenant's predecessors in title or lawful occupiers before or during the term of the Lease;

¹⁹ This Part of the Schedule contains an open market review. There is no attempt to review to a headline rent.

²⁰ Consider if any further definitions are required or if any amendments are required for these provisions to fit with the Lease.

²¹ There is deliberately no assumption that the Property is fitted-out. If the Property is to be valued on the assumption that they were handed over to the Tenant in a specific state (such as shell and core with capped services) then a rent review specification will be needed and an additional assumption added that the Property is handed over to the willing tenant in the state set out in the specification.

²² Use correct definition from the Lease.

²³ This assumption is considered to be neutral. There is no attempt to review to a headline rent.

²⁴ Consider carefully the extent of the Property to be taken into account on a rent review and whether works carried out under any prior lease should be taken into account or disregarded for the purposes of rent review. If any prior lease alterations are to be referred to a definition will need to be added and reference can be made to the PSG suite of leases.

- (ii) carried out with the written consent, where required, of the Landlord or the Landlord's predecessors in title; and
 - (iii) not carried out pursuant to an obligation to the Landlord or the Landlord's predecessors in title (but any obligations relating to the method or timing of works in the Lease or any other document giving consent will not be treated as an obligation for these purposes);
- (e) any reduction in rent attributable to works that have been carried out by the Tenant (or the Tenant's predecessors in title or lawful occupiers); and
- (f) any reduction in rent attributable to any temporary works, operations or other activities on any adjoining premises.

"Hypothetical Lease" means a lease:

- (a) of the whole of the Property;
- (b) on the same terms as the Lease as varied by this Minute of Variation (including this Part of the Schedule) except for:
 - (i) the amount of rent payable immediately before the Rent Review Date;
 - (ii) any rent free period, rent concession or any other inducement received by the Tenant in relation to the grant of the Lease or this Minute of Variation; [and]
 - (iii) any break clause in the Lease or this Minute of Variation, other than any right to terminate in contained in [clause [] of] [part [] of the schedule to] the Lease ²⁵; and
 - (iv) [*Insert any other specific exclusions*];
- (c) by a willing landlord to a willing tenant;
- (d) with vacant possession;
- (e) without any premium payable by or to the willing tenant;
- (f) for a term of [*Insert length*] years starting on the Rent Review Date;
- (g) with a rent commencement date on the Rent Review Date; [and]
- (h) with rent review dates every [five] years; and
- (i) with a right for the tenant to bring the Hypothetical Lease to an end on [or at any time after] the [*Insert number*] anniversary of the date on which the term starts²⁶.

"Market Rent" means the yearly rent at which the Property might reasonably be expected to be let on the open market on the Rent Review Date, on the terms of the Hypothetical Lease and applying the Assumptions and the Disregards; and²⁷

"Rent Review Date" means [*Insert date*] [in each of the years [*Insert years*] and references to "the Rent Review Date" mean the relevant Rent Review Date].²⁸

²⁵ All break clauses in the Lease are ignored (other than those that arise following a failure to reinstate insured or uninsured damage which is what the cross reference should be made to). Any corresponding break clauses in the Hypothetical Lease should be included in paragraph (i) of this definition. Where there is a rent free period or concessionary rent that follows the non-exercise of the break clause, consider including a specific exclusion of it.

²⁶ Consider the treatment of break clauses in the Hypothetical Lease.

²⁷ Current market practice is generally not to use the expression "best rent".

²⁸ The Rent Review Date(s) should ideally correspond to one of the Rent Days.

8. Rent review

8.1 On the Rent Review Date, the Rent is to be reviewed to the higher of:

8.1.1 the Rent payable immediately before the Rent Review Date; and

8.1.2 the Market Rent.

8.2 The reviewed Rent will be payable from and including the Rent Review Date.

9. Dispute resolution

9.1 The Market Rent at the Rent Review Date may be agreed between the Landlord and the Tenant. If they have not done so (whether or not they have tried) by [the date three months before] the Rent Review Date, either the Landlord or the Tenant can require the Market Rent to be decided by an independent [expert] [arbitrator]²⁹. If the Landlord and the Tenant do not agree on who should decide the Market Rent, the [expert] [arbitrator] will be appointed by the Chair (or other senior office holder) for the time being of the Royal Institution of Chartered Surveyors in Scotland (as constituted, re-constituted, formed or re-formed from time to time) on the application of either the Landlord or the Tenant. [The seat of the arbitration will be Scotland and the reference to the arbitration will take effect subject to and in accordance with the Arbitration (Scotland) Act 2010.]³⁰

[The expert will:

9.1.1 invite the Landlord and the Tenant to submit to them a proposal for the Market Rent with any relevant supporting documentation;

9.1.2 give the Landlord and the Tenant an opportunity to make counter submissions;

9.1.3 give written reasons for their decisions, which will be binding on the parties; and

9.1.4 be paid by the Landlord and the Tenant in the shares and in the manner that the expert decides (or failing a decision, in equal shares).]

9.2 The [expert] [arbitrator] must be an independent chartered surveyor of not less than 10 years' standing who is experienced in the rental valuation of property similar to the Property and who knows the local market for such premises.

9.3 If the [expert] [arbitrator] dies, becomes unwilling or incapable of acting or it becomes apparent for any other reason that the [expert] [arbitrator] will be unable to decide the Market Rent within a reasonable time, the [expert] [arbitrator] may be replaced by a new [expert] [arbitrator] who must be appointed on the terms set out in this paragraph 3 of this Part of the Schedule.

9.4 Responsibility for the costs of referring a dispute to an [expert] [arbitrator], including costs connected with the appointment of the [expert] [arbitrator], will be decided by the [expert] [arbitrator] and failing a decision, they will be shared equally between the Parties.

10. Consequences of delay in agreeing the revised rent

If, by the Rent Review Date, the reviewed Rent has not been ascertained, then:

10.1 the Rent payable under the Lease as varied by this Minute of Variation immediately before the Rent Review Date will continue to be payable until the reviewed Rent has been ascertained;

10.2 following the ascertainment of the reviewed Rent, the Landlord will demand the difference (if any) between the amount the Tenant has actually paid and the amount that would have been payable had the reviewed Rent been ascertained before the Rent Review Date; and

²⁹ Consider which option the client prefers for resolving rent review disputes.

³⁰ Consider whether the parties wish any of the non-mandatory Scottish Arbitration Rules to be disapplied at this stage.

10.3 the Tenant must pay that difference to the Landlord within 10 [Business Days] after that demand and interest at [three]³¹ per cent below the [Interest Rate]³² calculated on a daily basis on each instalment of that difference from the date on which each instalment would have become payable to the date of payment. If not paid those sums will be treated as rent in arrear.

11. Rent review memorandum³³

When the Market Rent has been ascertained, a memorandum recording the Rent payable on review must be entered into. The Landlord and the Tenant will each bear their own costs in relation to that memorandum, except that the Tenant must pay to the Landlord the dues of registering that memorandum in the Books of Council and Session and of obtaining an electronic extract where possible, otherwise an extract for each of the Parties.

12. Time not of the essence

For the purpose of this Part of the Schedule time is not of the essence.³⁴

³¹ Possible need to calibrate with the corresponding chosen Interest Rate to achieve a base rate "outcome".

³² Use correct definition from the Lease.

³³ Please refer to the PSG Rent Review Memorandum in this context.

³⁴ A decision has been taken not to include provisions to circumvent any statutory restrictions on implementing rent reviews or to nominate an extra rent review date when any restrictions cease to have effect.