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SCOTTISH HEALTH SERVICE, CLO  
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EDINBURGH



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31st March 1999

**AGREEMENT**  
between  
**WEST LOTHIAN NATIONAL HEALTH SERVICE TRUST**  
and  
**COMMUNITY HEALTH SERVICES LIMITED**  
and  
**CARE UK PLC**  
pursuant to the Private Finance Initiative  
relating to  
the Reprovision of Tippet Hill Hospital, Whitburn

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- B. The Trust's purpose pursuant to Section 12A(1)(a) of the National Health Service (Scotland) Act 1978 (as amended) and paragraph 3(2) of the Order is to provide and manage hospitals or other establishments or facilities.
- C. The Trust's functions pursuant to paragraph 3(2) of the Order to own and manage hospital establishments or facilities in West Lothian including the management of the facilities provided at and from those establishments, and also including the management of the teaching and research facilities associated with those establishments.
- D. Accordingly, on Eleventh April Nineteen hundred and ninety eight the Trust placed an advert in the Official Journal of the European Union requesting expressions of interest in a project ("Project") to design, construct, finance, equip and part operate a new hospital facility at Tippetill Hospital under the Government's Private Finance Initiative and the Company, *inter alia*, submitted an application to the Trust to be considered for the Project.
- E. On First July Nineteen hundred and ninety eight the Trust issued an invitation to Negotiate for works comprising the design and construction of a new build hospital facility and for the provision of services therein, and the Company *inter alia* was selected to proceed to the next stage of the procurement process.
- F. On Twenty third November Nineteen hundred and ninety eight the Trust issued to, *inter alia*, the Company an invitation to submit a best and final tender for the Project.
- G. On Seventh December Nineteen hundred and ninety eight the Company submitted a tender for the Project in response to the Trust's invitation to submit a best and final tender.

"Building Contract" means the contract entered into between the Company and the Works Contractor relating to the construction of the Facility in

"Bed" means a single unit of Patient accommodation within the Facility;

compounded at six-monthly intervals;

interest to accrue daily on the basis of a 365 day year and to be Company of the Bank of Scotland plc from time to time in force such "Base Rate" shall mean interest at the base rate of the Governor and

Schedule;

"Availability Table" means the table marked as such set out in Part 1 of the

Availability Criteria;

professional capacity as a clinician and having due regard to the Non-writing by the Trust for this purpose acting reasonably and in a proper and determined by a senior clinical staff member of the Trust nominated in therefrom in a safe and structurally sound environment all as shall be the care of Patients, and (3) the safe access and egress thereto and occupation in accordance with the terms of this Agreement by Patients, (2) time to time) the relevant Area of the Facility from time to time is fit for (1) maintenance and decoration of the Facility (as agreed with the Trust from "Available" means that subject to the programmes for planned

7SL;

"Architect" means McDonald Williams of 6 Royal Crescent, Glasgow G3

"Area" means a division of the Facility as shown in the Availability Table;

Specification and the Financial Model;

"Agreement" means this Agreement, the Schedule, the Output

accordance with the Design Specification approved by the Trust acting reasonably or as otherwise approved by the Trust such approval not to be unreasonably withheld or delayed.

"Building Documents" means all documents specified in Part 3 of the Schedule and the specifications, standards, requirements, design criteria, room data sheets and other information specified in the Design Specification and Output Specification or annexed hereto as the same may be varied from time to time in accordance with this Agreement;

"Building Warrants" means all such building warrants issued by the Planning Authority as are required for the design, construction and completion of the Facility and every part thereof;

"CDM Regulations" means the Construction (Design and Management) Regulations 1994

"Certificate of Completion" means a certificate issued to the Trust by the Company certifying that the Facility has been Completed;

"Change" means any structural design or equipment upgrade or alterations to the Facility or a change in or relating to any of the Services and shall include any change or changes necessitated by a change in use of the Facility by the Trust (provided that the Trust shall be bound to use the Facility at all times for uses consistent with title to the Site) or any additional FM Service reasonably required by the Trust;

"Clinical Designation" means the clinical categorisation of Patients (as determined by the Trust) who may be accommodated and/or treated within the Facility;

"Date of Appointment" means the last date of execution of this Agreement;

the Lease (as the case may be)

all material respects with the relevant provisions of this Agreement and/or

"Contract Standard" means the standard required to ensure compliance in

accordance with the provision of Clause 2.4

Expiry Date or such later date as may be agreed between the parties in

"Contract Period" means the period from the Date of Appointment until the

"Contents" means all Equipment and Trust Equipment ;

until the Operational Date;

"Construction Phase" means the period of time from the Effective Date

available from one party to the other without restriction;

suppliers of either party except any such information which is made

financial position, trade secrets, know-how, personnel, customers and

information which relates to the business, affairs, prospects, proposals,

identity, condition or medical history of a Patient of the Trust; and (iii) all

either party acting reasonably in writing; (ii) all information relating to the

"Confidential Information" means (i) all information designated as such by

Specification and the terms of this Agreement;

Permissions, Planning Permission, the Building Contract, the Design

"Completed" means constructed in accordance with the Development

deputy during his/her absence;

the Services or any person nominated by that individual as being his/her

and notified to the Trust to have ultimate responsibility for the provision of

"Company Executive" means the individual appointed by the Company

"Development Permissions" means the Planning Permission, the Building Warrants, the Road Construction Consents, the consent or other approval or certificate of the Fire Officer (to the extent necessary) and compliance with the CDM Regulations and all other necessary permits, certificates, licences, planning permissions, approvals of details, approvals of reserved matters, building regulation approvals and relaxations, building and other consents or which may from time to time be necessary to enable the

the Facility which are accepted in writing by the Trust;

any changes, additions and/or omissions to the design and specification of the Company or the Works Contractor; and

any more detailed documents, drawings and plans as may be prepared by contained in the Tender and approved by the Trust;

the Company's design and specification proposals for the Facility as for the Facility in the Output Specification;

the accommodation and equipment requirements as specified by the Trust out and equipping of the Facility incorporating:-

"Design Specification" means the specification for the design and fitting Building Contract to remedy any and all Works Defects at their own cost;

Contractor and any of its sub-contractors are obliged in terms of the Contract subsequent to Practical Completion during which the Works "Defects Liability Period" means the period specified in the Building

"Default" shall have the meaning ascribed to it in Clause 14;

am;

"Day" means a continuous period of twenty four (24) hours from 8 am to 8

Company to lawfully commence and carry out the Works and effect

subsequent operation of the Facility;

"Disaster or Major Incident Plan" means the plan to be agreed prior to the Effective Date between the Trust and the Company as same may be reviewed and varied from time to time by written agreement between the Trust and the Company;

"Disclosure Letter" means a letter to be forwarded by the Trust to the Company on the Date of Appointment in the terms of Clause 29.2;

"Effective Date" means the date upon which the Conditions precedent detailed in Clause 2.2 are waived or purfied;

"Employer's Agent" means Seely Stiles of 123 Grays Inn Road, London, WC1X 8TZ;

"Equipment" means the equipment to be provided, installed and maintained by the Company at or in connection with the Facility listed in Part 4 of the Schedule but excluding for the avoidance of doubt the Trust Equipment;

"Expert" means an appropriate independent expert agreed by the Trust and the Company or failing agreement appointed by referral of either of them by the Chairman of the Royal Institution of Chartered Surveyors in Scotland;

"Expiry Date" means the date twenty five (25) years after the Operational Date as extended by any period of time allowable due to a Permitted Delay Event;

"FM Provider" means the Company or any person, firm or entity of equivalent standing in all material respects as may be appointed by the Company to provide the FM Services or part thereof in accordance with

"FM Employees" means any employees who are immediately prior to the Termination Date engaged in the performance of the FM Services;

of the Schedule;

"First Deduction" means the sum or sums of money to be deducted from the Price if an Area or Areas is not Available calculated in terms of Part 1

out in Part 5 of the Schedule;

"Financial Model" means the set of financial projections made by the Company which predict key cash flows pertaining to the provision of the Services under this Agreement over the Contract Period in the form set

fittings present from time to time thereat;

"Facility" means the Site and all buildings (including without limitations the plate glass in the windows) erected, in the course of erection at any time or as may be erected at any time for the purpose of providing the new hospital facility and landscaped grounds on the Site so far as not built upon, fencing and all Utilities Services in accordance with this Agreement, together with all additions, alterations and improvements thereto made at any time during the term of the Agreement (and including without limitation every part and pertinent thereof) and all the Company's fixtures and fittings present from time to time thereat;

"Facilities Manager" means the individual appointed by the Company or the FM Provider and notified to the Trust as the person responsible for the day-to-day management of the provision of the FM Services at the Facility;

the Facility by fire, lightning, explosion, aircraft and other aerial devices  
"Insured Risks" means the risks in respect of damage to or destruction of

Statistics;

1987 = 100) published by H.M. Stationery Office in the Monthly Digest of  
"Index" means the "the index of Retail Prices"; (all items) (1<sup>st</sup> January

"Guarantor" means Care UK plc;

terms of Clause 30.2

in favour of the Trust immediately prior to the Termination Date in the  
"Future Disclosure Letter" means a letter to be provided by the Company

Provider's property arising from any of the events at (a) above

nuclear chemical or biological contamination of the Company's or the FM

the United Kingdom

war, civil war, armed conflict or terrorist attack arising within or affecting

party of its obligations arising from the following events:-

"Force Majeure" means any cause affecting the performance by either

time to time in accordance with the terms of this Agreement;

provided by the Company which may be agreed between the parties from

pursuant to the Output Specification and any additional Service to be

maintenance and ancillary services to be provided by the Company

and switchboard; buildings and engineering; grounds and gardens

car parking; domestic and portering; clinical waste management; reception

"FM Services" means the following services:- catering; linen; security and

which consent is not to be unreasonably withheld or delayed;

the terms of the Agreement or with the prior written consent of the Trust

"Legal Requirements" means any law, regulation, bye-law, directive, statute, statutory instrument or other legislative measure having force of law and any request, requirement, guideline, recommendation or

"Lease" means the lease of the Site to be granted by the Trust in favour of the Company for a term of 99 years from the Operational Date subject to earlier termination in accordance with the provisions of this Agreement in the form of the lease set out in Part 6 of the Schedule;

"JCT 81" means the Scottish Building Contract with Contractor's Design August 1998 Revision with such amendments and modifications approved or in advance by the Trust (such approval not to be unreasonably withheld or delayed);

"Intellectual Property Rights" means patents, trademarks, design rights (whether registrable or otherwise), applications for any of the foregoing, copyright, know-how, trade or business names or other similar rights (whether registrable or not) in any country (including but not limited to the United Kingdom);

"Insurers" means such insurance office or offices or underwriters of repute as may be previously approved of in writing by the Trust which approval shall not be unreasonably withheld or delayed;

(including articles dropped from aircraft), riot, civil commotion, malicious damage, earthquakes, storm, tempest, flood, bursting and overflowing of water pipes tanks and other apparatus; ionising radiation, impact by vehicles and all other risks (if any) which the Company may be required to insure against under this Agreement or the Building Documents or otherwise;

instruction of the Scottish Office Department of Health, the National Health Service Management Executive or equivalent body, whether or not having the force of law but, if not having the force of law, the compliance with which is in accordance with best practice;

"Lenders" means the British Linen Bank plc registered in Edinburgh under Companies Registration Number 63024 and having its Registered Office at 4 Melville Street, Edinburgh, EH3 7NZ or such other of the Company's lenders as the Trust shall approve in writing such approval not to be unreasonably withheld

"Local Authority Certificate of Completion" means the certificate to be issued by the Planning Authority in respect of the Facility's conformity with the building standards;

"Longstop Date" means the date falling thirty four weeks after the Date of Appointment or such later date as the Trust and the Company shall agree;

"Lothian Health Board" means Lothian Health Board constituted pursuant to the National Health Service (Scotland) Act 1978 or any statutory successor;

"ME" means the Management Executive of the National Health Service in Scotland;

"Mechanical and Electrical Engineer" means Wallace Whittle of 4 Queens Terrace, Aberdeen AB10 1XL or such other firm of mechanical and electrical engineers appointed by the Company as the Trust shall approve in writing such approval not to be unreasonably withheld or delayed;

"Medical Equipment" means any medical equipment to be supplied by the Trust and installed at the Facility by the Company as listed in Part 4 C of the Schedule for use by the Trust or its employees;

"Minimum Service Levels" means the minimum level of performance in respect of Services as specified in the Output Specification;

"NHS Superannuation Scheme" means the superannuation scheme operated for employees of the National Health Service;

"Non-Availability Criteria" means the criteria or other events or omissions which result in an Area being Unavailable as set out in Part 1 of the Schedule;

"Normal Working Hours" means between the hours of 8.30am to 5.30pm Monday to Friday each week excluding public holidays;

"Notice of Unavailability" means a notice to be issued to the Company by the Trust declaring an Area Unavailable pursuant to and in accordance with Clause 12;

"Occupancy" means the number of Beds utilised by the Trust for Patients in each Day;

"Open Market Value" means the value of the Company's remaining interest in the Facility and the Equipment as agreed between the parties, or determined by the Surveyor in accordance with the terms of Clause 21 assessed on the basis of the following:-

that the Site may continue to be used for healthcare purposes;

(a) contractors all risk insurance to be effected by the Works Contractor in terms of Clauses 5.2 and 44;

(b) insurance of the buildings to be erected on the Facility to be effected by the Company against the Insured Risks in terms of Clause 5.1(d);

(c) insurance of the Contents to be effected by the Company in accordance with Clause 5.1(f);

(d) advance loss of profits insurance to be effected by the Company in terms of Clause 5.3; and

(e) business interruption insurance to be effected by the Company in terms of Clause 5.1(d).

"Planned Maintenance" means the maintenance to be carried out by the Company to the Facility and every part thereof including the building, plant and equipment contained therein and the time limits for the implementation of such maintenance in each year throughout the currency of this Agreement pursuant to the Output Specification and Clause 27 hereof;

"Planned Operational Date" means the date falling fifty nine weeks after the Effective Date as extended by any Permitted Delay Event or Relief Event;

"Planning Acts" means every relevant law in force by virtue of the Town and Country Planning (Scotland) Act 1997 and any future legislation of a similar nature;

Operational Date until the Fifteenth day of the month thereafter, and each  
"Relevant Monitoring Period" means the period of time from the

reinstated);

time up to the date upon which the Premises shall be fully rebuilt or  
increases in building costs expected or anticipated to take place at any  
likely to take place having regard to all relevant factors (including any  
requirements of this Agreement at the time when such reinstatement is  
be likely to be incurred in reinstating the Facility in accordance with the  
incidental expenses and Value Added Tax where applicable) which would  
any works which may be required by Act of Parliament or law and  
expenses and the cost of shoring up, demolition and site clearance and  
surveyors', consultants', assessors' and other professional fees and  
"Reinstatement Value" means the reasonable costs (including architects',

require Planned Maintenance;

required to the Facility to be undertaken by the Company which does not  
"Reactive Maintenance" means any repairs, maintenance and work

Services all in accordance with the terms of this Agreement;

Tippehill Hospital, Whitburn, West Lothian and the provision there of FM  
hospital accommodation for the continuing care of elderly people at  
"Project" means the design, construction, financing and equipping of new

set out in Part 8 of the Schedule in respect of each of them;  
endeavours to procure pursuant to Clause 2.2(c) substantially in the form  
of the Trust which the Trust and the Company are to use all reasonable  
Mechanical and Electrical Engineer and the Structural Engineer in favour  
described as such entered into by the Employer's Agent, the Architect, the  
"Professional Team Collateral Warranties" means the documents

"Tender" means the best and final tender submitted by the Company to the Trust on Seventh December Nineteen hundred and ninety eight in

them to the President of the Royal Institution of Chartered Surveyors; and the Company and falling agreement appointed by referral of either of "Surveyors" means Independent Chartered Surveyors agreed by the Trust

of the Schedule; provisions of this Agreement in the form of the Sub-Lease set out in Part 7 Operational Date subject to earlier termination in accordance with the of the Trust in respect of the Site for a period of 25 years from the "Sub-Lease" means the sub-lease to be granted by the Company in favour

Gordon Street, Paisley PA1 1XA; "Structural Engineer" means Petrie Robertson Design of Mill House, 30

used in conjunction with the Equipment; "Software" means any operating or application software contained in or

as shown on the plan thereof annexed and executed as relative hereto; "Site" has the meaning ascribed to the term "Subjects" in the Lease and is

the Trust's data which relates to the provision of the Services; "Services Data" means all or any off-line storage and security copies of

Trust in terms of this Agreement; "Services" means the aggregate of all of the services to be provided to the

Schedule; Performance Standards calculated in accordance with Part 1 of the from the Price if the Services or any part thereof fall short of the "Second Deduction" means the sum or sums of money to be deducted

response to the Trust's invitation dated Twenty third November Nineteen hundred and ninety eight and all documents ancillary thereto;

"Termination Date" means the Expiry Date or earlier termination of the Agreement

"Termination Payment" means a payment calculated in accordance with Clause 14;

"Third Deduction" means the sum or sums of money to be deducted from the Price to take account of Days in respect of which Beds are empty calculated in accordance with part 1 of the Schedule;

"Third Party Agreement" means any agreement concluded between the Company and any third party in relation to performance by the Company of its obligations hereunder;

"Transferring Employees" means those employees employed in the provision of services equivalent to the FM Services whose employment is transferred to the Company or other service provider pursuant to the Transfer Regulations or as otherwise provided for in this Agreement;

"Transfer Regulations" means the Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended) and, to the extent that it is enforceable against either of the parties hereto, Council Directive Number 77/187/EEC;

"Trust Equipment" means the PC Equipment and the Medical Equipment;  
"Trust Executive" means the individual designated by the Trust and notified to the Company as having ultimate responsibility for the Facility or

any person nominated by that individual as being his/her deputy during

his/her absence;

"Trust Manager" means the Manager designated by the Trust and notified to the Company or the FM Provider as responsible for the day-to-day management of the provision of the Clinical Services at the Facility;

"Trust Procedures" means any procedures or policies of the Trust including standing financial instructions in force as at the Effective Date as amended from time to time and notified to the Company as being procedures or policies with which the Company must comply as listed in Part 9 of the Schedule;

"Unavailable" means that subject to the programmes for planned maintenance and decoration of the Facility (as agreed with the Trust from time to time) the relevant Area of the Facility from time to time is not fit for (1) occupation in accordance with the terms of this Agreement by Patients, (2) the care of Patients, and (3) the safe access and egress thereto and therefrom in a safe and structurally sound environment all as shall be determined by a senior clinical staff member of the Trust nominated in writing by the Trust for this purpose acting reasonably and in a proper and professional capacity as a clinician;

"Use" means a non-exclusive licence to load, execute, store, transmit, display, copy (for the purposes of loading, executing, storage, transmission or display) or otherwise utilising the Software;

"User Group" means the Trust Manager, the Facilities Manager and representatives of the users of the Facility as appointed by the Trust from time to time;

"Works Defects" means all or any material defects, shrinkage inconsistent with the use of timber frame structures, defective workmanship or materials, snagging items, faults, omissions, failures or other aspects of whatever nature in respect of which the Works or any part thereof whether in a complete or partially complete state, are materially defective or fall

hereof substantially in the form set out in Part 9B of the Schedule;  
are to use reasonable endeavours to procure pursuant to Clause 2.2(c) by the Trust and the Works Contractor which the Trust and the Company "Works Contractor Collateral Warranty" means the document entered into

Hillington, Glasgow, G52 4JX whose registered number is 141799);  
"Works Contractor" means Melville Dundas Limited of Cameron Court,

the Date of Appointment;  
"Works Commencement Date" means the date ten (10) working days after

Building Contract and the terms of this Agreement;  
accordance with the Design Specification, Development Permissions, the access, parking fencing and landscaped and recreational areas all in in-patient care for sixty (60) persons, ancillary services and external with the design and completion of new hospital accommodation to provide "Works" means all works of whatsoever nature related to or in connection

alteration, addition or omission);  
Documents and details of the Works contained in them (whether by way of "Variation" means any amendment to or departure from the Building

provide the Facility at all times during the period of this Agreement;  
water, telecommunications, drainage and all other services required to "Utilities Services" means the mains services including gas, electricity,

2.1 The following clauses of this Agreement shall come into force on the Date of Appointment and shall remain in force from that date until the Expiry Date or until previously terminated in accordance with Clause 2.3 or

2. **CONTRACT PERIOD AND EXPIRY OF CONTRACT**

1.8 Headings and recitals shall not affect the interpretation of the Agreement.

1.7 Words importing the singular include the plural and vice versa

and words importing the neuter include the masculine and feminine.

1.6 Words importing the masculine gender include the feminine gender

1.5 A reference to a "Clause" is a reference to a clause of the Agreement.

respectively by JCT 81.

and "Employer's Requirement" shall have the meanings attributed to them

1.4 The terms "Written Statement of Practical Completion", "Contract Works"

of the Trust may devolve by statute or otherwise).

any statutory successor of the Trust or any party upon which the functions

successors and permitted assignees (including for the avoidance of doubt,

1.3 A reference to the "Trust" or the "Company" shall include its respective

subsequent re-enactment thereof.

enactment, order, regulation or instrument or as contained in any

order, regulation or instrument as amended by any subsequent statute,

instrument shall be construed as a reference to the statute, enactment,

1.2 A reference to a statute, enactment, order, regulation or other similar

Contract, the Output Specification or the Design Specification.

short of the standards required or envisaged in terms of the Building

(c) confirm that it intends to invite tenders for a new contract for the provision of the FM Services within the Facility from the Expiry Date provided that in the event of the Company either not lodging a tender for the said provision of FM Services at the Facility from the Expiry Date (for whatever reason) or having lodged a Tender, failing to win the contract for the provision of FM Services as

or  
(b) confirm that it wishes to negotiate an extension of the Agreement with the Company commencing from the Expiry Date for a further period and on terms and conditions to be agreed in writing with the Company provided that if negotiations have not been concluded between the Trust and the Company by the date eighteen (18) months prior to the Expiry Date, either party may serve notice upon the other party terminating such negotiations and instead pursue any of the other options available to it in terms of this Clause 2.4;

terms; or  
(a) confirm termination of the Agreement with effect from the Expiry Date but such termination of this Agreement shall not operate to terminate the Lease which shall continue in accordance with its

2.4 The Trust shall by written notice to the Company served no later than the date two (2) years before the Expiry Date, either:-

2.3A. The remainder of this Agreement shall come into force on the Effective Date and shall remain in force from and including that date until the Expiry Date or unless previously terminated in accordance with Clause 14 or if the Lease is terminated for any reason at any time prior to the Expiry Date.  
Date.

obligations hereunder. The Company agrees to use all reasonable of the Trust, but not to the extent of relieving the Company of any thirty (30) bedded unit and to the needs of the continuing patients residents who are to be accommodated in the previously vacated efficient manner having regard to the needs of the patients/ to reconfigure the Facility and to provide the Services in a cost Clause 2.5 (a) the Company shall use all reasonable endeavours in the event that the Trust has exercised the option contained in

(b)

fifth anniversary of the Operational Date thereafter. Operational Date, and in the event not so exercised then at each within the Facility (at its discretion) on the tenth anniversary of the the option of vacating one or other of the thirty (30) bedded units months prior written notice on each occasion the Trust shall have Subject to the Trust giving the Company not less than twenty four

(a)

2.5

the Company the Open Market Value as at the Expiry Date. between the parties) in exchange for which the Trust shall pay to the Expiry Date (or such other date as may be agreed in writing of all right and title to the Facility by the Company to the Trust on comprised within the Facility and erected on the Site with transfer confirm that it intends to purchase all buildings and equipment

(d)

Market Value as at the Expiry Date; or tenderer in exchange for payment to the Company of the Open transfer its rights and claims to the Facility to the successful aforesaid, the Company shall be bound to assign the Lease and

and shall not be entitled therefore to raise any objection or inquiry in this Agreement with notice of the terms and conditions of title to the Site relevant to the Site, the Company shall be deemed to have entered into documents and requesting any other documents which they may deem been afforded the opportunity of examining the originals of such copies of the documents specified in Part 11 of the Schedule and have As the Company or the Company's solicitors have been supplied with

3.5

Part 11 of the Schedule.

The Trust's title to the Site shall conform with the documents specified in

3.4

(such approval not to be unreasonably withheld or delayed).

which licence has previously been approved in writing by the Company to the Facility upon the terms of a licence not granting security of tenure other organisations or individuals authorised by the Trust to have access shall be entitled to share occupancy of the Facility or part thereof with Contract Period subject to the provisions of this Agreement. The Trust Lease from and including the Operational Date for the remainder of the The Trust agrees to occupy and utilise the Facility in terms of the Sub-

3.3

whole of the Facility from the Operational Date.

Date. Subject to Clause 3.3 the Trust shall have the right to occupy the The Company shall grant to the Trust the Sub-Lease on the Operational

3.2

The Trust shall grant to the Company the Lease on the Operational Date.

3.1

**3. AGREEMENT TO USE FACILITY/TITLE**

reasonably and properly incurred) in respect of operating the facility. previously vacated thirty (30) bedded unit as a residential/nursing

respect of any matter contained or referred to therein or as to the deduction of the Trust's title to the Site to the date of this Agreement

#### 4. PROVISION AND MANAGEMENT OF THE FACILITY

4.1 The Company shall procure the design and construction of the Facility in accordance with the provisions of this Agreement and shall ensure subject to the terms hereof that the Facility is Available to the Trust for occupation and use by the Trust in accordance with the terms of this Agreement at all times from and after the Operational Date. In particular the Company shall and shall procure that the Works Contractor shall use all reasonable endeavours to perform all of its obligations under this Agreement in accordance with the timetable set out in and in accordance with the terms of the Implementation Plan.

4.2 The Company shall provide, install and commission the Equipment in accordance with Output Specification.

4.3 The Company shall be responsible for the management of or the provision of all Services at the Facility and shall undertake or, as the case may be, shall procure that the FM Provider undertakes and implements the provision of all FM Services at the Facility from the Operational Date in accordance with the provisions of this Agreement so that the whole Facility is Available for use by the Trust twenty four (24) hours per day throughout each year of this Agreement (except during any periods of maintenance agreed in advance with the Trust).

4.4 The Trust shall be responsible for and shall manage the provision of all Clinical Services at the Facility.



4.9 The Company shall procure that its staff and the staff of the Works Contractor and the FM Provider are provided with a means of identification of their staff in a form previously approved by the Trust Manager such approval not to be unreasonably withheld or delayed and shall require all staff to wear and keep visible such identification at all times while at the Site or the Facility. Special means of identification may be specified by the Trust Manager for specified areas within the Site or the Facility from time to time. All staff employed by the Company, the Works Contractor or the FM Provider shall carry such identification at all times at the Facility and make it available for inspection on reasonable request by any employees of the Trust. Entry to the Site or the Facility or parts thereof may be refused if the correct identification is not displayed and in this event the Company shall be fully responsible for resultant delays or difficulties in performance of the Agreement.

the purpose of fulfilling any obligation incumbent upon the Trust to supply to the National Health Service Management Executive or any other Government Department to which the Trust may be required to supply information as a matter of law or practice, but excluding Confidential Information. Payment shall be made of any part of the Price remaining unpaid following the monthly meeting at which the relevant Service Levels and attainment of Performance Standards have been considered, assessed and agreed, subject to any deduction which may be made in accordance with the provisions of this Agreement.

5. INSURANCE

5.1 The Company shall take out and maintain throughout the period of this Agreement commencing on the Operational Date until the expiry or earlier termination of this Agreement insurances with the Insurers for:-

(a) public and occupiers liability insurance (and in the event that the Company is the FM Provider, product liability insurance and malpractice cover) with a minimum indemnity limit of FIVE MILLION POUNDS (£5,000,000) (or such larger sum as may from time to time be agreed in writing or required pursuant to Clause 5.7) for any one occurrence (save in respect of malpractice insurance where the claims shall be not less than FIVE MILLION POUNDS (£5,000,000) cumulative in any one year);

(b) employee liability insurance with an indemnity limit of TEN MILLION POUNDS (£10,000,000) (or such larger sum as may from time to time be agreed in writing or required pursuant to Clause 5.7) for any one occurrence;

(c) any additional indemnity insurance necessary to cover the indemnities granted under Clause 28.2 with an indemnity limit of FIVE MILLION POUNDS (£5,000,000) (or such larger sum as may from time to time be agreed in writing or required pursuant to Clause 5.7) for any one occurrence;

(d) insurance in respect of any damage, destruction or loss to or affecting the whole or part of the Facility or site due to or arising from an Insured Risk for the Reinstatement Value

5.11 In the event that any of the policies to be effected in terms of this Clause 5, are effected upon a basis whereby the Insurers are liable to pay only if a claim is made during the period of its cover rather than when the event giving rise to the claim under such policy, then such cover shall be maintained (whether on a renewal policy basis or otherwise) for a period of five (5) years following the expiry of this Agreement or earlier termination for whatever reason.

5.10 If the Company shall default in taking out and maintaining insurance as required by this Clause 5 the Trust may, in the event that such default shall continue for a period of 48 hours following the deemed receipt of notice (calculated in accordance with the provisions of Clause 32) from the Trust to the Company requiring the same to be remedied, itself take out such insurances as the Company is required to take out and maintain pursuant to this Clause 5 and may charge the cost of such insurance (together with its reasonable costs in taking out and maintaining such insurance) to the Company and such sum shall be a debt due and payable by the Company to the Trust upon demand.

throughout the period of this Agreement starting with the Operational Date product liability insurance for a sum of not less than FIVE MILLION POUNDS (£5,000,000) cumulative in any one year and malpractice insurance for not less than FIVE MILLION POUNDS (£5,000,000) cumulative in any one year. In the event that such insurances are not maintained the provisions of Clause 5.10 shall apply as if the failure of the FM Provider to take out and maintain such insurances were a failure on the part of the Company to take out and maintain such insurances.

**6. REINSTATEMENT OF FACILITY**

6.1 In the event of damage to or destruction of the Facility after the

Operational Date, the Trust and the Company shall co-operate in the immediate implementation of the Disaster or Major Incident Plan. The Company shall be bound forthwith to commence and thereafter diligently proceed to repair, replace, reinstate or otherwise remedy the said damage or destruction and in the case of such damage or destruction having been caused by an Insured Risk shall be bound to recover all insurance monies which may be payable in respect of such damage or destruction. In the event that the Company fails to carry out such repair, replacement, reinstatement, renewal or remedy and the same is carried out by or on behalf of the Trust acting reasonably the Company shall be bound to repay to the Trust the whole costs incurred by the Trust in carrying out said repair, replacement, reinstatement, renewal or remedy. In such event the obligation upon the Trust to pay the Price shall be suspended or reduced in accordance with the Availability provisions.

6.2 In any event of material damage to or destruction of the Facility, the Trust shall be entitled within a period of six months from the date of material damage or destruction to review the healthcare need for the Facility with Lothian Health Board prior to any remedial work being carried out (except any emergency repairs which may be required to render the Facility safe) to ensure that there is a continuing healthcare need for the Facility and that it will continue to be affordable. If the Trust within such six month period determines that the Facility should not be repaired, replaced or reinstated then it shall be entitled to give notice to that effect to the Company and this Agreement shall terminate forthwith subject to payment

6.4 In the event that the Facility cannot be rebuilt, repaired or reinstated through no fault of either the Trust or the Company, the Agreement shall continue and the Company shall use all reasonable endeavours to provide alternative accommodation which is acceptable to the Trust, acting reasonably (taking into account the Trust's duty of care towards the Patients who are accommodated in the Facility) to enable the Company

6.3 The Company shall use all reasonable endeavours to make available alternative accommodation and continue to provide the Services or procure the provision of the FM Services from alternative accommodation until such time as the Facility has been repaired, rebuilt, reinstated or otherwise remedied. The Company shall free and relieve the Trust in respect of any additional costs and expenses properly incurred by the Trust in the transfer of patients and Trust Equipment to such alternative accommodation and the transfer back of patients and Trust Equipment to the Facility following completion of the repair, replacement or reinstatement of the Facility.

of a Termination Payment calculated on the basis of Trust default during the Operational Phase in accordance with the provisions of Clause 14.4. In such circumstances the Company shall be bound to mitigate any expenses and costs incurred by it and to recover or to give such assistance as may be requested by the Trust to recover the full amount of all insurance monies which may be payable in respect of such damage or destruction and there shall be deducted from any Termination Payment which may be payable by the Trust to the Company the whole amount of the insurance proceeds. Time is to be of the essence in relation to the operation of this clause.

accordance with provisions of Clause 42 of this Agreement;  
(a) to the Works prior to the Operational Date by way of Variations in

any Change(s)  
shall be entitled to require the Company to make or procure the making of  
7.1 Subject to the Procurement Rules applicable from time to time, the Trust

**7. CHANGES TO FACILITY/FM PROVISION**

Facility.  
pay any part of the Price from the date of damage or destruction of the  
the insurance proceeds. In such an event the Trust shall not be obliged to  
which may be payable by the Trust to the Company the whole amount of  
the Facility and there shall be deducted from any Termination Payment  
proceeds which may be payable in respect of damage to or destruction of  
Company shall be bound to recover the full amount of any insurance  
accordance with the provisions of Clause 14. In such circumstances, the  
Default on the part of the Company during the Operational Phase in  
Trust to the Company of a Termination Payment calculated on the basis of  
in accordance with the provisions of Clause 14 subject to payment by the  
this Agreement and the Trust shall be entitled to terminate this Agreement  
deemed to be a material breach of the Company's obligations in terms of  
Trust acting reasonably having been provided, then such failure shall be  
Agreement and no alternative accommodation which is acceptable to the  
6.5 In the event that the Company fails to fulfil its obligations in terms of this  
terms of this Agreement.  
thereby to fulfil upon no less favourable financial terms its obligations in

The Company shall be obliged to provide the Trust with proposals for implementing any Change proposed by the Trust and details of all anticipated costs which will reasonably be incurred or saved by the Company in complying with proposed Change(s) ("the First Stage Estimate"). The Company shall provide to the Trust such clarification of the proposals and/or anticipated costs as may be required by the Trust as soon as reasonably practicable following the request for same by the Trust. Upon receipt of written confirmation by the Trust that it wishes to proceed with the Change(s), the Company will prepare and make available to the Trust detailed proposals and final costs in respect of same ("the Second Stage Quote"). The Company shall be bound when considering such proposals to use all reasonable endeavours to identify and implement all means of undertaking the Change proposed by the Trust at the minimum and, if possible at no additional cost to the Trust.

Provided that in the event of the Company not being able to carry out any Changes having a capital value at a reasonable commercial rate, the Trust shall have the right to engage suitably qualified contractors to carry out the capital Works required in respect of the Facility.

(c) to the Facility to accommodate adjustment to or update or extension of the IT system or systems provided in the Facility.

(b) to the Facility and/or the FM Service after the Operational Date in accordance with this Clause 7 including without limitation a change in the provision of any Service Levels; or an addition to or reduction in the scope or quantity or quality of the FM Service or part thereof; or an improvement or alteration of the Company's monitoring systems and procedures; and/or

All Changes must be subject to open book accounting.

7.2

- (a) For the purpose of this Clause 7.2 "Aggregate Cost" means the total increased operating cost of implementing any Change or Changes which in the event of a Change or Changes involving capital expenditure shall be calculated by assuming that any capital cost is repaid evenly over the remaining term of this Agreement and that interest on the outstanding amount will be charged at 10% per annum Provided Always that any such capital cost may not in any event exceed £100,000 in any rolling period of five years.

- (b) Any Change or Changes made pursuant to the demand by the Trust (in terms of Clause 7.1) shall be made at no cost to the Trust provided that the Aggregate Cost in each year of the Agreement shall not exceed FIVE HUNDRED POUNDS (£500) or in any period of five years of the Agreement shall not exceed TWO THOUSAND FIVE HUNDRED POUNDS (£2,500) STERLING. In the event that the cost of implementing any Change or Changes in any year exceeds the Aggregate Cost then subject to the Procurement Rules the Price shall be amended to reflect the said Change or series of Changes so that the Company shall receive the full cost thereof in excess of the Aggregate Cost. The alteration to the Price in each such case shall be agreed between the parties or, failing agreement, shall be determined by an expert appointed in accordance with the provisions of Clause 7.5 prior to implementation of the Change. In the event that the cost of

7.4 In the event that the parties are unable to agree the projected or final cost of any Change required by the Trust in excess of the Aggregate Cost or then prior to implementation of the Change either party shall be entitled to refer the matter to an Expert. The Expert shall be entitled to require submissions by either party as he may deem appropriate and, in determining the projected or final costs of any Change or Variation, shall take account of inter alia:-

- (a) delay the Operational Date; or
- (b) increase the Price.

7.3 Any Change to the Facility proposed by the Company shall be subject to prior written consent of the Trust such consent not to be unreasonably withheld or delayed. The Trust will not be obliged to accept any proposed Change which would or is likely to

implementing a Change or Changes required by the Trust in any year exceeds the Aggregate Cost the Company shall use all reasonable endeavours to obtain funding for same on terms acceptable to both parties, acting reasonably. In the event that the Company fails to secure such funding, the Trust shall make a capital payment to the Company for the cost of any such Change and there shall be no adjustment to the Price in such circumstances. Capital payments by the Trust may be paid in instalments in line with normal commercial practice if preferred by the Trust provided always that the Company recognises and accepts that any capital payment to be made by the Trust must comply with Trust Procedures or any similar regulations replacing same the implementation of which is mandatory by the Trust.

The Expert's decision shall be final and binding. Each party shall bear their own costs in connection with their submission to the Expert. The parties shall bear the expenses and charges of the Expert equally or in such other proportions as the Expert shall determine.

Clause 42 respectively.

Variation in accordance with the provisions of this Clause 7 or by the Company but for the implementation of any Change or any reduction in costs which would otherwise have been incurred

(e)

Trust;

any increase in costs incurred by the Company during the process of implementation of the Change or Variation arising directly and unavoidably as a result of any Change or Variation required by the

(d)

during implementation of any Change or Variation);

as a consequence of suspension of the provision of Services shall be off-set by any reduction in costs accruing to the Company Variation required by the Trust (which for the avoidance of doubt arises directly and unavoidably as a result of any Change or the process of implementation of the Change or Variation which the net loss of income (if any) sustained by the Company during

(c)

the cost of the Change or Variation);

the additional financing costs (if the Company is required to finance

(b)

account of otherwise);

provided always that such fees have not already been taken Variation (including fees but limited to design fees only and the cost of the works required to implement the Change or

(a)

7.7 The Company shall make such applications to the Planning Authority and such other statutory bodies as may be necessary (with such assistance from the Trust as the Company may reasonably request) for all necessary planning permission(s), licences, warrants, permits or consents required in respect of any Change (including a Variation) having a capital value.

7.6 The Trust shall be entitled to withdraw its requirement for Change at any time either prior to or following the determination by the Expert or the Accountants in accordance with Clause 7.4 and 7.5 respectively upon giving written notice to that effect to the Company.

7.5 In the event that the cost of any Change or Variation has been agreed or has been determined in accordance with the provisions of this Clause 7 or Clause 42 hereof and the parties have determined that the said costs shall be implemented by an alteration to the Price but the parties have been unable to agree the alteration to the Price, then prior to the implementation of such Change either party shall be entitled to refer the matter to the Accountants. The Accountants shall act as experts and not as arbiters. The Accountants shall make their decision as to any alteration to the Price on a basis consistent with the Financial Model. The Accountants shall be entitled to require evidence in support of the submission from such other parties as they may deem appropriate. The Accountants' decision shall be final and binding. Each party shall bear their own costs in connection with the preparation of their submission or in-gathering of evidence. The Trust and the Company shall bear the Accountants' charges and expenses equally or in such other proportions as the Accountants shall determine.

8.2 Subject to Clause 8.3 the Trust shall pay each invoice or, if applicable, the undisputed portion thereof within fourteen (14) days of receipt. In the event that the Trust does not pay any invoice within such period of fourteen (14) days it shall be liable to pay to the Company interest at Base Rate plus four per centum per annum (4%) on the outstanding amount from the date of receipt of the invoice until the date payment in full is received by the Company.

8.1 The Company shall invoice the Trust on the last working day of each calendar month from and including the calendar month in which the Operational Date falls until the expiry or earlier termination of the Agreement and the Lease for one twelfth of the Price in arrears subject to any deductions properly to be made pursuant to Clause 8.4 as a result of monitoring carried out under the terms of this Agreement during the Relevant Monitoring Period. The Price from the Operational Date to the end of the calendar month in which the Operational Date occurs will be invoiced on a pro rata basis.

**8. PRICE**

7.8 The cost of such applications shall form part of the final cost of the Change.

7.9 The Trust shall be entitled at its option by written notice to the Company to change the Clinical Designation of Beds within the Facility within current service categories, namely frail elderly and elderly mentally ill or to any other service category provided that the cost of implementing any such Change shall be dealt with under Clause 7.2.

- 8.3 If any payment is the subject of a bona fide dispute the Trust shall pay the undisputed portion thereof by the due date and after agreement or determination of the dispute the amount agreed or determined to be payable shall be paid by the Trust within seven (7) days of the date of such agreement or determination with interest at Base Rate plus two per centum per annum (2%) from the date of receipt by the Trust of the invoice until the date payment in full is received by the Company. Where any sum is the subject of a bona fide dispute, the Trust shall not be considered to be in a breach its obligations under this Agreement or the Lease in withholding payment pending resolution of the dispute.
- 8.4 The Services shall be monitored in terms of availability, performance and occupancy during the Relevant Monitoring Period. The invoice for each month shall be calculated under deduction (where appropriate) of the First Deduction, the Second Deduction and the Third Deduction calculated in terms of Part 1 of the Schedule.
- 8.5 The Price (and all elements thereof ) is expressed exclusive of value added tax and the Trust shall pay any value added tax properly chargeable thereon at the rate in force from time to time provided that the Company issues a tax invoice in respect thereof.
- 8.6 In the event of a change in the Legal Requirements so far as directly arising out of a change to NHS specific legislation or PFI legislative change which results in an increase or decrease in the cost to the Company or, as the case may be, the FM Provider of implementing their obligations in terms of this Agreement then the Price shall be adjusted to reflect the increased or reduced costs.

8.10 The Trust must pay the Price without any adjustment pending determination of any adjustment pursuant to Clause 8.9 (b). Any shortfall between the amount paid by the Trust and the Price as adjusted shall be

of such Transferring Employee pursuant to Clause 8.9 (a).  
date of such resignation or transfer by the amount paid in respect the Contract Period the Price shall be reduced with effect from the employment to the terms and conditions of the Company during  
Where a Transferring Employee resigns or elects to transfer his  
accordance with Clause 21.

(b) The adjustment in Clause 8.9 (a) shall be agreed between the Trust and the Company, but in default of agreement determined in  
Employee.

(a) The Price shall be adjusted to reflect the difference in cost of employing staff on the Trust's terms and conditions and on those of the Company (including without limitation, any employer's contribution to a pension scheme comparable to the NHS Superannuation Scheme) in respect of each Transferring

8.9

Requirements the Price shall not be adjusted.  
8.8 The Trust and the Company shall use all reasonable conditions to ensure that the Facility is not assessed to be liable for payment of business rates but in the event that business rates are at any time levied on the Facility the Price shall be adjusted to reflect the increased costs.

8.7 Subject to Clause 8.8 in the event of any other change in the Legal

10.2 In the event that there is a material failure to provide the Services or part thereof the Trust shall be entitled to provide the Services or the relevant part thereof until such material failure has been rectified provided always that the Company shall reimburse to the Trust the costs properly incurred by the Trust in providing the Services as aforesaid to the extent that such

10.1 In the event that the performance of the Services do not achieve the Performance Standards, the Second Deduction shall be calculated and deducted from the Price in accordance with Part 1 of the Schedule.

**10. PERFORMANCE**

9.2 With effect on and from the tenth anniversary of First January Two thousand and one and on each anniversary thereafter, the percentage change in the Index referred to in Clause 9.1 will be reduced by 0.25.

- (a) 72% of the Price;
- (b) the Aggregate Cost referred to in Clause 7.3;

9.1 Subject to the terms of Clause 9.2 on First January Two thousand and one and on each anniversary thereof prior to the Expiry Date the following will be reviewed and increased by a percentage equivalent to the change in the Index in the period of twelve (12) months prior to the relevant anniversary:-

**9. INDEXATION**

paid by the Trust to the Company within 28 days of receipt of an invoice therefore.

10.5 No adjustment to the Price shall be made in relation to the suspension of any part of the Service by the timely reasonable and proper carrying out by the Company of its obligations to carry out Planned Maintenance provided that where the avoidable costs to the Company in the provision of the Service are reduced as a consequence thereof, a statement of such costs savings shall be presented by the Company to the Trust and if the Trust agrees with the Company's statement of costs savings such statement will be listed in the Performance Notice pertaining to the period in which the said Planned Maintenance is carried out and the Price

10.4 It shall be deemed to be a material breach of this Agreement entitling the Trust to terminate this Agreement pursuant to Clause 14 if Three (3) FM Providers (including, for the avoidance of doubt, the Company) are replaced upon requirement of the Trust pursuant to this Clause 10 in any Twenty four (24) month period.

10.3 In the event of consistent or persistent failure by the Company to meet the Performance Standards for the Services or any part thereof then at the option of the Trust, the Company shall be bound to appoint or procure the appointment of a replacement FM Provider in respect of the Services or the part hereof affected within a timescale to be agreed between the parties and incorporated into this Agreement. Consistent or persistent failure shall be deemed to have occurred in the event of failure to meet the Performance Standards for 3 consecutive months or more or for any 4 months or more in any one twelve (12) month period.

costs exceed the deductions against the Price, if any, made in accordance with the provisions of this Clause 10.

any of its employees, or  
(a) any negligent act or omission or default on the part of the Trust or  
give rise to Unavailability of an Area otherwise than as a result of

12.4 If any event or events occur including one or more of the events likely to  
during which the Facility is Unavailable.

12.3 In the event that the whole Facility is Unavailable for any reason (including  
for the avoidance of doubt any event of Force Majeure or any Relief  
Event) no part of the Price shall be payable by the Trust for each Day  
calculated and deducted from the Price in accordance with the provisions  
of Part 1 of the Schedule.

12.2 In the event that the whole or any part of the Facility is Unavailable for any  
Day during any Relevant Monitoring Period, the First Deduction shall be  
the Date of Expiry.

12.1 Subject to Relief Events and to the Facility being Unavailable due to  
Planned Maintenance, the Company shall ensure that the Facility is  
Available at all times throughout the period from the Operational Date to

**12. AVAILABILITY**

Part 1 of the Schedule.  
Deduction shall be calculated and deducted from the Price in accordance with  
the Trust in any Day within the Relevant Monitoring Period, then the Third  
In the event that all the Beds which are Available are not occupied by Patients of

**11. OCCUPANCY**

savings.  
payable for that period will be reduced by the amount of such cost

12.5 It is agreed that in the event that more than one of the Areas shall be deemed to be Unavailable for clinical use for the same Day the respective First Deductions shall be aggregated but in no event shall such aggregate adjustment exceed 100% of the Price payable in respect of any one Day.

(iii) in the event that the matters complained of are not remedied in the time stipulated in this Agreement then the Area or Areas, or Service or Services will be deemed to be Unavailable for that Day and the Price will be adjusted in accordance with the provisions of this Agreement.

(ii) the Area or Areas, or Service or Services will remain Unavailable until such time as the matter complained of is remedied or the Services are fully restored or alternative provision satisfying the Contract Standard and acceptable to the Trust, acting reasonably, have been implemented;

(i) the Trust shall complete a Notice of Unavailability and shall deliver such notice to the Company's representative where practicable following consultation with the Company Executive or the Company Manager;

Unavailable for clinical use, the following procedures shall apply:-  
 which event or events shall in the reasonable opinion of the Trust cause any Area or Areas of the Facility or any Service or Services to be Unavailable for clinical use, the following procedures shall apply:-

(b) any loss, damage to or malfunction or failure to replace, renew or provide any equipment which the Trust is obliged to maintain, repair, replace or renew pursuant to provisions of this Agreement

13.3 Neither the Company nor its sub-contractors shall obtain any right in relation to any Intellectual Property Rights belonging to the Trust or which

13.2 The Trust and any party instructed by it shall have a licence to copy and use such drawings and specifications to facilitate future extension, alteration, repair and maintenance of the Facility or to complete construction of the Facility pursuant to any assignment of the Building Contract in terms of Clause 22.2 but shall not otherwise copy or use such drawings or specifications unless otherwise agreed between the parties.

13.1 The Trust shall not acquire any right in relation to any Intellectual Property Rights created during or prior to the term of the Agreement by the Company, the Works Contractor or employees of the Company or its sub-contractors including the copyright in all drawings and specifications prepared by the Company or the Works Contractor otherwise than in pursuance of the terms of this Agreement.

**13. INTELLECTUAL PROPERTY**

12.7 In the event that the aggregate of the First Deductions exceed Twenty per centum (20%) of the Price as varied by Clause 9 in any rolling twelve (12) month period then the Company shall be deemed to be in Default and the provisions of Clause 14 will apply.

12.6 No adjustment to the Price for any month will be made in respect of any of the Area or Areas being Unavailable for clinical use where such circumstances are caused by the timely, reasonable and proper carrying out by the Company of Planned Maintenance as agreed annually with the Trust in accordance with Clause 27.1.

- (i) terminate the Agreement forthwith; or
- (b) Subject to Clause 14.4 in the event that a Default on the part of the Company occurs and provided that if such Default is capable of remedying the Trust shall have served the Company with a notice in writing specifying the Default and affording the Company a period of time which the Trust acting reasonably considers reasonable in which to remedy the Default but the Company has failed to remedy the Default, within the time stipulated, or if the Default is not capable of remedy, the Trust may at its sole option:-
  - (v) in the event of failure by the Company to meet the Performance Standards and in particular any failure by the Company to achieve a Performance Percentage of Seventy five per centum (75%) in any one month;
  - (vi) in the event of deductions from the Price totalling Twenty per centum (20%) or more in any rolling consecutive twelve month period; and/or
  - (vii) in the event of any Default in the terms of Clauses 17 and 19;
- (iv) in the event that in any rolling consecutive twelve (12) month period during the period of the Agreement Twenty (20%) per cent or more of the Facility is Unavailable.
- (v) in the event of failure by the Company to meet the Performance Standards and in particular any failure by the Company to achieve a Performance Percentage of Seventy five per centum (75%) in any one month;
- (vi) in the event of deductions from the Price totalling Twenty per centum (20%) or more in any rolling consecutive twelve month period; and/or
- (vii) in the event of any Default in the terms of Clauses 17 and 19;

reinstatement of the Facility and the Company fails to make up such shortfall from its own resources;

passes a resolution or a court of competent jurisdiction makes an order

14.2 The Trust shall be entitled to terminate the Agreement if the Company

this Clause 14.1.

(d) Time shall be of the essence with regard to the dates specified in

(iv) abandonment of the Site by the Company.

arise, and

(iii) in the event that circumstances detailed in Clause 14.2

sixteen weeks from or after the Planned Operational Date;

the Operational Certificate on or prior to the expiry of

Event(s) or Relief Events, a failure by the Company to issue

(ii) subject to any event of Force Majeure, Permitted Delay

Date;

by or prior to the expiry of four (4) weeks after the Effective

to commence, or procure the commencement of, the Works

Event or Relief Event, a failure on the part of the Company

(i) subject to any event of Force Majeure, Permitted Delay

14.1(b):

to be Defaults not capable of remedy for the purposes of Clause

14.1(c) the parties agree that the following events shall be deemed

(c) Notwithstanding the generality of the provisions of this Clause

shall be satisfied that the Default has been remedied.

the date of expiry of the said notice period until the Trust

having regard to the nature of the Default) of the Price from

(iii) withhold payment of a proportion (determined by the Trust

(b) In the event of Default on the part of the Company leading to termination on or after the Operational Date, the Termination Payment will be equal to 90% of the Open Market Value at the Termination Date

(i) the cost of the Works incurred by the Company to the Termination Date in line with or as predicted by the Financial Model (excluding for the avoidance of doubt, any cost overruns incurred in connection with the Works); and (ii) the Open Market Value on the Termination Date.

where X = 90% of Y, and Y is the lower of

(a) in the event of Default on the part of the Company leading to termination prior to the Operational Date, the Termination Payment shall be X,

calculated in accordance with the following principles, namely:-

14.3 In the event of termination of this Agreement (and the Lease) by the Trust in accordance with the provisions of Clauses 14.1 and 14.2, a Termination Payment will be payable by the Trust to the Company which shall be

within three (3) months of the date of striking off.

that the Company is insolvent or apparently insolvent or should be wound up (otherwise than for the purpose of a bona fide solvent reconstruction or amalgamation on terms previously approved in writing by the Trust such approval not to be unreasonably withheld or delayed) or a receiver, manager, administrator on behalf of a creditor is appointed in respect of any part or the whole of the business of the Company or the Company shall be struck off the Register of Companies without restoration thereto

(a) For the purpose of this Clause 14.4 "Default" on the part of the

Trust means:-

(i) failure to pay part of the Price in excess of TWO THOUSAND FIVE HUNDRED POUNDS (£2,500) STERLING for a period in excess of three months (provided same is not in dispute);

(ii) any material breach of the obligations incumbent upon the Trust in terms of this Agreement; or

(iii) a material adverse change in Legal Requirements which means that the Trust is no longer able to fulfill the obligations incumbent upon it in terms of this Agreement either due to loss of legal powers or due to material deterioration in credit worthiness.

(b) The Company shall be entitled to terminate the Agreement if the Trust shall Default in performance of the Agreement provided always that the Company shall only be entitled to terminate this Agreement in the following circumstances:-

(i) it shall first have served the Trust with a notice in writing in accordance with Clause 32 specifying the extent of the Default and affording the Trust a period of one calendar month in which to remedy the Default; and

(ii) failing such remedy, it shall then have served a warning notice on the Secretary of State for Scotland/First Minister