JONES DAY

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WHITE PAPER

THE LOAN MARKET ASSOCIATION'S REAL ESTATE FINANCE FACILITY AGREEMENT

A BORROWER'S GUIDE

INTRODUCTION

On 16 April 2012, the Loan Market Association (the "**LMA**") issued its recommended form of facility agreement for real estate portfolio investment transactions (the "**REF Document**"). The REF Document was further updated by the LMA on 24 August 2012.

The REF Document was prepared in response to an increased demand, particularly amongst lenders, for a form of standardised loan document for use in English-law real estate finance transactions.

The approach adopted by the LMA when producing the REF Document was to base it to the greatest extent possible on the existing LMA loan documents, particularly the multicurrency term facility agreement (the "**Existing LMA Facility**"). As a result, many of the 'boilerplate' clauses in the Existing LMA Facility—for example, the tax gross-up provisions, indemnities and increased costs—have been incorporated into the REF Document.

The purpose of this guide is to identify and explain some of the key features of the REF Document that will be relevant to borrowers when approaching this document (though this is not, and should not be regarded as, a definitive guide as to whether those provisions are appropriate to any particular transaction).

The guide has been broken down into the following sections:

1. *Assumed Structure and Basis of Preparation*
2. *Clause 1.1: Material Adverse Effect*
3. *Clauses 2 to 4: The Facility*
4. *Clauses 6 and 7: Repayment and Prepayment*
5. *Clause 8: Interest*
6. *Clause 16.3: Valuations*
7. *Clause 17: Bank Accounts*
8. *Clause 19: Representations*
9. *Clause 20: Information Undertakings*
10. *Clause 21: Financial Covenants*
11. *Clause 22: General Undertakings*
12. *Clause 23: Property Undertakings*
13. *Clause 24: Events of Default*
14. *Clauses 25 and 26: Changes to the Parties*
15. *Clauses 27 to 30: Appointment of the Administrative Parties*
16. *Schedule 2: Conditions Precedent*
17. *Summary*

Where relevant, cross-references to the applicable clauses of the REF Document have been included as footnotes to assist the reader.

In preparing this guide, we have assumed familiarity with the Existing LMA Facility and therefore have not included any commentary on those provisions that are common to both the Existing LMA Facility and the REF Document.

Terms defined in the REF Document, unless they are defined in this guide or the context otherwise requires, shall have the same meaning in this guide.

ASSUMED STRUCTURE AND BASIS OF PREPARATION

The REF Document assumes a structure whereby an English incorporated limited liability company (the "**Company**") establishes one or more wholly and directly owned English incorporated limited liability companies (each referred to as a "**Borrower**" and, together with the Company, each referred to as an "**Obligor**") to acquire the relevant properties (the "**Properties**") and act as borrowers under the REF Document (see below).

This structure will be appropriate for a large number of real estate transactions but by no means all. A wide range of alternative structures and vehicles is commonly used in the real estate sector (including partnerships, limited partnerships, limited liability partnerships, REITs and overseas incorporated entities).

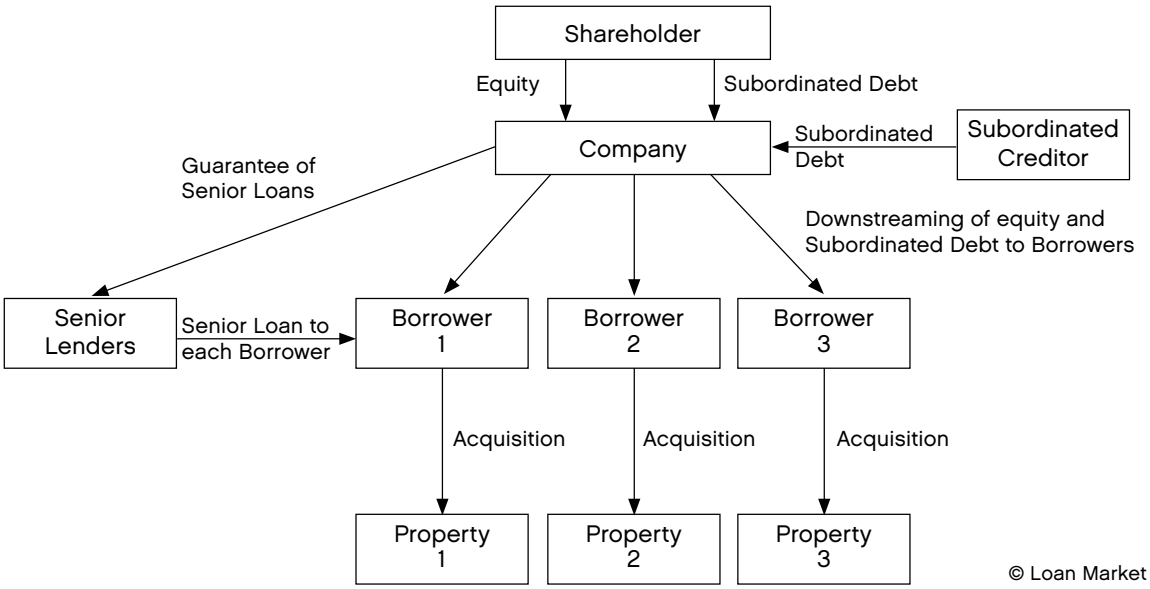
The other general characteristics of the REF Document (and assumptions upon which it is based) include the following:

(a) it provides for a single-currency term loan facility (with either a fixed or a floating rate of interest) that will be applied by the Borrowers to acquire the Properties;

(b) it assumes that:
- all Properties will be investment properties (i.e., there will be no development properties) located in England, Wales and/or Scotland;
- each Obligor will provide unlimited guarantees;
- where the loans are advanced with a floating rate of interest, they will be fully or partially hedged, and the hedge providers will be party to the REF Document (and benefit from the security package);
- all shareholder/sponsor debt to the Company will be subordinated to amounts due to the Lenders under the REF Document; and
- there will be no mezzanine financing; and

(c) the security package will comprise:
- fixed and floating debenture over all of the assets of each Obligor;
- a 'Standard Security' and an 'Assignation of Rent' (both of which are Scots-law security documents that will therefore be relevant only if a Property is located in Scotland);
- a 'Shareholder's Security Agreement' (i.e., security over the Company's shares to be granted by the Company's shareholder); and
- a 'Subordinated Creditor's Security Agreement' (i.e., security over any subordinated debts to be granted by the Subordinated Creditors to any Obligor).

It is likely that the security referred to in the first bullet—and, if any Property is located in Scotland, in the second bullet—will be uncontroversial. However, the Company and its shareholder/the Subordinated Creditors should consider whether the security referred to in the third and fourth bullets is acceptable.



Where the structure for a particular transaction does not reflect the REF Document's assumed structure (including, for example, financing for a real estate operating business and opco/propco structures), we would nevertheless anticipate that many lenders will seek to use the REF Document as a starting point for documentation.

THE REF DOCUMENT: A BORROWER'S GUIDE

CLAUSE 1.1: MATERIAL ADVERSE EFFECT

This is an important term, as it is used as a qualifier for a number of the representations, undertakings and Events of Default (as well as to trigger an Event of Default in its own right), and therefore the Company must carefully consider this definition.

The REF Document defines a 'Material Adverse Effect' as:
"a material adverse effect on:

(i) the business, operations, property, condition (financial or otherwise) or prospects of an Obligor; or

(ii) the ability of an Obligor to perform its obligations under the Finance Documents; or

(iii) the validity or enforceability of, or the effectiveness or ranking of any Security granted or purported to be granted pursuant to any of, the Finance Documents; or

(iv) the rights or remedies of any Finance Party under any of the Finance Documents".

As a minimum, the Company should consider:

- whether the reference in paragraph (i) to "*property*" is appropriate, given the extensive provisions specifically relating to the Properties;
- whether the reference in paragraph (i) to "*prospects*" is appropriate (this may be seen as a metric too subjective to quantify);
- whether the reference in paragraph (i) to "*an Obligor*" should be amended to read *"the Obligors taken as a whole*", given that the cross-guarantee means that each Obligor is liable for the indebtedness of every other Obligor under the REF Document;
- whether paragraph (iii) should be limited to payment or financial obligations only; and/or
- whether paragraph (iv) is appropriate, as this includes all rights and remedies of a Finance Party, no matter how immaterial or theoretical.

CLAUSES 2 TO 4: THE FACILITY

(a) Clause 2.2: Property Protection Loans

The REF Document provides for the possibility that 'Property Protection Loans' may be advanced by one or more of the Lenders to a Borrower at any time (whether or not a Default has occurred).

A 'Property Protection Loan' is a loan that is made to finance payments which are required to 'protect' a Property or the Lenders' security over that Property (for example, by paying amounts due under headleases or insurance policies).

The concept of a Property Protection Loan originated in securitised transactions where the ultimate creditors (i.e., the noteholders) needed assurance that the properties which comprised their collateral would be properly maintained in all circumstances, particularly following a Default. This concern arose because enforcing against securitised loans is not always a quick or easy process, due to the diversity and number of creditors. Some bank lenders have attempted to import this concept into unsecuritised bank creditor facilities. Borrowers may question how appropriate such loans are, given the lenders' separate ability to enforce security where the borrower fails to comply with the loan agreement.

If included, these loans, at the election of the Lenders, will be automatically advanced to the Borrowers, will be repayable on demand and will bear interest at the default interest rate. Given the characteristics of Property Protection Loans, the Company will need to consider carefully whether such loans are necessary and, if so, whether the terms of these loans are acceptable. Factors to consider may include the following:

- whether a Property Protection Loan should be capable of being advanced only if an Event of Default is continuing;
- the impact that having an on-demand loan will have on the balance sheets of the Borrowers (and therefore the increased possibility of the occurrence of a payment or solvency default); and
- the impact that the advance of such a loan will have on the historical and projected interest cover financial covenants, as interest on these amounts will accrue at the default interest rate.

Finally, if the Property Protection Loans are included, the REF Document will need certain administrative amendments to properly cater to these; for example, the stated purpose for which Loans can be advanced should be updated to incorporate Loans that are Property Protection Loans.

(b) Clause 3.1: Purpose

The facility made available under the REF Document is a term loan facility and is specified as being for the purpose of "*financing [or refinancing] the cost of acquisition of the Properties [and payment of any fees, costs and expenses, stamp registration and other Taxes (other than VAT) / (including recoverable VAT but excluding irrecoverable VAT)] incurred by any Obligor in connection with the acquisition of the Properties [and approved by the Majority Lenders]*".

This reflects the fact that the REF Document is designed only for use with the acquisition or refinancing of investment properties and not, for example, to finance the development or refurbishment of a property.

(c) Clause 4: Conditions Precedent

The specific documents required to be delivered as conditions precedent under the REF Document are considered below in Schedule 2.

In addition to these documents, the REF Document contains, as a 'further condition precedent', a requirement that "*on the basis of information available on the proposed Utilisation Date Historical Interest Cover as at [the second Interest Payment Date after the proposed Utilisation Date] will be at least [***]%*". The Company should consider whether this is acceptable (especially if Projected Interest Cover is included as a financial covenant) and, if so, the basis on which this will actually be calculated, as it requires a forward-looking assumption as to what, at that date, the relevant historical data will be.

CLAUSES 6 AND 7: REPAYMENT AND PREPAYMENT

(a) Clause 6.1: Repayment of Loans

The REF Document provides for either bullet repayment or amortising repayment.

(b) Clause 7: Prepayment and Cancellation

In addition to mandatory prepayment upon illegality and change of control, the REF Document also requires:

(i) all Disposal Proceeds (i.e., the net disposal proceeds from the disposal of a Property or the shares in a Borrower) to be paid into the Disposals Account; and

(ii) all of the following amounts to be paid into the Deposit Account:

- any Compensation Prepayment Proceeds (i.e., the amount of any compensation and damages received as a result of the compulsory purchase of, or any blight or disturbance affecting, its Property);
- any Hedging Prepayment Proceeds (i.e., any amounts payable to an Obligor by a hedge provider as a result of termination or closing out under a Hedging Agreement);
- any Insurance Prepayment Proceeds (i.e., the proceeds of any insurance claims received other than any proceeds required to be applied in replacing, restoring or reinstating a Property by the relevant insurance policy or a lease document);
- any Lease Prepayment Proceeds (i.e., amounts paid to a Borrower in respect of any agreement to amend, supplement, extend, waive, surrender or release a lease); and
- any Recovery Prepayment Proceeds (i.e., any amounts received by an Obligor from any claim against the persons from whom a Borrower acquired a Property or a report provider),

and, in each case, that such amounts be applied in prepayment of the Loans on the next Interest Payment Date.

The amount of the Disposal Proceeds that will be applied in prepayment of the Loans will be equal to an agreed multiple of the applicable 'Allocated Loan Amount'[1] for that Property or Borrower, together with the amount of any prepayment fee that is payable and any amounts payable under the Hedging Agreements in each case as a result of that prepayment. The excess Disposal Proceeds, if any, will be transferred into the General Account.

1 Where there is more than one Property, each Property and its Borrower will have a pre-agreed 'Allocated Loan Amount' (with the aggregate of all Allocated Loan Amounts being equal to the total loan amount).

The Company should consider whether the Hedging Prepayment Proceeds, the Lease Prepayment Proceeds, the Insurance Prepayment Proceeds, the Compensation Prepayment Proceeds and the Recovery Prepayment Proceeds should all be mandatorily applied in prepayment of the Loans or whether some of these amounts should be made available to the Obligors by being paid into the General Account. For example, the Company may wish to:

- apply some or all of the Hedging Prepayment Proceeds in effecting additional or replacement Hedging Agreements;
- apply some or all of the Lease Prepayment Proceeds in refurbishment of the Property to which it relates; and/or
- apply some or all of the Insurance Prepayment Proceeds in reinstating or replacing the relevant damaged or destroyed asset.

Particular thought should be given to the Insurance Prepayment Proceeds. If the Lenders insist on exerting a degree of control over the Insurance Prepayment Proceeds, the Company may consider including a threshold below which the Insurance Prepayment Proceeds will be available to the Obligors, but above which the Insurance Prepayment Proceeds will be applied in prepayment of the loans.

(c) Clause 7.7: Right of Repayment and Cancellation in Relation to a Single Lender

The REF Document retains the general right for the Company to prepay a single Lender that is seeking to claim amounts under the tax gross-up, tax indemnity and/or increased costs provisions. However, the alternative right available to borrowers under the Existing LMA Facility to replace such a Lender has been removed. The reason stated by the LMA is that this is not currently considered "market practice in the syndicated real estate market". Depending on the negotiating strength of the Company, this is a provision that the Company may seek to reinstate.

CLAUSE 8: INTEREST

(a) Clause 8.1: Calculation of Interest

The REF Document provides for the loans to be made available either on a floating rate (subject to the hedging requirements) or on a fixed rate and anticipates fixed quarterly interest payment dates.

The Company should ensure that the interest payment dates are appropriate in the context of the rent receipt dates (particularly if there is a portfolio of more than one Property and/or if any of the Properties are located in Scotland, which traditionally has different rent payment dates than England) so as to ensure that there is sufficient time to complete rent collection before the interest payment date.

Where the Properties are located in the UK (which is an assumption upon which the REF Document has been prepared), rent is likely to be paid on a quarterly basis, so quarterly interest payment dates are unlikely to be problematic. However, in other jurisdictions (for example, continental Europe), monthly rent payment is common, and therefore, where a Property is located outside the UK, the Company may need to consider more flexibility regarding the interest payment dates.

Finally, where the Loans are advanced on a fixed rate of interest, it is likely that the Lenders will each enter into private hedging arrangements with third parties in order to facilitate their ability to offer a fixed rate of interest to the Borrowers. In these circumstances, the REF Document assumes that the definition of 'Break Costs' will be amended by the Lenders to reflect the costs (if any) which will be associated with the early termination or closing out of any such hedging arrangements. The REF Document does not suggest any language for this, recognising that this will need to be determined on a case-by-case basis, depending on the financial arrangements effected by the Lenders. The Company, however, will need to ensure that any such Break Costs are expressly limited to the actual costs incurred by the Lenders in terminating or closing out any such hedging arrangements as a result of a prepayment.

(b) Clause 8.3: Hedging

The REF Document sets out the hedging requirements that will be applicable where the loan is advanced with a floating rate of interest. It is contemplated that all hedging (other than, possibly, caps and/or options) will be provided by one or more of the Lenders and that the rights of the Borrowers under all hedging arrangements will be assigned to the Security Agent under the Security Documents.

The hedging provisions deal with minimum hedging amounts, over-hedging, settlement dates, amendments, termination, closeout and reduction of the notional amount following repayments/prepayments.

The restriction on over-hedging does not apply to hedging arrangements where the Obligors "*have no actual or contingent indebtedness*" (which will capture interest rate caps).

It is likely that the hedging arrangements will vary from transaction to transaction, and therefore the Company will need to consider the precise requirements carefully (particularly any closeout/early termination requirements, as these may result in the Company's incurrence of significant costs). The REF Document assumes that prescriptive hedging requirements will be set out in detail in the REF Document, leaving the Obligors little discretion in this regard.

It is also worth noting that, where a Lender is providing hedging, the derivative desks of that Lender will often seek to negotiate this clause independently of the lending desk of that entity.

Finally, where the loans are offered on a floating rate of interest with a requirement to hedge, the Company should consider the potential implications of pending legislation that may require the parties to cash-collateralise swap contracts (which will be unattractive, as neither party will want to cash reserve on a mark-to-market basis because the breakage costs can be high). This is likely to increase the desirability and use of fixed-rate loans.

CLAUSE 16.3: VALUATIONS

The REF Document defines a 'Valuation' as "*a valuation of a Property, or as the context requires, the Properties by the Valuer, supplied at the request of the Agent, addressed to the [Finance Parties] and prepared on the basis of the market value as that term is defined in the then current Statements of Asset Valuation Practice and Guidance Notes issued by the Royal Institution of Chartered Surveyors*".

The Agent may request a Valuation at any time, but the Company will pay only for:

(i) the initial Valuation;
(ii) a Valuation obtained by the Agent on an annual basis;
(iii) any valuation obtained by the Agent in connection with the compulsory purchase of all or part of a Property; and
(iv) any Valuation obtained at any time when a Default is continuing or occurs as a result of obtaining that Valuation.

Any other Valuation obtained by the Agent will be at the cost of the Lenders.

The Company should consider whether it is acceptable that the Agent is entitled to obtain a Valuation at any time (even where that Valuation is at the cost of the Lenders), as this is likely to be administratively burdensome for the Obligors should the Lenders exercise this right. Additionally, the Company may wish to state when in each year the annual Valuation will be obtained (and whether the Company should have the option to elect that each Property be valued separately rather than as a portfolio). Finally, the Company may seek to argue that there should be no requirement to undertake any revaluation where a Property has been compulsorily purchased in full (which is akin to a disposal of that Property, which would not require a revaluation).

CLAUSE 17: BANK ACCOUNTS

The REF Document assumes that there will be four bank accounts—a General Account, a Deposit Account, a Disposals Account and a Rent Account—and that each such account will be held with a pre-agreed account bank "*in the names of the Borrowers*" and subject to security in favour of the Security Agent.

Under the REF Document, the Agent has the right, at any time, to require that the account bank be replaced. If agreed, this may cause administrative difficulties for the Obligors, as there would be no certainty or control over the identity of the account bank and it is likely that changing the account would be administratively burdensome. An alternative might be to set a minimum rating and state that:

- the Obligors may change the account bank at any time if appropriate replacement security is effected and the new account bank meets that minimum rating;
- the Agent can require an Obligor to change the account bank only if the current account bank's rating is below the agreed minimum rating and the proposed replacement bank's meets the minimum rating requirement.

(a) Clause 17.3: Rent Account

All Net Rental Income[2] (other than Lease Prepayment Proceeds), together with all amounts payable under any Hedging Arrangements (other than Hedging Prepayment Proceeds), must be paid into the Rent Account. If rent is collected by a managing agent, the Borrowers must ensure that the managing agent collects the Rental Income and pays it into the Rent Account at least two business days prior to each Interest Payment Date.

The REF Document assumes that the Security Agent will have sole signing rights on the Rent Account and that, on each Interest Payment Date, the Security Agent will apply monies standing to the credit of the Rent Account in the following order:

"(i) first, in or towards payment pro rata of any unpaid fees, costs and expenses of the Agent, the Arranger and Security Agent;

(ii) secondly, if applicable, in or towards payment of any accrued interest on any Property Protection Loans;

(iii) thirdly, if applicable, in or towards payment of any principal of Property Protection Loans;

(iv) fourthly, in or towards payment pro rata:

(1) [of] any accrued interest and fees due to the Lenders under the REF Document; and

(2) to the Hedge Counterparties of any periodical payments (not being payments as a result of termination or closing out) due but unpaid under the Hedging Agreements;

(v) fifthly, in or towards payment pro rata:

(1) of any principal due but unpaid under the REF Document; and

(2) to the Hedge Counterparties of any payments as a result of termination or closing out due but unpaid under the Hedging Agreements;

(vi) sixthly, in or towards payment pro rata of any other sum due but unpaid to the Finance Parties under the Finance Documents;

(vii) seventhly, payment of any agreed cash sweep amount into the Deposit Account; and

(viii) eighthly, payment of any surplus into the General Account."

If there is a single Rent Account (held, for example, by the Company) but multiple Borrowers, each of whom pays its Rental Income into that Rent Account, this will create inter-company balances between the Borrowers and the Company. In such circumstances, the Company will need to ensure that these inter-company balances are permitted by the REF Document, and it must also consider any indirect consequences that may be relevant (for example, any tax considerations).

(b) Clause 17.4: Deposit Account

The Security Agent will have sole signing rights on the Deposit Account.

All Hedging Prepayment Proceeds, Lease Prepayment Proceeds, Insurance Prepayment Proceeds, Compensation Prepayment Proceeds and Recovery Prepayment Proceeds must be paid into the Deposit Account and will be applied in prepayment of the loans on the next Interest Payment Date.

The Company should carefully consider each class of payment to be made into the Deposit Account and whether any of those proceeds should be made available to the Obligors by being paid into the General Account (see above on clause 3.1).

The REF Document does not provide for any cure rights in respect of the financial covenants (see below on clause 21). However, if the parties do include financial-covenant cure rights, it is likely that the Deposit Account will be identified as the appropriate account into which any designated 'cure payments' will be paid pending application in prepayment of the loans or release back to the Obligors.

(c) Clause 17.5: Disposals Account

The Security Agent will have sole signing rights on the Disposals Account.

Following the disposal of a Property, the Disposal Proceeds must be either applied in immediate prepayment of the loans or paid into the Disposals Account.

If the Company elects to pay the Disposal Proceeds into the Disposals Account (which, for example, it may do to avoid paying Break Costs that might otherwise be payable), then, on the next Interest Payment Date, an amount equal to an agreed multiple of the

2 'Net Rental Income' comprises Rental Income other than Tenant Contributions. The Company should therefore consider whether any additional amounts (for example, managing agent's fees where these are not covered by Tenant Contributions) should also be deducted from Rental Income to avoid the obligation to pay such amounts into the Rent Account.

applicable Allocated Loan Amount (together with the amount of any prepayment fee that is payable and any amount payable under the Hedging Agreements as a result of that prepayment) will be applied in prepayment of the loans. The excess, if any, will then be transferred to the General Account.

If the parties have agreed that additional properties can be acquired by the Obligors at a later date (see below on clause 22.9), the Company may want to consider including 'property substitution' provisions whereby, if a Property is sold and the Disposal Proceeds are paid into the Disposals Account, the Security Agent, rather than automatically applying those monies in mandatory prepayment of the Loans on the next Interest Payment Date, will, if requested by the Company, retain those funds in the Disposals Account for an agreed period of time during which they can be applied to fund the acquisition of a new property.

(d) Clause 17.6: General Account

The Company will have signing rights on the General Account, provided no Default is continuing.

All other amounts not specifically required to be paid into another account must be paid into the General Account and, subject to the Subordination Agreement, can be applied by the Company for any purpose that is not prohibited by the REF Document (unless they were paid into the General Account for a specific purpose—for example, the Tenant Contributions[3]—in which case those amounts must be applied by the Company for the applicable purpose).

If a Default is continuing, the Security Agent will be entitled to operate the General Account, withdraw moneys from the General Account and apply them "*in or towards any purpose for which moneys in any Account may be applied*". The Company should consider whether this is acceptable or whether the reference to 'Default' should, in this context, be amended to 'Event of Default'. Otherwise, the occurrence of a Default may be viewed as entitling the Security Agent to apply the balance of the General Account in prepayment of the loans.

(e) Clause 17.7: Miscellaneous Accounts Provisions

The REF Document contains a number of fairly standard general provisions relating to the Accounts (for example, that no Account can be overdrawn). However, a provision has been included that states that no Finance Party will be responsible to an Obligor for the "*non-payment of any liability of an Obligor which could be paid out of monies standing to the credit of an Account*". If the parties have agreed that the Security Agent will be obligated to make certain payments from one or more Accounts (for example, applying monies standing to the credit of the Disposals Account in prepayment of the loans in order to ensure compliance with the mandatory prepayment provisions), the Company may want to state that this provision will not apply where that nonpayment arises as a result of a breach by the relevant Finance Party of its obligations under the REF Document.

CLAUSE 19: REPRESENTATIONS

The REF Document contains a typical set of general representations relating to, amongst other things, the status of the Obligors, the binding nature of the various obligations incurred, nonconflict with other obligations, power and authority, validity and enforceability in evidence, and governing law and enforcement. These will need to be considered on a case-by-case basis and amended to suit the actual transaction and Obligor structure but generally should not be controversial.

However, one important difference between the general representations in the REF Document and the corresponding representations in the Existing LMA Facility is in respect of documents to which the representations relate. The various representations in the Existing LMA Facility relating to, for example, binding obligations, power and authority, and nonconflict with other obligations refer only to the 'Finance Documents' (i.e., confirmation is provided that the Finance Documents have been authorised, are enforceable, etc.). However, the corresponding representations in the REF Document refer to the 'Transaction Documents'. The term 'Transaction Documents' encompasses a wider range of documents than just the Finance Documents and includes, for example, all lease

3 'Tenant Contributions' are payments other than periodic rent that a tenant may pay or reimburse to an Obligor for a cost incurred in running, servicing or maintaining a Property (often referred to as a 'service charge').

documents, all headleases and all managing-agent appointments. Given that any misrepresentation may trigger a drawstop and/or result in the occurrence of an Event of Default, the Company should consider whether it is appropriate, or even possible, to give such representations in respect of all Transaction Documents. The Company will generally look to limit the documents to which these representations relate as far as possible (ideally restricting them to the Finance Documents). However, it is possible that the Lenders will resist this. While the Company can argue that the Lenders should rely on their due diligence of the relevant property documentation, it may be that an acceptable compromise is to exclude from the representations relating to the Transaction Documents the non-material lease documents (particularly if the restriction on terminating leases has been qualified to allow the Borrowers to terminate non-material leases—see below on clause 23.2) and any headleases such that the confirmations are given only in respect of the critical documents.

Below are the various representations to which specific consideration should be given.

(a) Clause 19.7: Deduction of Tax

The representations relating to payments and deduction of tax (in particular, deductions and withholdings of tax from payments of interest and Rental Income) should be carefully reviewed, particularly if any of the Borrowers are non-UK landlords. Specific tax advice is recommended in this respect.

(b) Clause 19.10: No Default

The REF Document contains a standard 'no Event of Default' representation but also seeks confirmation from the Obligors that no Event of Default might reasonably be expected to result from "*the entry into, or the performance of, or any transaction* ***contemplated*** *by, any Transaction Document*". It may not be possible for the Obligors to provide this confirmation if, for example, the Transaction Documents 'contemplate', but do not necessarily require, a number of possible transactions (for example, the sale of a Property) in circumstances where such transactions would not necessarily be permitted by the Finance Documents.

(c) Clauses 19.11 and 19.15: Information and Valuation

The representations regarding the accuracy of information have been incorporated from the Existing LMA Facility, together with additional representations regarding the accuracy of information provided to the Valuer for the purposes of the Valuations and to the relevant lawyers for the purposes of the reports on title.

However, the REF Document contains a few important modifications from the language incorporated in the Existing LMA Facility. For example:

(i) rather than referring to "*any factual information*", the representation now refers simply to "*all information*", which would therefore include both factual information and nonfactual information (for example, projections and matters of opinion). It is unlikely that the Obligors will be able to represent that any projections or opinions are "*true and accurate*". The Company should also consider limiting this to written factual information (therefore excluding information provided orally);

(ii) it relates to all such information supplied in connection with the 'Transaction Documents' rather than just the 'Finance Documents'; and

(iii) rather than confirming that such information was "*true and accurate* ***in all material respects*** *as at the date it was provided*" and that nothing has been omitted from such information that would make it "*untrue or misleading* ***in any material respect***", the representation states that such information was "*true and accurate as at the date it was provided*" and that nothing has been omitted from such information that would make it "*untrue or misleading in any respect*". Borrowers are likely to argue that the materiality qualification should be reinstated.

In respect of the Valuations, the REF Document also requires the Obligors to confirm that they have not "*omitted to supply any information to the Valuer which, if disclosed, would adversely affect the Valuation*". The Company should therefore consider whether this representation should be subject to a materiality qualification and/or *de minimis* carve-out.

(d) Clause 19.16: Title to Properties

The REF Document contains representations relating to the Obligors' title to the Properties and seeks to qualify these representations only by reference to matters disclosed in the 'Property Report' (i.e., the initial report on title provided to the Lenders as a condition precedent). This therefore leaves little scope for any adverse changes after the date of the REF Document (no matter how minor or immaterial), and therefore the Company may seek to qualify these

representations (for example, by reference to Material Adverse Effect or, failing that, simple 'materiality'). These qualifications are likely to be particularly important where the REF Document is financing the acquisition of a portfolio of more than one Property.

By way of example, the REF Document seeks confirmations from the Obligors that they are the legal and beneficial owners of the relevant Properties, with good and marketable title to those Properties, in each case free from security, restrictions and onerous covenants "*other than those set out in the Property Report in relation to that Property*", and that:

"except as disclosed in the Property Report relating to a Property:

(i) no breach of any law, regulation or covenant is outstanding which adversely affects or might reasonably be expected to adversely affect the value, saleability or use of that Property;

(ii) there is no covenant, agreement, stipulation, reservation, condition, interest, right, easement or other matter whatsoever adversely affecting that Property;

(iii) nothing has arisen or has been created or is outstanding which would be an overriding interest, or an unregistered interest which overrides first registration or a registered disposition, over that Property;

(iv) all facilities necessary for the enjoyment and use of that Property (including those necessary for the carrying on of its business at that Property) are enjoyed by that Property;

(v) none of the facilities referred to in sub-paragraph (iv) are enjoyed on terms:

(1) entitling any person to terminate or curtail its use of that Property; or

(2) which conflict with or restrict its use of that Property;

(vi) the relevant Obligor has not received any notice of any adverse claim by any person in respect of the ownership of that Property or any interest in it which might reasonably be expected to be determined in favour of that person, nor has any acknowledgement been given to any such person in respect of that Property; and

(vii) that Property is held by the relevant Obligor free from any lease or licence (other than those entered into in accordance with [the REF Document]".

The representations set out above are deemed to repeat periodically, and therefore, unless these representations are further qualified, the Obligors must be comfortable that nothing which may render these representations untrue in any material respect will occur to the Properties after the date of the REF Document.

(e) Clause 19.18: No Other Business

The REF Document contains a representation that "*no Obligor has traded or carried on any business since the date of its incorporation except for, in the case of the Company, the ownership of the Borrowers and, in the case of each Borrower, the ownership[, development] and management of its interests in the Properties*". This supports the REF Document's assumption that each Obligor is a special-purpose vehicle established for the purposes of this transaction. However, if this is not the case—for example, if any Obligor has historically incurred any liabilities (which may be the case if the Loan is being used to refinance existing indebtedness rather than to finance the acquisition of the Properties)—the Company must ensure that this is accurately reflected here.

Additionally, the REF Document seeks confirmation that no Obligor is party to any material agreement "*other than the Transaction Documents*". Again, the Company should ensure that if this is not the case, it is reflected here.

(f) Clause 19.19: Centre of Main Interest

Representations regarding the centre of main interest ("**COMI**") of Obligors were traditionally limited to transactions where the debt was to be securitised and/or rated. However, such representations are now becoming increasingly common in unrated transactions.

The REF Document contains a representation from each Obligor that its COMI is situated in "*[England and Wales] / [its jurisdiction of incorporation]*" and that it has no establishment "*in any other jurisdiction*". Where the Obligors are English incorporated companies whose assets are exclusively located in England, this representation is unlikely to be problematic. However, if this is not the case (for example, if a Property is located in a jurisdiction other than that in which it is incorporated or if an Obligor is incorporated outside the UK), this representation may need to be amended or deleted.

(g) Clause 19.21: Ownership

The representations as to ownership should be considered in conjunction with the agreed change-of-control provisions. In particular, care should be taken to ensure that a change of control will not, in addition to triggering a mandatory prepayment event, result in a misrepresentation (and therefore an Event of Default). This is likely to be particularly relevant in relation to the repeating representation as to the ownership of the Company's shares (though it will be less relevant where the Company and each Borrower is a special-purpose vehicle whose sole purpose is to acquire and hold the Properties and related activities).

CLAUSE 20: INFORMATION UNDERTAKINGS

The REF Document contains a set of fairly standard information undertakings relating to, amongst other things, provision of financial statements and compliance certificates, requirements as to financial statements, notification of Default, and details of litigation.

The only property-specific addition is the requirement to provide the Agent with a quarterly report containing the following information:

"(i) a schedule of the existing occupational tenants of each Property, showing for each tenant the rent, service charge, value added tax and any other amounts payable in that period by that tenant;

(ii) copies of any management accounts and management cashflows produced by, or for, any Obligor;

(iii) details of:

(1) any arrears of rents or service charges under any lease document; and

(2) any other breaches of covenant under any lease document,

and any step being taken to recover or remedy them;

(iv) details of any insolvency or similar proceedings affecting any occupational tenant of a Property or any guarantor of that occupational tenant;

(v) details of any rent reviews with respect to any lease document in progress or agreed;

(vi) details of any lease document which has expired or been determined or surrendered and any new letting proposed;

(vii) copies of all material correspondence with insurance brokers handling the insurance of any Property;

(viii) details of any actual or proposed capital expenditure with respect to each Property;

(ix) details of any actual or required material repairs to each Property;

(x) details of any notice it is entitled to serve on any former tenant of any occupational lease under section 17(2) of the Landlord and Tenant (Covenants) Act 1995 or on any guarantor of any such former tenant under section 17(3) of that Act; and

(xi) any other information in relation to a Property reasonably requested by the Agent."

The Company should ensure that all such information can actually be provided to the Agent (and, if so, whether this can be provided on a quarterly basis). Additionally, the REF Document requires that this report must be "*in form and substance satisfactory to the Agent*", and therefore the Company should consider either including an obligation on the Agent to act reasonably in this regard and/or pre-agreeing the format of such report.

Finally, the Company is obliged to notify the Agent of "*any likely occupational tenant of any part of a Property and any likely buyer of any part of a Property (including terms of reference)*". This requirement is likely to be more of a nuisance than a practical problem.

CLAUSE 21: FINANCIAL COVENANTS

The REF Document includes three financial covenants, namely:

- Historical Interest Cover ("*The Company must ensure that Historical Interest Cover is, at all times, at least [***] per cent.*");
- Projected Interest Cover ("*The Company must ensure that Projected Interest Cover is, at all times, at least [***] per cent.*"); and
- Loan to Value ("*The Company must ensure that the Loan to Value does not, at any time, exceed [***] per cent.*").

It is important to note that these are 'maintenance covenants' and therefore must be complied with at all times rather than only on those dates when they are tested. The appropriateness of these covenants and the levels at which they are set will need to be considered on a case-by-case basis. Many borrowers have previously resisted ongoing Loan to Value covenants, for example, and lenders have frequently waived these tests at times of market stress. However, given recent regulatory changes, lenders are now very keen to include ongoing Loan to Value covenants.

The REF Document does not include any cure or remedy rights in respect of the financial covenants. The LMA has stated that it has not included specific cure rights in the REF Document because they have not yet been established as being 'market standard'. This view is certainly debatable, and the Company should carefully consider whether it is appropriate to exclude all such rights. Without cure rights (which typically tend to permit the Company to either prepay the loans or place cash on deposit in a blocked account against which the outstanding loan amount will be notionally netted), any breach of the financial covenants will result in the immediate occurrence of an Event of Default that will be incapable of remedy.

Finally, if the financial covenants are set such that compliance is required only on certain 'test dates' (as drafted, the REF Document requires the financial covenants to be complied with at all times), then the Company may wish to consider the use of 'covenant mulligans'. The inclusion of a covenant mulligan will mean that a single breach of a financial covenant will not result in an Event of Default unless that covenant is also breached on the subsequent test date. Covenant mulligans were more prevalent pre-2008 but, if included, are useful qualifications.

(a) Clause 21.1: Historical Interest Cover

This is an interest cover covenant calculated on a backwards-looking basis against historical information.

Care should be taken to ensure that the definition of 'Historical Interest Cover' accurately reflects the basis upon which the Historical Interest Cover financial covenant has been modelled. Additionally, the Company should consider whether the adjustments and assumptions upon which Historical Interest Cover is calculated are appropriate—for example, whether it is appropriate:

- to assume that any applicable break clause was exercised "*at the earliest available date*" even if this was not the case;
- to ignore rental income that is not paid under an unconditional and binding lease document or is paid by a tenant that is in arrears on any of its rental payments if such rental income has nevertheless actually been paid; and/or
- to ignore all rental income paid by a tenant that has been in arrears for more than a certain period even if a portion of the rental income has been paid during this period.

Such assumptions are more appropriate in relation to the calculation of Projected Interest Cover.

Additionally, the definition of 'Historical Interest Cover' states that the Company must calculate Historical Interest Cover but that "*if the Company does not provide a calculation when requested by the Agent or [if] the [Agent/Majority Lenders] disagree[s] with the calculation provided then the [Agent/Majority Lenders] may calculate Historical Interest Cover and that calculation of the [Agent/Majority Lenders] shall prevail over any calculation by the Company*". If this is agreed, the Company may want to consider including a more reasoned basis upon which the Company's calculation can be disregarded and/or a more objective standard of calculation/recalculation by the Agent/Majority Lenders.

(b) Clause 21.2: Projected Interest Cover

This is a forward-looking 'projected' interest cover covenant.

As with the definition of 'Historical Interest Cover', care should be taken to ensure that this accurately reflects the basis upon which the Projected Interest Cover financial covenant has been modelled. Additionally, the Company should consider whether the adjustments and assumptions upon which Projected Interest Cover is calculated are appropriate—for example, whether it is appropriate to ignore all rent paid by tenants in arrears of rent or whether this should be limited to those tenants that are in arrears as a result of financial difficulties.

The definition of 'Projected Interest Cover' contains provisions relating to calculations that broadly correspond to those provisions in the definition of 'Historical Interest Cover'.

(c) Clause 21.3: Loan to Value

'Loan to Value' is defined as the amount of the outstanding Loans "*less so much of the amount standing to the credit of the Disposals Account as is required to be applied in prepayment of the Loans*" as a percentage of the aggregate market value of the Properties as set out in the most recent Valuation.

The principal consideration for the Company is whether the amount of the Loans should be calculated as being net of any amounts in addition to the balance standing to the credit of the Disposals Account (for example, amounts standing to the credit of the Deposit Account).

CLAUSE 22: GENERAL UNDERTAKINGS

As with the representations, the general corporate undertakings, to a large extent, have been based on the Existing LMA Facility (though, as with the representations, certain references in the Existing LMA Facility to 'Finance Documents' appear in the REF Document as references to 'Transaction Documents').

Unlike the Existing LMA Facility, the REF Document is a secured facility. Accordingly, there are a number of additional undertakings that will need to be considered on a case-by-case basis.

(a) Clause 22.3: Negative Pledge

The Company should carefully consider whether the qualifications to the general negative pledge are appropriate, as these are limited to:

(i) the security granted in connection with the REF Document;

(ii) liens arising by operation of law and in the ordinary course of trading; and

(iii) any security that is released prior to the first utilisation date.

(b) Clause 22.4: Disposals

The REF Document restricts the entry by any Obligor into "*a single transaction or a series of transactions (whether related or not and whether voluntary or involuntary) to dispose of all or any part of its assets*". Given that all disposals are restricted, the Company must therefore ensure that the carve-outs from this are appropriate.

There are general carve-outs (for example, disposals of cash by way of a payment out of an Account in accordance with the REF Document and disposals of assets subject only to floating charges where that disposal is made in the ordinary course of trading).

Additionally, there are specific provisions permitting disposals of Properties and/or the shares in the Borrowers. The principal point to note in this regard is that any such disposal will require the prior consent of the "*[Majority] Lenders*", and therefore, there is no absolute right/ability to make such disposals. The Company should consider whether this is appropriate, particularly if no Default is outstanding or would otherwise result from that disposal (which is itself already a specified precondition to a disposal of a Property or shares in a Borrower).

The other conditions to a disposal of a Property or the shares in a Borrower are that:

(i) the disposal must be on arm's length terms to an unrelated third party; and

(ii) the net disposal proceeds must not be less than the aggregate of [***] per cent of the relevant Allocated Loan Amount and the amount determined by the Agent to provide for "*prepayment fees, [any amount that will become due and payable under the hedging arrangements]*", together with any other amounts that will become due and payable under the prepayment provisions (for example, Break Costs).

In the context of paragraph (ii) above, it is important to note that the term 'net disposal proceeds' is specifically defined to mean "*the gross proceeds of any disposal […] less an amount determined by the Agent as the reasonable costs and expenses associated with that disposal*". The Company should therefore consider:

- whether it is appropriate for the Agent to determine, and therefore effectively have approval rights in respect of, the amount of costs and expenses that can be deducted from the gross disposal proceeds (the Company may argue that these 'are what they are', and therefore the Borrowers should not be expected to fund any such costs or taxes which the Agent may not agree to); and
- whether any other amounts (for example, Taxes) should be deducted from the gross disposal proceeds.

(c) Clause 22.5: Financial Indebtedness

The incurrence of any Financial Indebtedness by the Obligors is prohibited by the REF Document unless that Financial Indebtedness:

(i) is incurred under a Finance Document;

(ii) is repaid prior to the first utilisation of the facility[4]; or

(iii) is subordinated to amounts due to the Lenders by the Subordination Agreement.

Whether this is appropriate will need to be considered on a case-by-case basis in conjunction with consideration of the definition of 'Financial Indebtedness'. For example, the Company should consider whether any Financial Indebtedness has been (or will be) incurred under any other Transaction Document or otherwise in the ordinary course of trading.

(d) Clause 22.6: Lending and Guarantees

The ability of the Obligors to advance loans or provide credit to third parties is restricted unless the loan/credit is provided to another Obligor and is subject to the Subordination Agreement (which is important if intra-group cash-pooling arrangements are to be utilised—see above on clause 17.3). Similarly, the Obligors are restricted from guaranteeing the obligations or liabilities of third parties.

Again, this will need to be considered on a case-by-case basis.

(e) Clause 22.8: Change of Business

The REF Document contains a general restriction on the ability of the Obligors to change their business. For example:

(i) the Company's only permitted business is its ownership of the Borrowers (and it is not permitted to have any subsidiaries other than the Borrowers); and

(ii) the Borrowers' only permitted business is "*the ownership[, development] and management of its interests in the Property or Properties*".

This reflects the assumed structure upon which the REF Document has been prepared, but the Company should consider whether it would be appropriate or necessary to amend, qualify or remove either restriction (for example, in the case of paragraph (ii) above, it may be necessary to amend this by reference to 'any related or ancillary matter which is incidental to the general permitted purpose').

(f) Clause 22.9: Acquisitions

The REF Document prohibits any Obligor from making any acquisition "*other than as permitted under [the REF Document]*".

The Company should therefore consider what, if any, assets may need to be acquired in the future, whether in connection with the general business of the Obligors or otherwise. It is important to note that the REF Document does not provide for the acquisition of additional properties after funding, so if this is likely or desirable, the Company may need to consider incorporating a general ability to acquire further properties and to designate any such property as a 'Property'.

(g) Clause 22.10: Other Agreements

The REF Document contains a general restriction on the ability of the Obligors to enter into any "*material agreement*" other than the Transaction Documents and any other agreement expressly permitted by the REF Document. However, there is an express recognition in the REF Document that there may need to be other categories of agreements which should be included here, depending on the nature of the transaction.

The Company may consider whether or not a more permissive approach is appropriate (for example, by including a general permission to enter into any agreement that is not inconsistent with the general nature of the permitted business of the Obligors).

(h) Clause 22.11: Shares, Dividends and Share Redemption

The issue of shares and amendment of rights attaching to issued shares is restricted. However, the Obligors may want a right to be recapitalised by their shareholders (which may be necessary either to avoid a technical insolvency and/or to effect any financial covenant cure rights that may have been agreed and/or to provide funds to refurbish the Properties). This should not be controversial, provided that the Lenders retain security over all issued shares.

The REF Document also contains a general dividend/distribution block in the following terms:

"*[N]o Obligor shall:*

4 This reflects the fact that the REF Document envisages that the Loan may be applied to refinance existing indebtedness rather than fund an acquisition of the Properties.

(i) declare, make or pay any dividend, charge, fee or other distribution (or interest on any unpaid dividend, charge, fee or other distribution) (whether in cash or in kind) on or in respect of its share capital (or any class of its share capital);

(ii) repay or distribute any dividend or share premium reserve;

(iii) pay any management, advisory or other fee to or to the order of any of the shareholders of the Company; or

(iv) redeem, repurchase, defease, retire or repay any of its share capital or resolve to do so".

The only qualification to this prohibition is if that payment/distribution constitutes a 'Permitted Payment'.

A 'Permitted Payment' is defined as a payment to a shareholder and/or Subordinated Creditor[5] "*out of moneys standing to the credit of the General Account in circumstances where no Default is continuing and no Default would result from the payment*". It is important to ensure that the definition of 'Permitted Payment' reflects the agreed position, and the Company should carefully consider this in conjunction with the Subordinated Creditors (for example, whether 'Default' should be amended to read 'Event of Default').

CLAUSE 23: PROPERTY UNDERTAKINGS

The REF Document contains a number of undertakings that are specific to the Properties and matters relating to the Properties. Some of these are likely to be uncontroversial, for example, a requirement for each Borrower to provide the Security Agent with copies it has received of any "*application, requirement, order or notice served or given by any public or local or any other authority or any landlord with respect to its Property*". However, the majority of the undertakings will require some consideration to ensure that they are applicable and appropriate for each particular transaction.

(a) Clause 23.1: Title

The REF Document contains a number of covenants relating to the title of the Properties that permit limited, if any, scope for immaterial noncompliance. For example, it is a requirement that "*[e]ach Borrower must exercise its rights and comply in all respects with any covenant, stipulation or obligation (restrictive or otherwise) at any time affecting its Property*" and "*[n]o Borrower may agree to any amendment, supplement, waiver, surrender or release of any covenant, stipulation or obligation (restrictive or otherwise) at any time affecting its Property*".

Given the absolute nature of these requirements, the Company will likely want to introduce a measure of materiality or other qualifications to these provisions.

(b) Clause 23.2: Occupational Leases

Without the consent of the Majority Lenders, Obligors are not permitted to:

(i) grant any occupational lease, licence or agreement for lease;

(ii) agree to any amendment, extension, waiver, release or surrender in respect of an occupational lease;

(iii) exercise any rights to break or determine an occupational lease;

(iv) commence any forfeiture or irritancy proceeds in respect of an occupational lease;

(v) consent to any sublease or assignment of a tenant's rights; or

(vi) agree to any change of use.

If the Borrowers intend or need to grant leases in relation to the Properties (or otherwise have the right to manage their leasing arrangements), it is unlikely that these provisions will be workable. It is equally unlikely, however, that the Lenders will grant the Borrowers full discretion in this regard. A compromise may be to retain the general restrictions but to disapply them insofar as they relate to 'immaterial' leases (which could, for example, be defined as leases where the annual rent is less than a specified amount or where the leased premises are less than a specified area) and/or require that the consent of the Lenders is not to be unreasonably withheld or delayed.

This provision also contains a number of very strict requirements pertaining to the business of the Obligors in this respect. For example, each Borrower is required to "*exercise its rights and comply with its obligations under each [lease document] and use its*

5 A 'Subordinated Creditor' is defined as any third-party debt provider to an Obligor that enters into a 'Subordination Agreement' with the Lenders. It is likely that the Company's shareholder/sponsor will be a Subordinated Creditor.

reasonable endeavours to ensure that each tenant complies with its obligations under each [lease document]", and the Obligors "*must use their reasonable endeavours to find tenants for any vacant lettable space in the Properties with a view to granting a [lease document] with respect to that space*". Whether such requirements are appropriate will need to be considered on a case-by-case basis. However, the Company should be aware that any breach of these provisions will result in the occurrence of an Event of Default, and therefore it is important to ensure that any necessary or desirable carve-outs permitting, for example, immaterial deviations from these requirements are clearly set out within the covenants themselves.

(c) Clause 23.3: Headleases

Whether the inclusion of undertakings relating to headleases is appropriate will depend on the title under which the Properties are held by the Borrowers.

It is important to note that, as with the occupational lease requirements, these undertakings have been set on a very restrictive basis allowing little room for error or noncompliance (for example, each Borrower "*must exercise its rights and comply with its obligations under each [headlease]*"). However, this is likely to be seen as more reasonable because any forfeiture of a headlease is likely to compromise the rights of the Lenders as mortgagees.

For a property portfolio, the Company may wish to make the forfeiture of a Property a mandatory prepayment event rather than an Event of Default so that a problem with a single Property does not risk defaulting the entire facility.

(d) Clause 23.4: Maintenance

A maintenance covenant requiring the Borrowers to maintain the buildings, plant and machinery in good and substantial repair and condition is included in the REF Document and is not uncommon.

However, it may be necessary to qualify this clause if any known repair or maintenance work is or will be outstanding at the date that the REF Document is signed. Additionally, the Company should consider whether it would be appropriate to state that this clause should not be read as a requirement to put any building or other asset into a state of repair or condition better than the one it is in at the date the REF Document is signed, as this will be the basis on which the initial Valuations are prepared. Finally, the Borrowers are likely to need a 'reasonable timeframe' within which to effect any agreed repairs.

(e) Clause 23.5: Development

The REF Document assumes that all Properties are fully developed and therefore prohibits not only the carrying out of demolition or construction work, but also application for planning permission by the Borrowers. The Company should consider whether refurbishments and/or improvements should be permitted, provided that they are value-enhancing and are funded by equity/subordinated debt.

It is possible that, prior to the date when the facility made available under the REF Document matures, the Borrowers may wish to make planning applications (for example, for permission to change the use of a building), albeit on a speculative basis, and therefore it may be appropriate to seek a carve-out from this where such application does not, in and of itself, result in the imposition of obligations or liabilities on any Obligor.

(f) Clause 23.7: Investigation of Title

A requirement for the Borrowers to permit the Security Agent or their lawyers to carry out investigations of title to the Properties and make enquiries in relation to the Properties is not uncommon. However, the Company should consider whether a minimum notice period (or 'reasonable' prior notice) should be provided. Additionally, if there are any documents that restrict or limit the ability of the Borrowers to permit the Security Agent or their lawyers to undertake any of this (for example, restrictions in the lease documents or headleases), this should be included as a qualification.

(g) Clause 23.8: Power to Remedy

The failure by a Borrower to perform any obligation under the REF Document relating to its Property will entitle the Security Agent, at the cost of that Borrower, to:

(i) enter any part of that Property;

(ii) comply with or object to any notice served on the Borrower in respect of its Property; and

(iii) take any action that the Security Agent may reasonably consider necessary or desirable to prevent or remedy any breach of any such term or to comply with or object to any such notice.

As with the investigation on title provisions, the Company should consider whether it is necessary to qualify any right of entry by reference to any restrictions to which the Borrowers are subject (for example, under a lease document and/or a headlease). Additionally, it may be desirable to limit the Security Agent's rights under this clause to those circumstances where there has been a failure to perform a 'material' obligation and/or where such failure to perform will have an adverse effect on the interests of the Lenders. Finally, where the Security Agent is remedying a breach, the Company should consider specifying that the Security Agent may remedy that breach only to the extent necessary to ensure compliance with that notice.

(h) Clause 23.9: Managing Agents

Without the prior consent of the Agent, the Obligors are restricted from:

(i) appointing any managing agents;
(ii) amending, supplementing, extending or waiving the terms of appointment of any managing agent; or
(iii) terminating the appointment of any managing agent.

This restriction will be unsuitable where a managing agent will be appointed at the time of or shortly after funding, and therefore, in these circumstances, the Company will need to ensure that this restriction is appropriately qualified. It may also be desirable for a category of persons to be pre-approved (for example, the sponsor and any affiliate of the sponsor), such that the Obligors can change the identity of the managing agent to any such pre-approved person without requiring further consent.

Where a managing agent has been appointed, the Company should consider whether to reserve the right to make certain amendments to the terms upon which that managing agent has been appointed—provided that such amendments do not have a Material Adverse Effect on the Finance Parties—without being obliged to seek the Agent's consent (and, when the Agent's consent is required, whether there should be an obligation on the Agent to act reasonably if withholding such consent).

Where a managing agent has been appointed, the Obligors must ensure that the managing agent enters into a duty-of-care agreement, acknowledges the existence of the security that has been granted in favour of the Security Agent and, importantly, agrees to pay all Net Rental Income into the Rent Account "*without any withholding, set-off or counterclaim*". These requirements are unlikely to be controversial from the Company's perspective. However, if there will be a managing agent from the outset, the Company must ensure that the managing agent will comply with these requirements and will enter into an agreed form of duty-of-care agreement prior to the signing of the REF Document.

Finally, if a managing agent has been appointed and is in breach of the terms of its appointment such that an Obligor is entitled to terminate the appointment of that managing agent, then "*if the Agent so requires, that Obligor must promptly use all reasonable endeavours to terminate the management agreement and appoint a new [managing agent] in accordance with [the provisions of the REF Document]*".

(i) Clause 23.10: Insurances

The insurance requirements should be considered very carefully, and if the Company has an insurance broker, it is important for the broker to review these provisions to ensure that they reflect the terms of the intended policy/policies to be effected.

The insurance requirements set out in the REF Document are fairly comprehensive and seek to provide a high degree of control to the Lenders. For example, the insurance provisions require:

(i) all risks to be insured against, including terrorism, irrespective of the cost to the Company of obtaining such a policy (or, indeed, the availability of that policy in the relevant market);
(ii) a minimum of three years' loss of rent to be provided for, including provision of any increases of rent during the period of insurance;
(iii) all policies of insurance to be "*in an amount, and in form, and with an insurance company or underwriters, acceptable at all times to the Agent*" without any obligation to act reasonably or any other objective test as to what is appropriate in the circumstances;
(iv) the Security Agent to be named as co-insured; and
(v) all policies to contain "*a loss payee clause in such terms as the Security Agent may reasonably require in respect of insurance claim payments otherwise payable to any Obligor*".

The extent to which these provisions are acceptable will depend on a number of matters, including the location and nature of the Properties, the state of the insurance market, the negotiating strength of the Obligors, and the terms of the insurance already in place. It may be necessary, for example, to generally qualify the insurance requirements by reference to what is available in the relevant market on reasonably commercial and economic terms.

Finally, the insurance provisions require, save where the terms of a policy of insurance require the proceeds of any claim to be applied in replacing, restoring or reinstating a Property, that the proceeds of any insurances be paid into the Deposit Account to be applied in prepayment of the Loans. The Company should consider whether this is appropriate, particularly in the context of the terms of the lease documents, or whether, absent an Event of Default (and an express requirement in the insurance policy itself), some or all of the proceeds should be available to the Obligors to replace or reinstate the relevant asset.

(j) Clause 23.11: Environmental Matters

Again, the provisions of the REF Document relating to environmental matters are extensive. However, they are, on the whole, qualified by reference to the relevant matter having or being "*reasonably likely to have*" a Material Adverse Effect.

However, the Company should consider the definitions relating to the environmental matters. For example, each Obligor is required to obtain and maintain all necessary 'Environmental Permits'. 'Environmental Permits' are defined to include those permits that are required for the operation of the business of any Obligor on or from any of the "*properties*" owned or used by that Obligor, and therefore the Company may want to tighten this such that it applies only to the 'Properties'.

These provisions are important for the Lenders, as it is possible that the breach of an environmental law relating to a Property could result in direct or indirect liability for a Lender if, for example, that Lender is at the relevant time acting as mortgagee in possession. For this reason, there is also an indemnity from each of the Obligors against any loss or liability incurred by a Finance Party "*as a result of any actual or alleged breach of any Environmental Law by any person*" where that loss "*would not have arisen if a Finance Document had not been entered into*".

CLAUSE 24: EVENTS OF DEFAULT

The REF Document incorporates the standard Events of Default from the Existing LMA Facility with the following principal changes:

- the breach by a 'Transaction Obligor', rather than just an Obligor, of a Finance Document (or a misrepresentation by a Transaction Obligor in a Finance Document) will, subject to agreed cure periods, result in an Event of Default. The definition of 'Transaction Obligor' is wider than just the Obligors, as it also includes the Company's shareholder and the Subordinated Creditors. This means that, for example, the breach of the Subordination Agreement by a Subordinated Creditor would trigger an Event of Default;
- the carve-out to the cross-default has been removed such that, amongst other things, any nonpayment or acceleration of any Financial Indebtedness, irrespective of how small or immaterial, will trigger an Event of Default;
- the insolvency Events of Default can be triggered by any Transaction Obligor;
- Events of Default relating to the security and the Security Documents have been included; and
- wording for the 'material adverse change' Event of Default has now been included (the Existing LMA Facility included this as an Event of Default but provided no suggested language). The REF Document states that if "*[a]ny event or circumstance occurs which[, in the opinion of the Majority Lenders, has or is reasonably likely to have a Material Adverse Effect]*", an Event of Default will result. The acceptability of this Event of Default will depend largely on how 'Material Adverse Effect' has been defined (see above on clause 1.1). However, in addition, the Company may wish to make this an objective test by removing the words "*in the opinion of the Majority Lenders*" (or, if this is not acceptable to the Lenders, by adding the word 'reasonable' between the words 'the' and 'opinion').

(a) Clause 24.9: Cessation of Business

It will be an Event of Default if an Obligor "*ceases, or threatens to cease, to carry on business except as a result of any disposal allowed under [the REF Document]*".

(b) Clause 24.12: Compulsory Purchase

If "*[a]ny part of any Property is compulsorily purchased or the applicable local authority makes an order for the compulsory purchase of all or any part of any Property*" and "*in the opinion of the Majority*

Lenders, taking into account the amount and timing of any compensation payable, the compulsory purchase has or will have a Material Adverse Effect", then an Event of Default will occur. As with the general 'material adverse change' Event of Default, the Company may wish to make this an objective test by removing the words "*in the opinion of the Majority Lenders, taking into account the amount and timing of any compensation payable*" (or possibly adding the word 'reasonable' between the words 'the' and 'opinion').

(c) Clause 24.13: Major Damage

If "*[a]ny part of any Property is destroyed or damaged*" and "*in the opinion of the Majority Lenders, taking into account the amount and timing of receipt of the proceeds of insurance effected in accordance with the terms of [the REF Document], the destruction or damage has or will have a Material Adverse Effect*", then an Event of Default will occur. If the compulsory-purchase Event of Default has been amended (see paragraph (b) above), the Company may wish to make a corresponding amendment to this Event of Default.

(d) Clause 24.14: Headlease

It will be an Event of Default if "*[f]orfeiture or irritancy proceedings with respect to a Headlease are commenced or a Headlease is forfeited or irritated*". The Company should consider whether this is applicable and, if so, whether this should be qualified by reference either to the forfeiture or irritancy having a Material Adverse Effect or where the Borrower can demonstrate to the reasonable satisfaction of the Agent that relief from such proceedings can be obtained. Where there is more than one Property, the Company may wish to consider recasting this as a mandatory prepayment event (see above on clause 24.13).

(e) Clause 24.15: Ownership of Obligors

If "*[t]he Company is not or ceases to be a legally and beneficially wholly owned Subsidiary of the Shareholder*", an Event of Default will occur. This Event of Default will be unnecessary if a mandatory prepayment event on a change of control of the Company has been included.

CLAUSES 25 AND 26: CHANGES TO THE PARTIES

(a) Clause 25: Changes to the Lenders

The Existing LMA Facility states that:

- the Lenders can assign or transfer their rights only to a person that is "*another bank or financial institution or to a trust, fund or other entity which is regularly engaged in or established for the purposes of making, purchasing or investing in loans, securities or other financial assets*"; and
- the prior consent of the Company is required before any assignment or transfer can be effected unless the assignee/transferee is another Lender or an affiliate of a Lender or it is made at a time when an Event of Default is continuing.

However, the REF Document provides for a more permissive approach to Lender transferability (which the LMA views as reflecting the current state of the real estate lending market) by allowing a Lender to freely assign or transfer its rights to any person "*other than an individual*" without any requirement to obtain the prior consent of any Obligor. Accordingly, the Lenders' rights and obligations under the REF Document are freely transferable at any time. The Company will therefore need to carefully consider whether this is acceptable.

However, it should be noted in this context that the REF Document retains the provisions in the Existing LMA Facility preventing an assignee/transferee of a Lender from claiming amounts under the tax gross-up or increased costs provisions in circumstances where the transferor was not claiming amounts under those provisions.

(b) Clause 26: Changes to the Obligors

As with the Existing LMA Facility, the REF Document prohibits any changes to the Obligors. However, the REF Document does permit, subject to the satisfaction of certain conditions precedent, the accession of additional 'Subordinated Creditors' (from which, amongst other things, the Obligors can borrow funds).

CLAUSES 27 TO 30: APPOINTMENT OF THE ADMINISTRATIVE PARTIES

The REF Document sets out the appointment of the Agent and the Arranger on terms very similar to those of the Existing LMA Facility. However, unlike the Existing LMA Facility (which is unsecured), the REF Document includes language appointing the Security Agent.

SCHEDULE 2: CONDITIONS PRECEDENT

As one would expect, the conditions precedent set out in the REF Document are far more extensive than the conditions precedent set out in the Existing LMA Facility. The additional conditions include:

"(i) a requirement for each Transaction Obligor (which includes the Subordinated Creditors) to provide corporate approvals and certifications;

(ii) financial information;

(iii) valuations;

(iv) archaeological, environmental and/or ground condition reports and structural surveys;

(v) confirmations from the insurance broker that the insurance provisions of the REF Document have been complied with;

(vi) undertakings from the Company's solicitors that it is holding, amongst other things, all title documents relating to the Properties;

(vii) reports on title, clear Land Registry searches and all other required property documents, authorisations, consents and documents; and

(viii) copies of the appointment of (and duty of care agreements from) the managing agent."

The Company should ensure that each such condition precedent is applicable to the transaction and, if so, is actually capable of being delivered within the required time period.

SUMMARY

The REF Document is likely to be used by many Lenders in the UK market—particularly bank lenders—as the basis for their loan documentation relating to real estate finance transactions involving investment properties. It is also likely that it will form the starting point for transactions which do not precisely fit the REF Document's assumed structure (for example, development loans, UK Lenders lending against non-UK properties, etc.).

There are, however, a number of areas where the 'market position' is less well defined or, more importantly, the market is currently in flux. Of particular note in this context is the changing regulatory landscape that will impact upon real estate loans, both in the UK and overseas. The implications of Basel III and the FSA's 'slotting' regime could both result in additional capital requirements for the lenders, and therefore it is important for the Company to carefully consider these, particularly in the context of the increased costs provisions.

We would expect, however, that many borrowers, depending on their negotiating strength, will seek to negotiate many of the provisions contained in this document. There are clearly a number of areas where the REF Document is likely to be regarded as unduly restrictive or onerous.

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