

Dated

11 JULY

2022

SPELLER METCALFE (MALVERN) LIMITED (1)

FILTON TOWN COUNCIL (2)

ACTIVE NATION UK LTD (3)

**DUTY OF CARE DEED
relating to**

Filton Sports and Leisure Centre

THIS DEED is made on

11 JULY

2022

BETWEEN:

- (1) **SPELLER METCALFE (MALVERN) LIMITED** (Company No. 03127386) whose registered office is Maple Road, Enigma Business Park, Malvern, Worcestershire, WR14 1GQ (the **Building Contractor**);
- (2) **FILTON TOWN COUNCIL** whose principal office is at Elm Park, Filton, South Gloucestershire BS34 7PS (the **Authority**), which expression includes its permitted successors in title and assigns); and
- (3) **ACTIVE NATION UK LTD** (company registration number 03072216 registered charity 10477742) whose registered office is at Unit 1b, Hatton Rock Business Centre, Hatton Rock, Stratford-Upon-Avon, Warwickshire, CV37 0NQ (**Active Nation**).

BACKGROUND

- (A) By a Leisure Operating Contract dated [11] July 2022 (the **Agreement**) Filton Town Council has appointed Active Nation to carry out, in relation to the Site, the provision of serviced leisure facilities for the Authority at the Site as contemplated by the Agreement including the carrying out of the Works and the provision of the Services and the design and construction of the Works.
- (B) By a design and build contract of even date (the **Building Contract**) Active Nation has appointed the Building Contractor to carry out, in relation to the Site, the design and construction of the Works.
- (C) The Building Contractor is obliged under the Building Contract to give a warranty in this form in favour of the Authority.
- (D) The Building Contractor and Active Nation have agreed to execute this Deed in favour of the Authority.

1 DEFINITIONS AND INTERPRETATIONS

Unless expressly defined otherwise in this Deed any defined term in this Deed shall have the same meaning given to such term in the Building Contract.

Intellectual Property Rights

any and all patents, trade marks, service marks, copyright, database rights, moral rights, rights in design, know how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attaching thereto which is created, brought into existence, acquired, used or intended to be used by the Building Contractor for the purpose of carrying out the Works;

Project Data

- (i) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the Facility (as defined in the Agreement) in each case that is used by or on behalf of the Building Contractor in connection with the provision of the Works or the performance of the Building Contractor's obligations under the Building Contract; and
- (ii) any other materials, documents or data acquired or brought into existence or used in relation to the Works or the Building Contract by or on behalf of the Building Contractor in connection with the provision of the Works or the performance of the Building Contractor's obligations under the Building Contract.

2 OPERATIVE PROVISIONS

In consideration of the payment of one pound (£1.00) by the Authority to the Building Contractor, receipt of which the Building Contractor acknowledges:

3 BUILDING CONTRACTOR'S WARRANTY AND LIABILITY

- 3.1 The Building Contractor warrants to the Authority that it has carried out and will continue to carry out its duties under the Building Contract in accordance with the Building Contract and that it has exercised and will continue to exercise, in carrying out the design of the Works, the level of skill and care reasonably to be expected from an appropriately qualified and competent professional designer providing those services in relation to a project of a similar size and scope to the Works. In particular and without limiting the generality of the foregoing the Building Contractor covenants with the Authority that it has carried out and will carry out and complete the Works in accordance with the Building Contract and duly observe and perform all its duties and obligations thereunder.
- 3.2 The Building Contractor shall have no liability under clause 3.1 or clause 11 of this Deed that is greater or of longer duration than it would have had as if in lieu of this Deed the Authority had been a party to the Building Contract as joint employer and the Building Contractor shall be entitled in any action or proceedings by the Authority to raise equivalent rights in defence of liability (except for set off or counterclaim). Upon the expiration of twelve (12) years from the date of practical completion of the Works, the liability of the Building Contractor under this Deed shall cease and determine, save in relation to any claims made by the Authority against the Building Contractor where proceedings have commenced prior to such date.
- 3.3 The Building Contractor shall have no liability to the Authority in respect of any delay in the completion of the Works howsoever caused save to the extent that the liability arises under the Building Contract and the Authority shall have exercised its right to step in under clause 10 of this Deed. Any claim in relation to a delay in completion of the Works but not otherwise will be extinguished to the extent that the Building Contractor has had deducted liquidated damages under the relevant clause of the Building Contract.

3.4 Nothing in this Deed shall entitle the Authority to exercise its rights under this clause 3 unless:

3.4.1 the Agreement (or the Active Nation's employment under it) has been terminated; or, in the absence of such termination

3.4.2 Active Nation has not (either itself or through its supply chain (whether through the Building Contractor or Leisure Operator or otherwise)) satisfied the potential claim by the Authority under this clause 3, including addressing and/or remedying the matter or circumstance giving rise to such claim, within a reasonable time of such matter or circumstance arising,

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

4 INTELLECTUAL PROPERTY

4.1 The Building Contractor shall make available to the Authority free of charge (and hereby irrevocably licences the Authority to use) all Project Data that might reasonably be required by the Authority. The Building Contractor shall obtain all necessary licences, permissions and consents necessary for it to make the Project Data available to the Authority on these terms, for the purposes of:

4.1.1 the Authority using the Works for the provision of Services (as defined in the Agreement) and for ancillary purposes, its duties under the Agreement and/or any statutory duties that the Authority may have; and

4.1.2 following termination of the Agreement or of Active Nation's employment under it, the design or construction of the Works and/or the operation, maintenance or improvement of the Works,

(together, the Approved Purposes), and in this clause 4 "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly. The Authority will not hold the Building Contractor liable for any use it may make of the Project Data for any purpose other than the Approved Purposes.

4.2 The Building Contractor:

4.2.1 hereby grants to the Authority, free of charge, an irrevocable non-exclusive and transferable (subject to the restrictions continued in clause 7 of this Deed) licence to use the Intellectual Property Rights that are or become vested in the Building Contractor for the Approved Purposes (save that the Building Contractor shall not be liable for any use made by any third party of any documents for any purpose other than that for which they were originally prepared or provided); and

4.2.2 shall (where any Intellectual Property Rights are or become vested in a third party) use all reasonable endeavours to procure the grant of a like licence to that referred to in clause 4.2.1 to the Authority,

in both cases, solely for the Approved Purposes.

4.3 The Building Contractor warrants to the Authority that it has used the standard of skill, care and diligence as set out in clause 3.1 to see that the Project Data (save to the extent duly appointed sub-contractors or consultants have been used to prepare the same) are its own original work and that in any event their use in connection with the Works will not infringe the rights of any third party.

4.4 Where a claim or proceeding is made or brought against the Authority that arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or equipment in connection with the Works infringes or the Works themselves infringe any Intellectual Property Rights of a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Authority otherwise than in accordance with this Deed, the Building Contractor shall indemnify the Authority at all times from and against all Direct Losses and Indirect Losses (as defined in the Agreement) arising as a result of such claims and proceedings.

5 INSURANCE

5.1 The Building Contractor hereby covenants with the Authority to:

5.1.1 take out and maintain professional indemnity insurance cover with a limit of indemnity that shall be a minimum of ten million pounds (£10,000,000) either each and every loss or in the aggregate (and if in the aggregate, then in any one (1) year of insurance a minimum of one (1) automatic reinstatement of the aggregate indemnity limit shall be required) in respect of each and every claim or series of claims arising out of the same occurrence (but in the aggregate for claims arising out of pollution or contamination and limited to £250,000 in the aggregate in relation to claims related to asbestos) in relation to the Works (**PI Insurance**) and that it will maintain such insurance with reputable insurers carrying on business in the European Union from the date hereof until twelve (12) years after Services Availability pursuant to the Agreement, provided that such insurance is generally available in the market to design and build contractors at commercially reasonable rates and terms and provided further that payment of any increased or additional premiums or more onerous terms required by insurers by reason of the Building Contractor's own claims record or other acts, omissions, matters or things peculiar to the Building Contractor will be deemed to be within the commercially reasonable rates and terms;

- 5.1.2 provide evidence (as and when reasonably required by the Authority) satisfactory to the Authority of the PI Insurance being in full force and effect from the date of the Building Contract (such evidence to include details of the cover);
- 5.1.3 provide the Authority with notice of:
 - 5.1.3.1 any cancellation of the PI Insurance not less than thirty (30) days prior to the relevant cancellation date; and
 - 5.1.3.2 any adverse material change to or suspension of cover relevant to the Works not less than thirty (30) days prior to such relevant change or suspension;
 - 5.1.3.3 inform the Authority as soon as reasonably practicable of any claim under the PI Insurance in respect of the Works in excess of one million pounds (£1,000,000) and provide such information to the Authority as the Authority may reasonably require in relation to such claim and provide notice of any potential breach of the aggregate limit of the policy; and

6 NOTICES

Any notice to be given by any party will be sufficiently served if sent by hand, by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on the date of delivery. Any notice sent by post will be deemed to have been duly served at the expiration of forty-eight (48) hours after the time of posting if the end of that period falls before 4.45pm on a Business Day and otherwise on the next Business Day.

7 ASSIGNMENT

The benefit of and the rights of the Authority under this Deed may be assigned without the consent of the Building Contractor on two (2) occasions only and the Authority will notify the Building Contractor in writing following any such assignment specifying the name and address of the assignee and the date of the assignment. The Building Contractor will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original beneficiary hereunder or by reason that the original beneficiary or any intermediate beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Site or that the original beneficiary or any intermediate beneficiary has not suffered any, or as much, loss.

8 AUTHORITY'S REMEDIES

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

9 INSPECTION OF PROJECT DATA

The Building Contractor's liabilities under this Deed will not be in any way reduced or extinguished by reason of any inspection or approval of the Project Data or attendance at site meetings or other enquiry or inspection which the Authority may make or procure to be made for its benefit or on its behalf.

10 STEP-IN RIGHTS IN FAVOUR OF THE AUTHORITY

10.1 The Building Contractor will not exercise or seek to exercise any right which may be or become available to it to terminate or treat as terminated or repudiated the Building Contract or its engagement under it or discontinue or suspend the performance of any duties or obligations thereunder without first giving to the Authority not less than twenty (20) Business Days' prior written (seven (7) days' prior written notice of suspension in the event of non-payment under the Building Contract) notice specifying the Building Contractor's ground for terminating or treating as terminated or repudiated the Building Contract or its engagement under it or discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the Building Contract. Within such period of notice:

10.1.1 the Authority may give written notice to the Building Contractor that the Authority will thenceforth become the client under the Building Contract to the exclusion of Active Nation and thereupon the Building Contractor will admit that the Authority is its client under the Building Contract and the Building Contract will be and remain in full force and effect notwithstanding any of the said grounds;

10.1.2 if the Authority has given such notice as aforesaid or under clause 10.3, the Authority shall accept liability for the Active Nation's obligations under the Building Contract and will as soon as practicable thereafter remedy any outstanding breach by Active Nation that properly has been included in the Building Contractor's specified grounds and which is capable of remedy by the Authority; and

10.1.3 if the Authority has given such notice as aforesaid or under clause 10.3, the Authority will from the service of such notice become responsible for all sums properly payable to the Building Contractor under the Building Contract accruing due after the service of such notice but the Authority will in paying such sums be entitled to the same rights of set-off and deduction as would have applied to Active Nation under the Building Contract.

- 10.2 Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by the Authority to the Building Contractor, the Authority will not be under any obligation to the Building Contractor nor will the Building Contractor have any claim or cause of action against the Authority unless and until the Authority has given written notice to the Building Contractor pursuant to clause 10.1.1 or clause 10.3 of this Deed.
- 10.3 The Building Contractor further covenants with the Authority that if the employment of Active Nation under the Agreement is terminated or if the Agreement is terminated by the Authority the Building Contractor, if requested by the Authority by notice in writing and subject to clause 10.1.2 and clause 10.1.3, will accept the instructions of the Authority to the exclusion of Active Nation in respect of its duties under the Building Contract upon the terms and conditions of the Building Contract and will if so requested in writing enter into a novation agreement in the form set out in Appendix 1 to this Deed whereby the Authority is substituted for Active Nation under the Building Contract.
- 10.4 If the Building Contractor is requested to enter into a novation agreement pursuant to clause 10.3, Active Nation agrees to enter into the same at the request of the Authority.
- 10.5 Active Nation acknowledges that the Building Contractor will be entitled to rely on a notice given to the Building Contractor by the Authority under clause 10.3 as conclusive evidence that the employment of Active Nation under the Agreement has been terminated or that the Agreement has been terminated.
- 10.6 The Authority may by notice in writing to the Building Contractor appoint another person to exercise its rights under this clause 10 subject to the Authority remaining liable to the Building Contractor as guarantor for its appointee in respect of its obligations under this Deed.
- 10.7 As from the date of service of notice under clauses 10.1.1 or 10.3 to the extent that the Building Contract operates by reference to the existence and application of the Agreement, the Building Contract shall be administered and construed as though the Agreement were continuing and the Building Contract shall therefore continue, subject to amendment only as necessary to reflect the fact that the Agreement may in fact have been terminated and the Authority has undertaken the obligations set out in clause 10.1.2.
- 10.8 Upon request by the Authority the Building Contractor agrees to co-operate with the Authority in determining the duties performed or to be performed by the Building Contractor and to provide a copy of the Building Contract and any variations thereto and details of all monies paid and due under the Building Contract.

11 **STANDARDS OF PRODUCTS AND MATERIALS**

The Building Contractor warrants that it has only used and will only use new materials and recycled materials that are in accordance with British Standards or Good Industry Practice only in carrying out the Works, unless the Authority agrees otherwise in writing or the contrary is set out in the Authority's Requirements (as defined in the Agreement))

and all goods used or included in the Works shall be of satisfactory quality, and subject to the standard of care as set out in Clause 3.1, the Building Contractor warrants that it has not used or included and will not use or include in the Works any of those products and materials listed in Schedule 9 (Prohibited Materials) of the Agreement nor any products or materials not in conformity with relevant British or European Union standards or codes of practice or which, at the time of use, are widely known to building contractors, or members of the relevant design profession to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used.

12 **SUB-CONTRACTORS**

Following a written request from the Authority the Building Contractor will (unless it has already done so) and/ or procure that its Principal Building Sub-Contractors (as defined in the Agreement) and members of the Professional Team (as defined in the Agreement) each execute a deed of collateral warranty in the relevant form specified in the Building Contract in favour of any person in whose favour the Building Contract obliges the Building Contractor to give or procure the giving of such a warranty.

13 **SEVERABILITY**

If any term, condition or provision of this Deed shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality and enforceability of the other provisions of or any other documents referred to in this Agreement.

14 **WAIVER**

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

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

15 **THIRD PARTY RIGHTS**

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This clause 15 does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

16 **GOVERNING LAW AND JURISDICTION**

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

17 **ACTIVE NATION ACKNOWLEDGEMENT**

Active Nation has entered into this Deed in order to acknowledge the arrangements effected hereby and undertakes to each of the Authority and the Building Contractor to

observe the provisions of this Deed at all times and not in any way to prejudice or affect the enforcement hereof or to do or permit to be done anything which would be a breach hereof.

18 **COUNTERPARTS**

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

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

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

Signature 

Name (block capitals) Mr CHAPLIN
Director

Witness signature 

Witness name MARK JOHNSON
(block capitals)

Witness address 


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

Signature

[Redacted Signature]

Name (block capitals)

SMART MARTIN

Director

Witness
signature

[Redacted Signature]

Witness name
(block capitals)

MARK JOHNSON

Witness address

[Redacted Address]
[Redacted Address]
[Redacted Address]

Executed as a deed, but not delivered)
until the first date specified on page 1, by)
FILTON TOWN COUNCIL acting by:)
)

[Redacted Signature]

Authorised Signatory

D. W. COLLINS

[Redacted Signature]

Authorised Signatory

A. P. MONK

[Redacted Signature]

L. A. REUBEN

Appendix 1
Form of Deed of Novation

THIS DEED is made on

20[]

BETWEEN:

- (1) **SPELLER METCALFE (MALVERN) LIMITED** (Company No 03127386) whose registered office is Maple Road, Enigma Business Park, Malvern, Worcestershire, WR14 1GQ (the **Building Contractor**);
- (2) **FILTON TOWN COUNCIL** of Elm Park, Filton, South Gloucestershire BS34 7PS (the Authority), which expression includes its permitted successors in title and assigns); and
- (3) **ACTIVE NATION UK LTD** (company registration number 03072216 registered charity 10477742) whose registered office is at Unit 1b, Hatton Rock Business Centre, Hatton Rock, Stratford-Upon-Avon, Warwickshire, CV37 0NQ (**Active Nation**).

WHEREAS

- (A) By a Leisure Operating Contract dated [] 2022 (the **Agreement**) the Authority appointed Active Nation to carry out in relation to Filton Sports and Leisure Centre (the **Site**) the design and construction of the Works (as defined in the Agreement).
- (B) By a design and build contract dated [] 2022 (the **Building Contract**) Active Nation appointed the Building Contractor to carry out the design and construction of the Works at the Site.
- (C) [The employment of Active Nation under the Agreement has been terminated] [the Agreement has been terminated by the Authority].
- (D) Active Nation has transferred or agreed to transfer its interest in (or granted or agreed to grant a subordinate interest in) the Site to the Authority.
- (E) The parties have agreed to novate the Building Contract to the Authority on the terms set out below.

IT IS AGREED

1 Novation of Building Contract

The Building Contract is hereby novated from Active Nation and the Building Contractor to the Authority and the Building Contractor.

2 Release of Active Nation

Active Nation shall no longer owe any duty or obligation to the Building Contractor under or in respect of the Building Contract whether by virtue of its terms or by virtue of any breach or otherwise.

3 Release of the Building Contractor

The Building Contractor shall no longer owe any duty or obligation to Active Nation under or in respect of the Building Contract whether by virtue of its terms or by virtue of any breach or otherwise.

4 Binding of the Building Contractor to the Authority

4.1 The Building Contractor binds itself to the Authority in the terms of the Building Contract as if the Authority were and always had been named in the Building Contract in place of Active Nation.

4.2 The Building Contractor warrants to the Authority that prior to the date of this Deed it has performed and that it will continue to perform its duties and obligations as required by and in accordance with the terms of the Building Contract.

4.3 The Authority shall not be precluded from recovering any losses incurred by the Authority or Active Nation resulting from any breach of clause 4.2 by reason that (if it be the case) the acts or omissions causing such breach occurred before this Deed took effect, or that Active Nation will not incur or has not or would not have incurred any such losses. No waiver by Active Nation, either express or implied, will affect the Building Contractor's liability to the Authority pursuant to this clause 4.

4.4 Upon the expiration of twelve (12) years from the date of completion of the Works in accordance with the Building Contract, the liability of the Building Contractor under this Deed shall cease and determine, save in relation to any claims made by the Authority against the Building Contractor and notified by the Authority to the Building Contractor in writing prior thereto.

5 Binding of the Authority to the Building Contractor

The Authority binds itself to the Building Contractor in the terms of the Building Contract as if the Authority were and always had been named in the Building Contract in place of Active Nation and as if all acts and omissions of Active Nation (including any wrongful acts or omissions) under and in respect of the Building Contract were the acts and omissions of the Authority.

6 Vesting of remedies in the Authority

All rights of action and remedies vested in Active Nation against the Building Contractor under and in respect of the Building Contract shall hereupon vest in the Authority.

7 Vesting of remedies against the Authority

All rights of action and remedies vested in the Building Contractor against Active Nation under and in respect of the Building Contract shall hereinafter lie against the Authority.

8 Amendment of the Building Contract

The Authority and the Building Contractor agree that the terms of the Building Contract shall be and are varied in the manner set out in Schedule 1.

9 Affirmation of the Building Contract

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

10 Third Party Rights

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

11 Governing Law and Interpretation

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

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

