

Dated

2023

WIRRAL COUNCIL

and

BIRKENHEAD SCHOOL

and

PRENTON RUFC LIMITED

and

THE OLD PARKONIANS ASSOCIATION LIMITED

and

RUGBY FOOTBALL FOUNDATION

and

FRITHMERE LIMITED

SECTION 106 AGREEMENT

pursuant to Section 106 of the Town and Country
Planning Act 1990 (as amended) in respect of
Noctorum Field, Noctorum and Prenton RUFC
Grounds, Prenton

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This Deed is dated the

day of

2023

Between

- (1) **WIRRAL COUNCIL** of Town Hall, Brighton Street, Wallasey, Wirral, CH44 8ED ("**the Council**");
- (2) **BIRKENHEAD SCHOOL** (CRN 4492250) care of The Bursar, Birkenhead School, 58 Beresford Road, Prenton, Wirral, Merseyside, CH43 2JD ("**the Owner**"); and
- (3) **PRENTON RUFC LIMITED** (CRN 8295033) whose registered office is at Prenton RUFC The Clubhouse, Prenton Dell Road, Birkenhead, CH43 3BS ("**Prenton**");
- (4) **THE OLD PARKONIANS ASSOCIATION LIMITED** (CRN 8670419) whose registered address is HM Curphey Memorial Ground And Clubhouse, Holm Lane, Birkenhead, Merseyside, CH43 2HU ("**Old Parkonians**");
- (5) **RUGBY FOOTBALL FOUNDATION** (CRN 4608134) (Charity No. 1100277) whose registered address is Rugby Football Union, 200 Rugby House, Twickenham Stadium, 200 Whitton Road, Twickenham, TW2 7BA ("**the Mortgagee**"); and
- (6) **FRITHMERE LIMITED** (CRN 02420072) whose registered address is New Hey Chester Road, Great Sutton, Ellesmere Port, Cheshire, England, CH66 2LS ("**Frithmere**").

Background

- (A) The Council is the local planning authority for the purposes of the Act for the area in which the Site is situated and is the authority by whom the obligations hereby created are enforceable.
- (B) The Owner is the freehold owner of Noctorum Field registered at HM Land Registry with title number MS251606.
- (C) Prenton is the freehold owner of the Prenton Site registered at HM Land Registry with title number MS598701.
- (D) Old Parkonians is the freehold owner of the Old Parkonians Site registered at HM Land Registry with title number MS597139.
- (E) The Mortgagee has the benefit of a legal charge over the Old Parkonians Site dated 11 December 2013.
- (F) Frithmere is the freehold owner of the Frithmere Land.
- (G) The Owner submitted the Application in respect of Development of Noctorum Field to the Council on [] and it was validated by the Council on [].
- (H) The parties have agreed to enter into this Deed with the intention that the obligations contained in this Deed may be enforced by the Council against the Owner, Prenton, Old Parkonians and Frithmere and their successors in title in relation to their interests (respectively) in Noctorum Field, the Prenton Site, the Old Parkonians Site and Frithmere Land

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It is agreed:

1. **Definitions and Interpretation**

1.1. For the purposes of this Deed the following expressions shall have the following meanings:

- “Act”** the Town and Country Planning Act 1990;
- "Affected Unit"** means any Affordable Rented Unit or Shared Ownership Unit that the Owner is unable to dispose of to a Registered provider and in lieu of the onsite provision of which an Off-Site Affordable Housing Contribution is to be paid to the Council in full accordance with the provisions of paragraph 1.4 of Part 1 of Schedule 2 hereof;
- “Affordable Housing”** housing provided to eligible households whose needs are not met by the market in accordance with the definition in Annex 2 of the National Planning Policy Framework (or any successor policy or legislation in respect of affordable housing);
- "Affordable Housing Units"** means those dwellings designated as Affordable Housing by the Affordable Housing Scheme;
- "Affordable Housing Scheme"** means a scheme for the provision of Affordable Housing within the Development to be approved in writing by the Council;
- "Affordable Rented Unit"** means Affordable Housing to be let at an Affordable Rent;
- "Affordable Rent"** means a rent which is not subject to the national rent regime but is subject to other rent controls that require a rent of no more than 80% of the local market rent or such other rent that may be permitted by Homes England (or any successor body to which the function of regulation of registered providers is transferred) including target rents;
- “Application”** the [outline] planning application for the demolition of the existing pavilion and erection of up to 33 dwellings (Use Class C3) and associated infrastructure (all matters are reserved with the exception of access) at Noctorum Field validated by the Council [] and allocated reference number [];
- "Chargee"** means any mortgagee or chargee of a Registered Provider and its successors in title or

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any receiver (including an administrative receiver) appointed by such mortgagee or chargee or any other person appointed under any security documentation to enable such mortgagee or chargee to realise its security or any administrator (howsoever appointed) including a housing administrator (each a "Receiver") or any persons or bodies deriving title through such mortgagee or chargee or Receiver;

**"Commencement
Development"**

of the date on which development pursuant to a relevant planning permission is commenced on a part of the Site (and where for the avoidance of doubt "planning permission" as defined for the purposes herein comprises more than one such Planning Permission the earliest date after the date hereof on which any such said planning permission is commenced on the Site) and/or the carrying out of any material operation in accordance with Section 56(4) of the Act (whichever is the earlier) provided that the following shall not amount to a material operation:

- (a) operations consisting of site clearance;
- (b) demolition work;
- (c) archaeological investigations;
- (d) investigations for the purpose of assessing ground conditions;
- (e) remedial work in respect of any contamination or other adverse ground conditions;
- (f) diversion and laying of services;
- (g) erection of any temporary means of enclosure; and
- (h) the temporary display of site notices or advertisements;

and "Commence Development" shall be construed accordingly;

"Development"

the development of Noctorum Field pursuant to the Planning Permission;

"Dwelling"

a unit of residential accommodation to be constructed pursuant to the Planning Permission;

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"Frithmere Land"	means that part of the Site edged [] on [];
"Index"	means the All In Tender Price Index published by the Building Cost Information Service of the Royal Institution of Chartered Surveyors or any successor organisation and "Indexation" and "Index Linked" are to be construed accordingly;
"Noctorum Field"	means that part of the Site edged [] on [];
"Occupation"	occupation for the purposes permitted by the Planning Permission but not including occupation by personnel engaged in construction, fitting out or decoration or occupation for marketing or display or occupation in relation to security operations and "Occupy" and "Occupied" shall be construed accordingly;
"Off-Site Affordable Housing Contribution"	means the sum of £[] ([] pounds) to be paid by the Owner to the Council and to be applied by the Council towards Affordable Housing within the administrative area of the Council the need for which arises as a consequence of the Development;
"Old Parkonians Site"	means that part of the Site edged [] on the Plan X;
"Old Parkonians Works"	means the installation of drainage at the Old Parkonians Site more specifically comprising: (a) []; (b) []; (c) [etc];
"Plan X"	the plan marked "Plan X" attached to this Deed at Appendix 1;
"Planning Permission"	the planning permission to be granted by the Council in substantially the same form as the draft attached at Appendix 2;
"Practical Completion"	the date upon which a certificate of practical completion is issued by the Owner's architect or such other person who is monitoring the

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development to which the term relates on behalf of the Owner

and "Practically Completed" shall be construed accordingly;

"Prenton Application"

means the application for planning permission for the formation of a turf playing pitch, associated drainage and the installation of [] no. floodlights submitted to the Council with reference number [];

"Prenton Site"

means that part of the Site edged [] on Plan X;

"Prenton Works"

means the creation of a new floodlit, natural turf pitch pursuant to planning permission granted by the Council further to Prenton Application on the required parts of the Prenton Site and the Frithmere Land;

"Protected Tenant"

means as the case may be:

- (a) a tenant who has exercised the right to acquire pursuant to the Housing Act 1996 or any other statutory provision for the time being in force (or equivalent contractual right) in respect of an Affordable Rented Unit; or
- (b) a tenant who has exercised a statutory right to buy (or equivalent contractual right) in respect of an Affordable Rented Unit.
- (c) has been granted a Shared Ownership Lease (where a share of the Affordable Housing Unit is owned by the tenant and a share is owned by the Registered Provider) in respect of a particular Affordable Housing Unit and the tenant has subsequently purchased from the Registered Provider all the remaining shares so that the tenant owns the entire Affordable Housing Unit; or
- (d) has acquired an Affordable Rented Unit from a Registered Provider through Social Homebuy funded pursuant to section 19(3) of the Housing and Regeneration Act 2008, or any amendment or replacement thereof;

AND FOR THE AVOIDANCE OF DOUBT any person or body and/or their mortgagee deriving

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title through or from any of the parties mentioned in paragraphs above;

- "Registered Provider"** means a registered provider of social housing as defined in Part 2 of the Housing and Regeneration Act 2008 who is registered with Homes England and has not been removed from the register.
- "Secretary of State"** means the Secretary of State for Levelling Up, Housing and Communities;
- "Shared Ownership Lease"** means such lease as shall from time to time be substantially in accordance with Homes England model form of shared ownership lease or such other successor bodies model form of lease;
- "Shared Ownership Unit"** means the Affordable Housing Units that are to be owned and managed by a Registered Provider such that they shall be occupied on the basis of a Shared Ownership Lease;
- "Site"** the parcels of land comprising Noctorum Field, the Frithmere Land, the Prenton Site and the Old Parkonians Site against which the obligations within this Deed may be enforced as shown edged red on Plan X and described in Schedule 1.

2. **Construction of this Deed**

- 2.1. Where in this Deed reference is made to any clause, paragraph or schedule or recital such reference (unless the context otherwise requires) is a reference to a clause, paragraph or schedule or recital in this Deed (unless the context otherwise requires).
- 2.2. Words importing the singular meaning where the context so admits include the plural meaning and vice versa.
- 2.3. Words of the masculine gender include the feminine and neuter genders and words denoting actual persons include companies, corporations and firms and all such words shall be construed interchangeable in that manner.
- 2.4. Any reference to an Act of Parliament shall include any modification, extension or re-enactment of that Act for the time being in force and shall include all instruments, orders, plans, regulations, permissions and directions for the time being made, issued or given under that Act or deriving validity from it.
- 2.5. References to any party to this Deed shall include the successors in title to that party and to any deriving title through or under that party and in the case of the Council the successors to their respective statutory functions.
- 2.6. The headings and contents list are for reference only and shall not affect construction.

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2.7. Any covenant by the Owner or the Council not to do any act or thing includes a covenant not to permit or allow the doing of that act or thing.

2.8. Insofar as any clause or clauses of this Deed are found (for whatever reason) to be invalid illegal or unenforceable then such invalidity illegality or unenforceability shall not affect the validity or enforceability of the remaining provisions of this Deed.

3. **Legal Basis**

3.1. This Deed is made pursuant to Section 106 of the Act and Section 111 of the Local Government Act 1972 and Section 1 of the Localism Act 2011 and all powers so enabling.

3.2. The covenants, restrictions and requirements imposed upon the Owner, Prenton, Old Parkonians and Frithmere under this Deed create planning obligations pursuant to Section 106 of the Act and are enforceable by the Council as local planning authority against the Owner, Prenton, Old Parkonians and Frithmere as further particularised in clause 5 of this Deed.

4. **Conditionality**

4.1. The obligations in this Deed in Schedule 2, are conditional upon:

4.1.1. the grant of the Planning Permission; and

4.1.2. the Commencement of Development.

5. **Covenants**

5.1. The Owner covenants with the Council so as to bind the Site to fully observe and perform the obligations in this Deed and hereby agrees that the Site shall be subject to the obligations, restrictions and covenants herein, such obligations being planning obligations for the purposes of Section 106 of the Act.

5.2. The Council covenants with the Owner to observe and perform the obligations on its part in this Deed including those obligations more particularly set out in Part 2 of Schedule 2.

5.3. Old Parkonians, Prenton and Frithmere covenant separately with the Council to observe and perform the obligations in this Deed including those obligations set out in Part 3 of Schedule 2 as they separately affect their respective parts of the Site.

6. **Local Land Charge**

6.1. This Deed shall be registrable as a local land charge by the Council.

6.2. Following the performance and satisfaction of all the obligations contained in this Deed the Council shall forthwith effect the cancellation of all entries made in the Register of Local Land Charges in respect of this Deed.

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7. **Communication and Council's Consent or Approval**

- 7.1. Where the agreement, approval, consent or expression of satisfaction is required by the Owner from the Council under the terms of this Deed such agreement, approval or consent or expression of satisfaction shall not be unreasonably withheld or delayed and any such agreement, consent, approval or expression of satisfaction shall be given on behalf of the Council by the Director of Planning and any notices shall be deemed to have been properly served if sent by recorded delivery to the principal address or registered office (as appropriate) of the relevant party.

8. **Termination of this Deed**

- 8.1. This Deed shall cease to have effect (insofar only as it has not already been complied with) if the Planning Permission shall be quashed, revoked or otherwise withdrawn (without the consent of the Owner) or it is modified by any statutory procedure or expires prior to the Commencement of Development.

9. **The Contracts (Rights of Third Parties) Act 1999**

- 9.1. Save as provided in respect of successors in title to the Site or any successor to the relevant statutory function of the Council this Deed shall not be enforceable by any third party pursuant to the Contracts (Rights of Third Parties) Act 1999 and no third party shall acquire any benefit, rights or claims whatsoever thereto.

10. **Liabilities**

- 10.1. No person shall be liable for any breach, non-performance and non-observance of any covenant, obligation or restriction or other provision of this Deed after it shall have parted with all or part of its interest in the Site (or the part of the Site to which the breach relates) but without prejudice to liability for any subsisting breach arising prior to parting with such interest.
- 10.2. No purchaser or tenant of any Dwelling to be constructed on the Site or any mortgagee thereof or a statutory undertaker shall be liable for any of the covenants contained in this Deed.
- 10.3. Nothing in this Deed shall prohibit or limit the right to develop any part of the Site in accordance with a planning permission other than the Planning Permission granted after the date of this Deed.

11. **Mortgagee's Consent**

- 11.1. The Mortgagee acknowledges and declares that this Deed has been entered into by Old Parkonians with its consent and that the Old Parkonians Site shall be bound by the obligations contained in this Deed and that the security of the mortgage over the Old Parkonians Site shall take effect subject to this Deed

PROVIDED THAT the Mortgagee shall otherwise have no liability under this Deed unless it takes possession of the Old Parkonians Site in which case it too will be bound by the obligations as if it were a person deriving title from Old Parkonians.

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12. **Council's Powers**

12.1. Nothing contained or implied in this Deed shall prejudice or affect the rights discretions powers duties and obligations of the Council under all statutes by-laws statutory instruments orders and regulations in the exercise of their functions as local authority.

13. **Waiver**

13.1. No waiver (whether expressed or implied) by the Council of any breach or default in performing or observing any of the covenants terms or conditions of this Deed shall constitute a continuing waiver and no such waiver shall prevent the Council from enforcing any of the relevant terms or conditions or from acting upon any subsequent breach or default.

14. **Dispute Provisions**

14.1. In the event of any dispute or difference arising between the parties to this Deed in respect of any matter contained in this Deed such dispute or difference shall be referred to an independent and suitable person holding appropriate professional qualifications to be appointed (in the absence of an agreement) by or on behalf of the president for the time being of the professional body chiefly relevant in England with such matters as may be in dispute and such person shall act as an expert whose decision shall be final and binding on the parties in the absence of manifest error and any costs shall be payable by the parties to the dispute in such proportion as the expert shall determine and failing such determination shall be borne by the parties in equal shares.

14.2. In the absence of agreement as to the appointment or suitability of the person to be appointed pursuant to clause 14.1 or as to the appropriateness of the professional body then such question may be referred by either part to the president for the time being of the Law Society for him to appoint a solicitor to determine the dispute such solicitor acting as an expert and his decision shall be final and binding on all parties in the absence of manifest error and his costs shall be payable by the Owner.

14.3. Any expert howsoever appointed shall be subject to the express requirement that a decision was reached and communicated to the relevant parties within the minimum practicable timescale allowing for the nature and complexity of the dispute and in any event not more than twenty-eight working days after the conclusion of any hearing that takes place or twenty-eight working days after he has received any file or written representation.

14.4. The expert shall be required to give notice to each of the said parties requiring them to submit to him within ten working days of notification of his appointment written submissions and supporting material and the other party will be entitled to make a counter written submission within a further ten working days.

15. **Indexation**

15.1. The Old Parkonians Contribution and Prenton Contribution shall each be increased by an amount equivalent to the increase in the Index from the date of this Deed until the date on which such sum is payable.

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16. **Jurisdiction**

16.1. This Deed is governed by and interpreted in accordance with the law of England and Wales.

17. **Delivery**

17.1. The provisions of this Deed (other than this clause which shall be of immediate effect) shall be of no effect until this Deed has been dated.

18. **Future / Amended Planning Permission(s)**

18.1. In the event that a condition or conditions to the Planning Permission is or are varied pursuant to Section 96A of the Act this Deed shall continue in full force in respect of the Planning Permission with the relevant condition or conditions so varied.

18.2. In the event that an application is made pursuant to Section 73 of the Act for an amendment to the Planning Permission and planning permission is granted in respect of that application references to Planning Permission in this Deed shall include the new planning permission granted pursuant to Section 73 of the Act and this Deed shall apply to and remain in full force in respect of that new planning permission without the need for a further agreement to be entered into pursuant to Section 106 of the Act.

19. **Exemptions**

19.1. Subject to clause 19.2 below from the date of Practical Completion of the Affordable Dwellings they shall not be used other than for Affordable Housing in accordance with the Affordable Housing Scheme.

19.2. Clause 19.1 of this Deed shall not be binding on a Protected Tenant or a Chargee (or any receiver (including an administrative receiver) appointed by such Chargee or any other person appointed under any security documentation to enable such Chargee to realise its security or any administrator (howsoever appointed) including a housing administrator (each a Receiver)) of the whole or any part of the Affordable Dwellings or any persons or bodies deriving title through such Chargee or Receiver

PROVIDED THAT (in the case of a Chargee):

19.2.1. such Chargee or Receiver shall first give written notice to the Council of its intention to dispose of the Affordable Housing Units and shall have used reasonable endeavours over a period of three months from the date of the written notice to complete a disposal of the Affordable Housing Units to another registered provider for a reasonable consideration not less than the amount due and outstanding under the terms of the relevant security documentation including all accrued principal monies, interest and costs and expenses; and

19.2.2. if such disposal has not completed within the three month period, the Chargee or Receiver shall be entitled to dispose of the Affordable Housing Units free from the provisions in this Deed which provisions shall determine absolutely.

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20. **Legal Fees**

20.1. The Owner covenants to pay to the Council on the date of completion of this Deed the sum of £[] ([] pounds) in respect of the Council's legal costs in the preparation of this Deed.

IN WITNESS whereof the parties hereto have executed this Deed on the day and year first before written.

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Schedule 1 – The Site

[DESCRIPTION HERE]

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Schedule 2 – Planning Obligations

Part 1 – The Owner's Covenants with the Council

The Owner covenants with the Council as follows:

1. Affordable Housing

- 1.1.** Prior to Commencement of Development the Owner shall submit an Affordable Housing Scheme to the Council for approval which shall deal with the provision of Affordable Housing Units pertaining to the Development and which shall include the following:
 - 1.1.1. The numbers, type, size and location of the Affordable Housing Units save that nothing shall require the total number of Dwellings to be provided as Affordable Housing Units across the whole of the Site to be greater than seven (7) in number;
 - 1.1.2. Arrangements for the marketing of the Affordable Housing Units;
 - 1.1.3. The timing of the construction of the Affordable Housing Units in relation to the Occupation of the Open Market Dwellings;
 - 1.1.4. Details of arrangements the Council may reasonably require to ensure that the Affordable Housing Units remain as Affordable Housing to first and all subsequent occupiers including (but not limited to) details of any restrictions on title to secure affordable housing provisions in perpetuity save where the exemptions in clause 19 of this Deed apply;
 - 1.1.5. The basis on which any of the Affordable Housing Units may be occupied whether in respect of their first becoming occupied and/or in relation to subsequent occupations or disposals to include the occupancy criteria to be used for determining the initial and subsequent Occupiers of the Affordable Housing Units;
- 1.2. The Owner shall carry out the Development in accordance with the terms of the Affordable Housing Scheme as approved by the Council for the purpose of paragraph 1.1.
- 1.3. To the extent that the Affordable Housing Scheme is approved in a form that authorises the construction and delivery of Affordable Rented Units or Shared Ownership Units all such Affordable Housing shall be disposed of to a Registered Provider.
- 1.4. Where, despite having used reasonable endeavours over a continuous period of three months proceeding the Commencement of the Development to transfer any of the Affordable Housing for the purposes of paragraph 1.3 hereof to a Registered Provider the Owner has been unable to secure such disposal then the Owner shall be entitled to pay the Off-Site Affordable Housing Contribution to the Council in lieu of the on-site provision of Affordable Housing by way of those Affected Units.

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1.5. Upon payment of the Off-Site Affordable Housing Contribution the Owner shall be free to dispose of any Affected Units free from the restrictions in this paragraph 1 of Part 1 of this Schedule 2 of this Deed and the Affordable Housing Scheme.

2. **Prenton Works**

2.1. The Owner shall submit the Prenton Application to the Council for the laying out and improvement of the Prenton Site and Frithmere Land comprising the Prenton Works no later [than the Commencement of the Development] and shall not Commence the Development until such planning permission has been duly granted by the Council.

2.2. The Owner shall not cause or permit the [Commencement/the Occupation of more than [x]no. Dwellings at Noctorum Field] unless and until the Prenton Works are substantially complete in full accordance with the planning permission granted by the Council pursuant to paragraph 2.1 hereof.

3. **Old Parkonians Works**

3.1. The Owner shall not cause or permit [Commencement/the Occupation of more than [x]no. Dwellings at Noctorum Field] unless and until the Old Parkonians Works are substantially complete

Part 2 – The Council’s Covenants with the Owner

The Council covenants with the Owner as follows:

1. At the written request of any party, the Council shall provide written confirmation of the discharge of the obligations contained in this Deed when satisfied that such obligations have been performed to that party.
2. To use (or procure the use of) all sums received under the terms of this Deed for the purposes specified in this Deed for which they are to be paid.
3. In the event that all or part of the Off-Site Affordable Housing Contribution remains unexpended at the end of the period of 5 years from the date when the contribution was received in full by the Council then the Council shall within 28 days of a written request to do so repay any unexpended sums to the person who made the payment.
4. At the written request of the Owner the Council shall provide written confirmation of whether and how the Off-Site Affordable Housing Contribution has been spent and shall provide such evidence of expenditure as reasonably requested.
5. To issue the Planning Permission on the date hereof or as soon as reasonably practicable thereafter.

Part 3 – Prenton and Frithmere Covenants

1. **Prenton Works**

1.1. Prenton covenants with the Council to substantially complete the Prenton Works upon the Prenton Site no later than []

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1.2. Frithmere covenants with the Council to substantially complete the Prenton Works upon the Prenton Site no later than [].

2. **Old Parkonians Works**

2.1. Old Parkonians covenant with the Council to substantially complete the Old Parkonian Works on the Old Parkonian Site no later than [].

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Appendix 1 – Plans

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Appendix 2 – Draft Planning Permission

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The Common Seal of)
WIRRAL COUNCIL)
was hereunto affixed)
in the presence of:)

.....
Duly Authorised Signatory

Signed as a Deed by
BIRKENHEAD SCHOOL

In the presence of:

Signature of Witness:

Name:

Address:

.....

Occupation:

Signed as a Deed by
PRENTON RUFC LIMITED

In the presence of:

Signature of Witness:

Name:

Address:

.....

Occupation:

Signed as a Deed by
THE OLD PARKONIANS ASSOCIATION LIMITED

In the presence of:

Signature of Witness:

Name:

Address:

.....

Occupation:

**Signed as a Deed by
FRITHMERE LIMITED**

In the presence of:

Signature of Witness:

Name:

Address:

.....

Occupation:

**Signed as a Deed by
RUGBY FOOTBALL FOUNDATION**

In the presence of:

Signature of Witness:

Name:

Address:

.....

Occupation: