

Schedule of Standard Terms and Conditions

BACKGROUND

ADVANTAGE FINANCE LIMITED at Christchurch (**"the Lender"**) has entered into the Commercial Loan Facility Agreement to which this Schedule applies (**"the Agreement"**) with the persons therein named as Borrower and (if any) as Guarantor on the condition that the terms and conditions set out in this Schedule shall be incorporated in and form part of the Agreement.

TERMS AND CONDITIONS

1. INTERPRETATION

1.1 **Definitions:** In this Agreement, unless the context otherwise requires:

"Agreement" means the agreement incorporating the Schedule of Key Terms to which this Schedule applies

"Authorised Signatory" means each director and the secretary of the Borrower severally and such other persons as the Borrower may nominate as authorised signatories for the purposes of this Agreement by not less than three (3) Business Days notice in writing to the Lender together with a copy of a resolution of the directors of the Borrower approving that nomination.

"Borrower" includes the successors and permitted assignees of the Borrower and unless the context otherwise requires, includes the Guarantor (and the existence of separate references to the Guarantor in conjunction with "Borrower" in this Agreement shall not give rise to any contrary inference in any instance where "Borrower" appears alone) to the intent that wherever the expression "Borrower" appears it shall be construed as a reference to the Borrower and the Guarantor unless the context otherwise demands or the Lender in its sole discretion decides that it would be adverse to the Lender's interests so to construe and where two or more persons are named herein as the Borrower the obligations and agreements on their part contained or implied herein shall bind them and any two or more of them jointly and each of them severally.

"Business Day" means a day upon which the majority of trading banks are generally open for business in Auckland and Wellington, New Zealand.

"Drawdown Date" means the date as specified by the Borrower in a Drawdown Notice, upon which the Borrower wishes to make a Drawing of the Loan in accordance with this Agreement being a date which is no less than one Business Day after the service of the Drawdown Notice.

"Drawdown Notice" means a notice to the Lender signed by an Authorised Signatory on behalf of the Borrower or the Solicitor acting for the Borrower requesting a Drawing of the Loan in accordance with this Agreement.

"Drawing" means a drawing of the Loan, or part of the Loan, by the Borrower in accordance with this Agreement.

"Event of Default" means any of the events specified as such in clause 10.1.

"Guarantor" means the Guarantor (if any). If the Guarantor shall consist of two or more parties such expression shall mean and include throughout this

Agreement all those parties and each of them and shall so far as the context admits be construed in the singular as well as in the plural. All covenants, agreements, undertakings and warranties in this Agreement whether expressed or implied on the part of the Guarantor shall be deemed to be joint and several. None of the persons included in the expression the "Guarantor" shall as against the Lender be entitled to any of the rights or remedies, whether legal or equitable, of a surety as regards the indebtedness or liabilities of any of the other persons included in the expression "Guarantor".

"Interest Payment Date" means the last day of each Interest Period for so long as there are any Moneys Owed pursuant to this Agreement.

"Interest Period" shall have the meaning specified in clause 5.2.

"Lender" includes the successors and assigns of the Lender.

"Material Adverse Effect" means something which has a material adverse effect on:

- (a) the Borrower's financial condition or operations; or
- (b) the Borrower's ability to perform and comply with its obligations under this Agreement or any of the Security Documents; or
- (c) as the context may require, the Lender's ability to recover the Loan and any other moneys payable under this Agreement or any of the Security Documents or to enforce performance of the Borrower's obligations under this Agreement or any of the Security Documents.

"Moneys Owed" means all principal, interest, capitalised interest, default interest, fees, costs, expenses, charges and other moneys of whatever nature owed or payable by the Borrower to the Lender under this Agreement or the Security Documents or the loans referred to in the recitals hereto or otherwise howsoever.

"Potential Event of Default" means any event or circumstance which, if it continued after the giving of any notice or the expiry of any grace period, would or may become an Event of Default.

"Security Documents" means this Agreement and the documents and securities granted in favour of or obtained by the Lender which secure the Moneys Owed (including but not limited to the documents listed in the Agreement).

"Total Moneys Owed" means the aggregate of the Moneys Owed.

1.2 **References:** In this Agreement, unless the context otherwise requires:

"agreement" includes a contract, deed, licence, franchise or undertaking (in each case whether oral or written);

"assets" of any person includes all present and future assets, undertaking, revenues (including any right to receive revenues), rights, benefits, choses in action and, if applicable, uncalled capital;

"charge" includes a fixed or floating charge, mortgage, encumbrance, lien, pledge, hypothecation, trust, financial lease, title retention, "hold back" or "flawed asset" arrangement or other

security interest or arrangement of whatsoever nature;

"consent" includes an approval, authorisation, permission, exemption, filing, recording, registration or other act of similar effect;

one person being **"controlled"** by another means that other person (whether directly or indirectly and whether by the ownership of share capital, the ability to exercise voting power, contract or otherwise) has the power to appoint or remove the majority of the members of the governing body of that person or otherwise controls or has the power to control the affairs of that person and **"control"** shall be construed accordingly;

a **"disposal"** and to **"dispose"** of an asset includes a sale, gift, transfer or any other kind of disposal of, or the grant of an option in respect of, a right or interest, legal or equitable, in that asset or any agreement for any of the foregoing;

a **"directive"** includes a present or future directive, regulation or requirement (in each case, whether or not having the force of law but, if not having the force of law, the compliance with which is in accordance with the general practice of persons to whom the directive is addressed or applies);

the **"dissolution"** of a person also includes the winding-up or liquidation or bankruptcy of that person or the equivalent procedure under the law of any jurisdiction in which that person is incorporated, domiciled, resident, carries on business or has assets;

"dollars" or **"\$"** means New Zealand dollars, or such other lawful currency of New Zealand from time to time;

"guarantee" includes an indemnity, and any other obligation (whatever called) of any person to pay, purchase, provide funds or underwrite, or otherwise be responsible for the indebtedness of any person, or any arrangement or agreement that has a similar effect (and **"guaranteed"** and **"guarantor"** shall be construed accordingly);

"GST" means goods and services tax levied under the Goods and Services Tax Act 1985;

"holding company" has the meaning ascribed to it by Sections 5 and 6 of the Companies Act 1993;

"indebtedness" includes any obligation (whether present or future, actual or contingent, secured or unsecured, as principal, surety or otherwise) for the payment or repayment of money;

"laws" means all applicable statutes, regulations, by-laws, orders in council, judgments and decrees, and includes common or customary law, of any relevant jurisdiction and any other measure which has the force of law;

"month" means calendar month;

"or" includes **"and/or"**;

"person" includes any individual, company, corporation, partnership, joint venture, association, trust, state or agency of state, whether or not having separate legal personality;

"subsidiary" has the meaning ascribed to it by Sections 5 and 6 of the Companies Act 1993 and also includes an "in-substance subsidiary" as defined in the New Zealand Society of Accountants Statement of Standard Accountancy Practice Number 8;

"tax" includes any present or future tax, duty, levy, impost, charge, fee, deduction or withholding of any nature and whatever called, imposed or assessed by any government, state, municipal authority or other person whomsoever and includes any penalty,

interest, surcharge or other amount payable in connection with the foregoing, and **"taxation"** shall be construed accordingly; and

"written" and **"in writing"** includes all means of reproducing words in a tangible and permanently visible form, and includes reproduction by facsimile.

1.3 **General:** Unless otherwise stated or the context otherwise requires, this Agreement shall be construed as follows:

- (a) Headings are inserted for reference only and shall be ignored in construing this Agreement.
- (b) Words importing one gender include the other genders and the use of a pronoun shall be construed accordingly.
- (c) Words importing the singular include the plural and vice versa.
- (d) References to clauses and schedules are references to clauses and schedules in this Agreement.
- (e) References to dates or times are references to dates or times in New Zealand, unless otherwise expressly stated.
- (f) References to any document are references to that document as varied, amended or novated from time to time.
- (g) References to any specific statute, regulation, order, bylaw or other legislation are references to such statutes, regulations, orders, bylaws or other legislation as amended, consolidated, re-enacted, substituted or extended from time to time.
- (h) References to a party in this Agreement includes the representatives, successors and permitted assigns of that party.
- (i) The execution of this Agreement shall be in the form appropriate as for a deed and as between the parties and for all other purposes these presents shall have the status of and be construed as a deed.
- (j) If the Borrower is not a company such provisions of this Schedule that apply to companies provided that with sensible modification they can be made to apply to the Borrower or any of them shall so apply as so modified.

1.4 **Negative Obligations:** Any obligation under this Agreement not to do anything shall be deemed to include an obligation not to suffer, permit or cause that thing to be done.

2. THE LOAN

All references in this Schedule to **"the Loan"** are references to the Loan as it may be increased, reduced or extended from time to time.

3. CONDITIONS PRECEDENT

3.1. The obligations of the Lender to make the Loan available to the Borrower pursuant to this Agreement shall be subject to the conditions that the Lender has received, not later than two (2) Business Days before the first Drawdown Date or such later date as the Lender may in its discretion approve, the following:

- (a) **Security Documents:** An original copy of this Agreement and the Security Documents together with all discharges, releases and other documents as may be required to register the Security Documents and to afford the Lender the priority the Lender requires, if applicable;

- (b) **Constitution:** In relation to the Borrower, certified true, up to date and complete copies of the certificate of incorporation, memorandum and articles of association or other constitutional documents, and a current list of the directors and the secretary;
- (c) **Drawdown Notice:** A notice from the Borrower, signed by an Authorised Signatory, requesting the Lender to advance to the Borrower a Drawing on a Drawdown Date;
- (d) **Fees:** Payment by the Borrower to the Lender and to the Lender's solicitors of all fees due to be paid on or before the Drawdown Date;
- (e) **Consents:** Evidence that all consents and approvals as may be necessary to authorise the transactions contemplated by this Agreement and the Security Documents have been obtained and remain in full force and effect;
- (f) **Insurance:** Evidence satisfactory to the Lender that the Borrower's insurance obligations under this Agreement and the Security Documents have been complied with (in the absence of any specific provision in any Security Document the Borrower's obligation is to insure all security assets on a replacement basis of if that is not possible then for full insurable value);
- (g) In the event that the Guarantor has declined to take separate advice, a copy of the Guarantor's written instruction to the Borrower's solicitor accordingly.
- (h) Confirmation to the Lender's satisfaction that there has been compliance with the Resource Management Act 1991 and the Building Act 1991 in respect of the activities of the Borrower and the use to which any property to which any of the security documents relate is being or will be put and building construction works or other activities which the Borrower is about to undertake.
- (i) Satisfaction of all conditions precedent and pre-conditions detailed in the Lender's loan offer to the Borrower.
- 3.2 **Form of Security Documents:** All the documents and other items referred to in clause 3.1 above shall be:
- (a) **Form:** In a form satisfactory in all respects to the Lender; and
- (b) **Duly Executed:** Where applicable, duly executed by all relevant parties and in registrable form.
- 3.3 **Satisfaction of Conditions Precedent:** The Borrower undertakes to satisfy, or procure the satisfaction of, the conditions precedent specified in clause 3.1 on or before the first Drawdown Date.
4. **DRAWINGS**
- 4.1 The Lender shall not be obliged to make a Drawing available to the Borrower if:
- (a) **Event of Default:** An Event of Default or Potential Event of Default has occurred on or before the Drawdown Date, or will occur as a result of making the Drawing;
- (b) **Representations False:** The representations, warranties and undertakings or any of them in this Agreement or the Security Documents are not true, accurate and have not been fully observed in all respects as at the Drawdown Date as if given on the Drawdown Date with reference to the circumstances existing at that time; and
- (c) **No Market Disruption:** An event mentioned in clause 11 of this Agreement has occurred.
- 4.2 **Drawdown Notice Irrevocable:** A Drawdown Notice once given by the Borrower shall be irrevocable by the Borrower and the Borrower shall be obliged to take the Drawing in accordance with that Drawdown Notice, unless otherwise agreed by the Lender in its discretion.
- 4.3 **Drawdown of the Loan:** Subject to the terms of this Agreement the Lender shall advance the Loan to the Borrower or the Borrower's solicitors or such other bank account as the Lender may in its discretion approve by direct bank credit.
5. **INTEREST**
- 5.1 **Payment of Interest:** Subject to the provisions of clause 6 the Borrower shall pay to the Lender on each Interest Payment Date interest in arrears at the Interest Rate on the Total Moneys Owed for the time being outstanding during the preceding Interest Period or any part of it (interest being calculated daily pursuant to clause 5.3). In the event that the Borrower fails to make payment of any such amount on the due date for payment, the amount of the overdue payment shall be added to the principal amount of the Loan and shall itself attract interest at the then applicable interest rate. Interest remains payable for so long as there are Moneys Owed under this Agreement or the Security Documents.
- 5.2 **Interest Periods:** In this Agreement the term "Interest Period" shall mean a period of one month (or such other period as the Lender may stipulate by notice to the Borrower from time to time) provided that:
- (a) the first Interest Period shall commence on the Drawdown Date and shall end on the last day of that Interest Period;
- (b) each subsequent Interest Period shall commence on the day following the last day of the preceding Interest Period;
- (c) if any Interest Period would otherwise end on a day which is not a Business Day then that Interest Period shall be shortened to the immediately preceding day which is a Business Day; and
- (d) Interest Periods will continue to apply for as long as there remains any Moneys Owed.
- 5.3 **Calculation of Interest:** Interest shall:
- (a) accrue and be calculated on a daily basis and charged to the Borrower on the last day of each calendar month; and
- (b) be calculated on the basis of days elapsed and a three hundred and sixty five (365) day year.
- 5.4 **Certificate of Lender Conclusive:** The certificate of the Lender as to the rate or amount of interest payable pursuant to this Agreement shall be conclusive and binding upon the Borrower save in the case of manifest error or fraud.
- 5.5 **Interest Review:** The Lender may at any time and from time to time during the currency of this Agreement vary all or any of the Interest Rate or the margin payable hereunder, together with the monthly instalments consequently payable by the Borrower hereunder as follows:

- (a) The Lender shall give to the Borrower at least five (5) Business Day's notice of the Lender's intention to vary the interest rate (including, where applicable, the Lender's Base Rate) by serving notice in accordance with clause 23;
- (b) Any variation of interest rate, howsoever served shall effect a corresponding alteration in the instalments payable pursuant to this Agreement;
- (c) The interest rates as so varied shall become effective on a date to be specified in the said notice, and the instalments so varied shall be payable from and including the interest date next following the date specified in such notice;
- (d) On receipt of the said notice the Borrower shall be entitled to repay the Loan together with interest thereon at the existing rate to the date of repayment on or before the date specified in the said notice and interest shall cease to be payable on the moneys so repaid from the date of repayment of the same.

6. HIGHER INTEREST RATE

- 6.1 **Higher Interest Rate:** Only in respect of a payment which is made on or before its due date and there being, as at the payment date, no Event of Default will the interest content of that payment be accepted at the Lower Interest Rate in lieu of interest at the Higher Interest Rate.
- 6.2 **Higher Interest Rate on Moneys Owed:** The Lender shall be entitled to charge interest at the Higher Interest Rate on all charges expenses and costs (including legal fees computed on a solicitor and own client basis) incurred by the Lender in the enforcement or attempted enforcement of this Agreement or the Securities.
- 6.3 **Interest until Date of Payment:** If the Lender obtains a judgment against the Borrower for any sum payable pursuant to this Agreement, the Borrower shall pay to the Lender interest on the sum for which judgment is obtained at the Higher Interest Rate from the date of judgment until the date of payment of such sum.

7. REPAYMENT

All mandatory repayments of the principal amount of the Loan shall be made to the Lender in cleared funds by 3.00 pm on the day on which the payment is due or if that is not a Business Day then the time for payment shall be shortened to the immediately preceding day which is a Business Day subject to clause 21.2.

8. REPRESENTATIONS AND WARRANTIES

- 8.1 The Borrower represents and warrants to and for the benefit of the Lender as follows:
 - (a) **Status:** If the Borrower is a company that it is duly incorporated and existing under the laws of New Zealand.
 - (b) **Powers:** The Borrower has the power to enter into, exercise its rights, perform and comply with its obligations under and engage in the transactions contemplated by this Agreement and the Security Documents;
 - (c) **Authorisation and Consents:** All actions, conditions and things required to be taken, fulfilled and done (including the obtaining of any necessary consents) in order to:

- (i) enable the Borrower lawfully to enter into, exercise its rights and perform and comply with its respective obligations under this Agreement and the Security Documents;
- (ii) ensure that those obligations are valid, legally binding and enforceable;
- (iii) ensure that those obligations rank and will at all times rank in accordance with the provisions of the First Schedule to this Agreement; and
- (iv) make this Agreement and the Security Documents admissible in evidence in the Courts of New Zealand

have been taken, fulfilled and done;

- (d) **Obligations Binding:** Its obligations under this Agreement and the Security Documents are legal and valid obligations, binding on the Borrower in accordance with their respective terms;
- (e) **Non-Violation of Laws:** Its entry into, exercise of its rights or performance of or compliance with its obligations under this Agreement or the Security Documents do not and will not violate or exceed any borrowing or other power or restriction granted or imposed by:
 - (i) any law to which it is subject; or
 - (ii) the constitutional documents of the Borrower;
- (f) **Non-Violation of Other Agreements:** Its entry into, exercise of its rights or performance of or compliance with its obligations under this Agreement or the Security Documents do not and will not:
 - (i) violate any agreement to which it is a party or which is binding on it or its assets; or
 - (ii) result in the existence of, or oblige it to create any charge over any of its assets other than a charge in favour of the Lender;
- (g) **No Default:** No Event of Default or Potential Event of Default has occurred or will occur as a result of making the Loan and it is not in breach of or default under any agreement which is binding on it or any of its assets to an extent or in a manner which could have a Material Adverse Effect on the Borrower;
- (h) **Existing Charges:** Except as otherwise permitted under this Agreement, no charge exists on or over its assets;
- (i) **Accounts:** The accounts of the Borrower (including the profit and loss accounts and balance sheets) for the most recently ended financial year together with the notes to such accounts, as most recently delivered to the Lender pursuant to the terms of this Agreement:
 - (i) save as stated in those notes, were prepared and, if required, audited in accordance with generally accepted New Zealand accounting principles consistently applied and in accordance with all relevant laws;
 - (ii) give a true and fair view of the Borrower's financial condition and operations as at the date of those accounts and for the financial year then ended; and

- (iii) to the extent required by generally accepted New Zealand accounting principles consistently applied, disclose or reserve against all the Borrower's liabilities (contingent or otherwise) as at that date all material unrealised or anticipated losses from any commitment entered into by it and which existed on that date;
 - (j) **No Material Adverse Change:** There has been no change which could have a Material Adverse Effect on the Borrower since the date at which the accounts referred to immediately above were made up;
 - (k) **Litigation:** No litigation, arbitration or administrative proceeding is current or pending or, so far as the Borrower is aware, threatened against it:
 - (i) to restrain the entry into, exercise of any of its rights under or performance or enforcement of or compliance with any of its obligations under this Agreement or the Security Documents; or
 - (ii) which has or could have a Material Adverse Effect on it;
 - (l) **Winding Up:** Neither the Borrower nor any Guarantor have any action or legal proceedings started or threatened against it for their winding up, dissolution, or bankruptcy or for the appointment of a receiver, receiver and manager, statutory manager, trustee or similar officer of it or all or any of its assets and the Borrower is solvent and able to pay its indebtedness as it falls due;
 - (m) **Full Disclosure:** All factual information provided by it in connection with this Agreement or the Security Documents was true, complete and accurate in all material respects at the date it was provided and it is not aware of any material facts or circumstances which have not been disclosed to the Lender and which, if disclosed, might reasonably be expected to adversely affect the decision of a person considering whether to provide finance to the Borrower; and
 - (n) **Accuracy of Forecasts:** All forecasts and expressions of opinion contained in any reports furnished by the Borrower to the Lender have been made after due and proper consideration and are based on facts known (or which ought reasonably to be known) to the Borrower.
- 8.2 **Repetition:** Each of the representations and warranties contained above will be correct and complied with in all respects on the date of this Agreement and on each due date thereafter for payment of indebtedness under this Agreement, as if given on that date by reference to the facts and circumstances then prevailing.
- 8.3 **Reliance of Representations:** The Borrower acknowledges that the Lender has been induced to enter into this Agreement and to provide the Loan in reliance upon its representations and warranties in this clause 8.
9. **UNDERTAKINGS**
- 9.1 **General Undertakings:** The Borrower undertakes to the Lender that it shall:
- (a) **Events of Default:** Notify the Lender of the occurrence of any Event of Default or Potential Event of Default immediately upon becoming aware of it, giving full details of it and of any action taken, or to be taken, in respect of that Event of Default or Potential Event of Default;
 - (b) **Maintain Consents and Licences:** Maintain and keep in full force and effect all consents and licences required to enable it to perform or comply with its obligations under this Agreement and the Security Documents;
 - (c) **Litigation:** Promptly deliver to the Lender details of any litigation, arbitration or administrative proceeding which, if it had been current, pending or, to its knowledge, threatened at the date of this Agreement, would then have rendered the relevant representation and warranty in this Agreement incorrect;
 - (d) **Further Assurance:** Promptly, and at its own cost, execute and deliver to the Lender all such transfers, assignments, other documents and do all such acts and things in respect of this Agreement and the Security Documents as the Lender may deem necessary or desirable to secure to it the full benefit of its rights under this Agreement and the Security Documents;
 - (e) **Compliance with Laws:** Duly and promptly comply with all laws (including but not limited to the Resource Management Act 1991 and the Building Act 1991) non-compliance with which might impose any charge on its assets or have a Material Adverse Effect on it or the security afforded to the Lender pursuant to the Security Documents;
 - (f) **Pay Taxes:** File all tax returns as required by law, and pay and discharge all taxes, assessments and governmental charges upon it or against its assets prior to the date upon which penalties become payable, except only to the extent that such taxes, assessments or governmental charges are being contested in good faith by appropriate proceedings and adequate reserves are set aside for their payment.
 - (g) **Perform Obligations:** Duly perform and observe its obligations under this Agreement and the Security Documents;
 - (h) **Use of Loan:** Use or procure the use of the proceeds of the Loan solely for the purpose specified in this Agreement;
 - (i) **Inspection:** Permit the Lender or any authorised officer of the Lender, upon reasonable notice and at reasonable intervals during normal business hours, to inspect its premises, books, documents and records;
 - (j) **Collateral:** Subject to the provisions of clause 9.2(e) maintain and protect or procure the maintenance and protection of all property subject to the Security Documents (or any of them), and in particular, without limitation, it shall:
 - (i) remedy any defect in the title to such property which comes into effect after the date of this Agreement;
 - (ii) take or defend all such legal proceedings as the Lender shall deem advisable for protection or recovery of such property;

- (iii) in relation to anything required under this paragraph, execute any document that may require execution; and
- (iv) if any such property is compulsorily acquired by any governmental agency or if the Borrower is required to sell or otherwise divest itself of such property, pay or procure the payment of any compensation moneys or proceeds of sale (in each case up to an amount not exceeding the Total Moneys Owed then owing under this Agreement into such account as the Lender may approve, such moneys to be available exclusively for the payment of the moneys then owing under this Agreement; and
- (k) **Pari Passu Obligations:** Procure that their liabilities under this Agreement and the Security Documents and any other loans, facilities or accommodation given by the Lender to the Borrower will at all times rank in priority of payment to all other current and future obligations of the Borrower.
- (l) **Land Use:** Supply to the Lender within one month of the beginning of each financial year confirmation that all requirements of the Resource Management Act 1991 and the Building Act 1991 are being complied with.
- (m) **Agreements for Sale and Purchase:** promptly provide the Lender with a copy of any sale agreement entered into in relation to any property the subject of any mortgage comprised within the Security Documents, and must provide evidence of satisfaction of any conditions of that sale agreement promptly after such satisfaction and shall pay to the Lender, without deduction (except for reasonable real estate agents' fees and expenses), all deposits received in relation to any such sale promptly after the same is released to or at the direction of the vendor. The Borrower shall direct in writing the relevant real estate agent to pay the deposit in accordance with this clause and provide evidence to the Lender of compliance with these requirements promptly on request

9.2 **Negative Undertakings:** The Borrower will not do or suffer to be done any of the following:-

- (a) **Charges:** Create or permit to exist any charge over any of its assets except as expressed to be created under the Security Documents or as disclosed to the Lender prior to the date of this Agreement;
- (b) **Guarantees and Borrowings:** Incur any indebtedness for borrowed money or give any guarantee of any indebtedness of any person other than under the Security Documents or as disclosed to the Lender prior to the date of this Agreement;
- (c) **Change of Business:** Make or threaten to make any change in its business or carry on any other business that would amount to substantial change in the business as it is presently conducted by the Borrower;
- (d) **Repay Capital or Declare Dividends:**
 - (i) Purchase or redeem its own shares or make any return of paid-up capital (including any distribution from a capital redemption reserve fund or a

capital replacement reserve account), or

- (ii) Pay any dividend or other distribution (other than as approved by the Lender in writing);
- (e) **Disposals:** Whether by a single transaction or a number of related or unrelated transactions and whether at the same time or over a period of time sell, transfer, lease out, lend or otherwise dispose of the whole of its assets nor of any part of its assets which, when aggregated with all other disposals required to be taken into account by this clause is material in relation to the assets of the Borrower and its subsidiaries, each taken as a whole or the disposal of which (when so aggregated) could have a Material Adverse Effect on the Borrower. The following disposals shall not be taken into account under this sub-clause:
 - (i) disposals in the ordinary course of business on normal commercial terms;
 - (ii) disposals on normal commercial terms of obsolete assets or assets no longer required for the purpose of the relevant person's business;
 - (iii) the payment of cash as consideration for the acquisition of any asset on normal commercial terms;
 - (iv) the temporary application of funds not immediately required in the relevant person's business in the purchase or making of investments, or the realisation of such investments;
 - (v) the exchange of assets for other assets of a similar nature and value, or the sale of assets on normal commercial terms for cash which is payable in full on the completion of the sale and is to be, and is, applied in or towards the purchase of similar assets within thirty (30) days;
- (f) **Agreements for Sale and Purchase:** Enter into any agreement for the sale and purchase of any land (including any property subject to the Security Documents) without the prior written approval of the Lender.
- (g) **Shareholder Advances:** Withdrawal or repayment of any loans or advances to the Borrower by any Director or Shareholder of the Borrower.
- (h) **Change of Name:** A change to the Borrower's name or address without providing to the Lender 7 days prior written notice of the change.

10. **EVENTS OF DEFAULT**

10.1 **Events of Default:** An Event of Default shall occur if:

- (a) **Non-Payment:** The Borrower fails to pay any amount or sum due under this Agreement in the manner required on its due date (or within two (2) Business Days of its due date where non-payment on its due date has arisen solely by reason of a bank, technical, computer or similar error outside the control of the Borrower); or
- (b) **Breach by the Borrower of Other Obligations:** The Borrower commits any breach of or omits to observe or perform any

- of its obligations or undertakings under this Agreement or the Security Documents or any of them (other than failure to pay any amount due under this Agreement); or
- (c) **Misrepresentation:** Any representation, warranty or statement made, deemed to be made or repeated by the Borrower in or pursuant to this Agreement or the Security Documents or any of them or in any notice, certificate, statement or opinion or other document contemplated by or made or delivered pursuant to this Agreement or the Security Documents or any of them is or was untrue or incorrect in any material respect when made, deemed made, or repeated; or
- (d) **Insolvency:** The Borrower is unable to pay its debts when due, or is deemed unable to pay its debts under any law or enters into dealings or negotiations with any of its creditors with a view to avoid or in expectation of avoiding insolvency or bankruptcy or makes a general assignment or an arrangement or composition with or for the benefit of any of its creditors or general moratorium on the payment of indebtedness or stops or threatens to stop any payment or payments generally or a judgment of any Court against the Borrower shall remain unsatisfied for more than seven (7) days; or
- (e) **Distress:** A distress, attachment, execution or other legal process is levied or enforced upon or sued out against any of the assets of the Borrower and is not discharged or stayed within seven (7) days; or
- (f) **Receiver:** An encumbrancer takes possession or a statutory manager, trustee, receiver, receiver and manager, or the official assignee, or similar officer, or official, is appointed in respect of the whole or any part of the assets of the Borrower; or
- (g) **Order for Winding-Up:** An application or an order is made or an effective resolution is passed for the dissolution or winding-up of the Borrower, or the Borrower shall convene a meeting for the purposes of making, or proposes to enter into, any arrangement or composition for the benefit of its creditors; or
- (h) **Corporations (Investigations and Management Act) 1989:** If any step is taken to appoint or with a view to appointing a statutory manager (including the making of any recommendation in such regard by the Securities Commission) under the Corporations (Investigations and Management) Act 1989 in respect of the Borrower or any associated person (as that term is defined in that Act) is declared at risk pursuant to the provisions of that Act; or
- (i) **Cross-Default:** Any other indebtedness for borrowed money of the Borrower is not paid when due or within any applicable grace period in any agreement relating to that indebtedness or shall become (or becomes capable of being declared) due and payable prior to its stated maturity by reason of a default or event of default (however described) or if steps are taken to enforce any security for such indebtedness, or if any contingent obligation or obligation as surety in respect of indebtedness, borrowed money or the obligation to which it relates becomes due and payable by reason of a default or event of default (however described) of the Borrower; or
- (j) **Enforcement of Security:** Any present or future security or charge over or in respect of any of the assets of the Borrower becomes enforceable or is enforced or if any floating charge over such assets crystallises or becomes fixed or specific; or
- (k) **Withdrawal of any Authorisation:** Any consent, authorisation, licence or approval of, or registration with or declaration to, any governmental or public body or authority or court required by the Borrower to authorise, or required by the Borrower in connection with, the execution, validity, enforceability or admissibility in evidence of this Agreement or the Security Documents or any of them or the performance by the Borrower of its obligations under this Agreement or the Security Documents or any of them is not granted or is revoked or terminated or expires and is not renewed or otherwise ceases to be in full force and effect; or
- (l) **Material Adverse Effect:** Any other event or series of events, whether related or not, occurs or circumstances arise or exist which in the reasonable opinion of the Lender may have a Material Adverse Effect on the Borrower or its ability or willingness to perform or comply with all or any of its obligations under this Agreement or the Security Documents or any of them; or
- (m) **Cessation of Business:** The Borrower shall cease or threaten to cease carrying on all or substantially all of its business or operations other than for the purpose of a solvent reconstruction or amalgamation on terms previously approved in writing by the Lender; or
- (n) **Reduction of Capital:** Without the prior written consent of the Lender, the Borrower reduces or takes any action to reduce its capital; or
- (o) **Invalidity:** Any provision of this Agreement or the Security Documents or any of them in any material respect:
- (i) ceases to have effect in whole or in part, otherwise than in accordance with its terms; or
 - (ii) is or becomes void, voidable, illegal, invalid or unenforceable in whole or in part (other than by reason only of a party waiving any of its rights) or of limited force and effect or the performance of any such provision becomes illegal; or
 - (iii) is or will become unlawful for the Borrower to perform or comply with; or
- (p) **Change in Business or Ownership:** At any time without the prior written consent of the Lender the Borrower changes the nature of its business from that being conducted at the date of this Agreement or there is any change in the beneficial ownership of or control of the Borrower; or
- (q) **Change in Constitution:** The constitution (however named) of the Borrower is altered in a manner which in the opinion of the Lender may materially and adversely affect the rights

or powers of the Lender under this Agreement or the Security Documents or any of them; or

- (r) **Disposition of Assets:** The Borrower sells, leases, transfers, further charges or encumbers or otherwise disposes of, or agrees by one or more transactions or series of transactions (whether related or not) to sell, lease, transfer, further charge or encumber or otherwise dispose of, the whole or any material part of its revenues or its assets without the prior written consent of the Lender other than in the ordinary course of its business; or
- (s) **Leases:** Any lease charged or assigned pursuant to the Security Documents or any of them is cancelled, terminated or suspended prior to its stated expiry date, or is amended or varied in any way, without the prior consent in writing of the Lender and such cancellation, termination, suspension, amendment or variation will in the reasonable opinion of the Lender have a Material Adverse Effect on the Borrower, or its ability to perform its obligations under this Agreement and the Security Documents or any of them, when due.
- (t) **Statutory Duties:** There is any failure on the part of the Borrower to comply with the provisions of the Building Act 1991 or the Resource Management Act 1991 or any regulations code or ordinances made under those Acts or any other statutory duty affecting the property comprised in the Security Documents.
- (u) For the avoidance of doubt (pursuant to the definition of "**Borrower**" in clause 1.1) any event that occurs which if the references in clause 10.1(a) to 10.1(t) (inclusive) to the "**Borrower**" were replaced by the word "**Guarantor**" would constitute an Event of Default shall be an Event of Default.

10.2 **Remedies on Default:** Upon or at any time after the occurrence of an Event of Default and if any Event of Default continues unremedied then the Lender may at its discretion and without prejudice to its other rights and remedies by notice in writing to the Borrower take all or any of the following actions:

- (a) demand immediate repayment of all moneys owing or payable pursuant to this Agreement and the Security Documents or any of them and if so demanded the Borrower shall immediately repay such moneys to the Lender and for all purposes of this Agreement or the Security Documents upon such demand being made the Expiry Date shall be deemed to have arrived; and/or
- (b) enforce, or procure the enforcement of, its rights and remedies pursuant to this Agreement and the Security Documents or any of them in such order as it thinks fit; and/or
- (c) declare any undrawn portion of the financial accommodation agreed to be provided pursuant to this Agreement to be cancelled, and if so declared such undrawn portion shall immediately be cancelled; and/or
- (d) declare that the Lender's obligations under this Agreement and the Security Documents or any of them have ceased, and if so declared such obligations shall immediately cease.

11. CHANGES IN CIRCUMSTANCES

11.1 Increased Costs: If:

- (a) any change in applicable law or regulation or in the interpretation thereof by any governmental or agency or authority charged with the administration thereof shall:
 - (i) subject the Lender to any tax with respect of the Loan or with respect to any loan arranged by the Lender to fund the Loan, (other than tax on overall net income); or
 - (ii) change the basis of taxation (in any jurisdiction) of the Lender in relation to payments of principal, interest, fees, discounts or commission or other moneys in respect of the Loan (except for changes in the rate of tax on overall net income) including (without limitation) the Lender ceasing to be able to:
 - (aa) recognise the receipt of income (including interest and fees); or
 - (bb) to deduct all of its interest or other costs incurred in relation to the Loan in the tax year in which such income is received or interest or other costs incurred, as the case may be; or
 - (cc) impose, modify or deem applicable any reserve requirements including without limitation liquidity requirements, cash ratio requirements, special deposits against any assets of, deposits with or for the account of, or loans by, the Lender; or
 - (dd) impose on the Borrower any other condition with respect to the Loan or any part of it or any payments to be made in connection therewith; or
- (b) the Lender complies with any directive from any applicable fiscal or monetary authority or the Lender shall be required by law to make any deduction or withholding with respect to any loan arranged by the Lender to fund the Loan;

AND the result of any of the foregoing is to increase the cost to the Lender of making or maintaining the Loan or any part thereof or reduce the Lender's net after tax return in relation to the Loan taking into account the costs of any loan arranged to fund the Loan by an amount which the Lender deems material then and in any such case:

- (c) the Lender shall use its best efforts promptly to notify the Borrower in writing of the happening of such events; and
- (d) the Borrower shall pay to the Lender on demand by the Lender such amount as will compensate the Lender for such additional cost or reduction in return.

11.2 Change of Law: If the Lender shall certify to the Borrower that by reason of:

- (a) the introduction after the date of this Agreement of a change in any applicable law, regulation or directive or a change in the interpretation thereof by any governmental or

- other regulatory authority charged with the administration or issuance thereof or in any requirement thereunder; or
- (b) compliance by the Lender with any directive from any applicable fiscal or monetary authority; or
- (c) any other circumstances materially affecting the New Zealand domestic funding market or the availability to lending institutions in New Zealand of finance; or
- (d) war, riot, civil commotion, strike, lockout or Act of God

the Lender is:

- (i) unable or it is impracticable to fund or maintain the Loan or any part thereof; or
- (ii) the cost to the Lender of making available funding or maintaining the Loan or any part thereof in the manner contemplated by this Agreement shall be materially and adversely affected and that accordingly it will not be prepared to make available or continue to make available the Loan;

then:

- (e) the Lender may, at its discretion by notice to the Borrower, terminate the Lender's obligations under this Agreement whereupon the Loan shall be cancelled and the Borrower shall immediately repay the Moneys Owed; and
- (f) if so terminated the Lender shall be under no further obligation to provide the Loan pursuant to this Agreement.

12. TAXES

12.1 **Payments to be Free and Clear:** All amounts payable by the Borrower under this Agreement shall be paid:

- (a) free and clear of any restriction or condition; and
- (b) free and clear of and (except to the extent required by law) without any deduction or withholding on account of any tax; and
- (c) without any deduction or withholding on account of any other amount, whether by way of set-off, counterclaim or otherwise.

12.2 **Gross-Up:** If:

- (a) the Borrower is required by law to make any deduction or withholding from any amount paid or payable by it under this Agreement; or
- (b) the Lender is required by law to make any payment on account of tax (other than tax on overall net income of the Lender) or otherwise, on or in relation to any amount received or receivable by it under this Agreement,

then:

- (c) the Borrower shall ensure that any such deduction or withholding does not exceed the legal minimum and shall pay any such tax or other amount required to be deducted or withheld to the relevant taxation or other authority before the date on which penalties attach thereto; and
- (d) the amount payable by the Borrower in respect of which such deduction, withholding or payment is required to be made shall be increased to the extent necessary to ensure

that, after the making of such deduction, withholding or payment, the Lender receives and retains (free from any liability in respect of any such deduction, withholding or payment) a net amount equal to the amount which it would have received and so retained had no such deduction, withholding or payment been made; and

- (e) the Borrower shall deliver to the Lender, within thirty (30) days after each deduction or withholding is required by law to be made, a receipt issued by the applicable taxation or other authority evidencing that such deduction or withholding has been made.

12.3 **Indemnity:** If:

- (a) the Lender (or any person on its behalf) is required by law to make any deduction or withholding on account of tax, or on any other account from any amount paid or payable to any person from whom it has borrowed moneys to enable it to fund the Loan or any part thereof, or any other payments made or to be made by it under this Agreement and accordingly the Lender is required to increase its payment to that person, the Borrower shall indemnify the Lender against any such increased payment and shall on demand by the Lender, pay to the Lender such amount as shall result in the Lender, after receiving such amount and making such increased payment, being in the same position as it would have been in if no such increased payment was required to have been made; and
- (b) if the Lender is required to make any payment to any government or other authority on account of any deduction or withholding of the nature referred to in the preceding provisions of this clause (including any penalties imposed in relation thereto) which the Borrower should have made but failed to make, then the Borrower shall indemnify the Lender against any liability to make this payment.

12.4 **Tax Credits:** If the Lender receives the benefit of a tax credit, refund or allowance resulting from a payment that includes an increased amount paid by the Borrower under the preceding provisions of this clause then, promptly after the Lender shall become aware that it has received the same and that it relates to the relevant amount so paid by the Borrower, the Lender shall provide to the Borrower the benefit of all or any part of any tax credit, refund or allowance that the Lender may obtain as a result of the Borrower having made any withholding, deduction or payment so that the Lender is in no more and no less favourable position than it would have been in had no deduction or withholding been made in respect of which an increased amount was required to be paid under this clause. The Lender shall be under no obligation to disclose any information relating to the assessment or computation of its tax liabilities or benefits, and nothing in this clause shall interfere with its right to arrange its tax affairs in whatever manner it deems fit.

13. **SET-OFF**

The Lender may at any time following an Event of Default set-off against any debt or liability of the Lender to the Borrower any part of the Moneys Owed and the Lender may apply any credit balance to which the Borrower is at any time entitled (whether in the name of the Lender or the Borrower alone or

jointly or otherwise) in satisfaction of any debt or liability of the Borrower to the Lender under this Agreement or otherwise.

14. ATTORNEY

Lender as Attorney: The Borrower irrevocably appoints the Lender and any manager, officer or corporate secretary for the time being of the Lender severally the lawful attorney of the Borrower in the Borrower's name and on the Borrower's behalf at any time from time to time and in such manner as the Lender in its absolute discretion shall think fit, to take all steps and proceedings and to do all acts, matters and things as the Lender shall think proper:

- (a) to remedy any default or breach of the terms and provisions of this Agreement or any of the Security Documents by the Borrower;
- (b) to exercise any of the rights, powers and remedies of the Lender contained in this Agreement or any of the Security Documents;
- (c) to execute any deed, instrument or document necessary for the Lender to perfect its title to any of the securities that are or are to be collateral to the Loan or this Agreement;
- (d) to execute and deliver any deed, instrument or documents required by the Lender for the purposes of clauses 13.1(a) and 13.1(b) above;
- (e) in respect of any development of any land forming part of the Security, to execute all notices, applications, plans, transfers, leases and other documents as required or expedient in the Lender's opinion to enable the Lender to complete or continue such development provided that the Lender shall not exercise the powers conferred on the Lender by this sub-clause unless and until the Borrower is in default under this Agreement or any of the Security Documents;
- (f) to execute a lease or leases of any land forming part of the Security on generally accepted commercial terms provided that the Lender shall not exercise the powers conferred on the Lender by this sub-clause unless and until the Borrower is in default under this Agreement or any of the Security Documents.

15. INDEMNITIES

The Borrower hereby indemnifies, and agrees to save harmless, the Lender from and against all losses, claims, demands, liability, payments, charges and expenses which may be made against or incurred by the Lender arising from or relating to this Agreement or any Security Document or the exercise by the Lender of any rights, powers or remedies under such and further from and against any losses, costs or expenses (including without limitation any legal expenses as between solicitor and own client, loss of profits and losses incurred in liquidating deposits or re-employing funds borrowed, contracted for or utilised to fund any part of the Loan) which the Lender sustains or incurs from any reason or cause whatever and as a consequence of, but not limited to:

- (a) any amount payable by the Borrower under this Agreement not being paid when due; or
- (b) the occurrence of any Event of Default; or
- (c) the receipt or recovery by the Lender of all or any part of any amount payable under this Agreement or any Security Document (by repayment or acceleration or otherwise)

otherwise than on the due date relating to such amount; or

- (d) any part of the Loan not being made available to the Borrower on a requested Drawdown Date by reason of non-compliance by the Borrower with any of the conditions of this Agreement or any Security Document; or
- (e) any action or non-action by the Lender in the enforcement of or protection of its rights or remedies under this Agreement or the Security Documents; or
- (f) any and all representations and warranties made by the Borrower to the Lender relating to this Agreement, any Security Document and the Loan; or
- (g) the operation of any statute, by-law or regulation affecting this Agreement or any Security Document; or
- (h) any claim by any person relating to any assets or property or other matter or thing the subject of any Security Document; or
- (i) any claim against the Lender or liability incurred by the Lender under the Resource Management Act 1991 in respect of the properties the subject of the Security Documents or any of them; or
- (j) any claim against the Lender or liability incurred by the Lender under the Building Act 1991 in respect of the properties the subject of the Security Documents or any of them.

16. FURTHER ASSURANCE

Further Assurance: The Borrower shall at any time if and when required by the Lender at the Borrower's cost make, execute, do and perform all such further assurances, instruments, acts or things as the Lender shall from time to time reasonably require to:

- (a) perfect this Agreement; or
- (b) perfect the Lender's title or interest to the Security Documents and the assets and property charged or encumbered or intended to be charged or encumbered by the Security Documents; or
- (c) perfect the Borrower's title or interest to the assets and property charged or encumbered by the Security Documents; or
- (d) vest or enable the Lender to vest the assets or property charged or encumbered by the Security Documents in itself or its nominees or any purchaser as permitted by the terms of this Agreement or the Security Documents, or as permitted by the Lender following the occurrence of an Event of Default.

17. SURVIVAL OF PROVISIONS

The agreements, undertakings, representations and indemnities of the Borrower in this Agreement and the Security Documents or any of them will survive the termination or expiry of this Agreement, the release or discharge by the Lender of the Security Documents and the repayment of the Moneys Owed.

18. **FEES**

Establishment Fee: The Borrower shall, not later than the date of execution of this Agreement, pay to the Lender the establishment fee referred to in this Agreement.

19. **EVIDENCE OF DEBT**

19.1 **Lender's Records:** The Lender shall maintain records in accordance with its usual practice evidencing the amounts from time to time owing by the Borrower pursuant to this Agreement or any Security Document. In any legal proceedings or other action arising out of or in connection with this Agreement or any Security Document the contents of such records shall, in the absence of manifest error or fraud, be conclusive and binding on the Borrower.

19.2 **Certificate Conclusive:** Where any provision of this Agreement or any Security Document provides that the Lender may certify or determine an amount or rate payable by the Borrower, a certificate by the Lender or a manager, director, secretary or other officer of the Lender as to such amount or rate shall, in the absence of manifest error or fraud, be conclusive and binding on the Borrower.

20. **FINANCIAL INFORMATION**

The Borrower shall, if requested by the Lender, supply to the Lender such financial or other information relating to the Borrower as the Lender may reasonably require to the intent that the Lender shall be able to carry out a review of the loan facility provided pursuant to the Agreement.

21. **PAYMENTS**

21.1 **Method:** All payments required to be made by the Borrower to the Lender pursuant to this Agreement shall be made by Automatic Payment Authority or otherwise as the Lender may from time to time direct. Any payment received by the Lender or its solicitor after 4.00pm on a Business Day is deemed to be received on the next Business Day.

21.2 **Business Days:** If any sum becomes due for payment pursuant to this Agreement or the Security Documents or any of them on a day which is not a Business Day then such payment shall be made on the preceding Business Day.

21.3 **No Counterclaim:** All payments to the Lender pursuant to this Agreement or the Security Documents shall be made by the Borrower without set-off, counterclaim, condition or qualification and free and clear of, and without any, deduction or withholding except to the extent that this Agreement may otherwise provide.

21.4 **Discharge of Obligation to Pay:** Notwithstanding the provision of any receipt by the Lender, the obligation of the Borrower to make a payment under this Agreement and the Security Documents or any of them shall only be discharged when the Lender is satisfied that the Borrower or any person making any payment of such moneys was solvent at the time of making such payment or on the expiry of the period during which any payment made to the Lender pursuant to this Agreement and the Security Documents or any of them may become or be deemed to be avoided or voidable.

22. **APPLICATION OF MONEYS**

The Lender may apply any repayment by the Borrower, or other funds received by the Lender in

reduction of the liabilities of the Borrower under this Agreement, or funds received by the Lender in connection with any Security Document, to the repayment of the principal, interest, fees or any other amount due under this Agreement or any Security Document in the order and manner as the Lender may determine from time to time.

23. **NOTICES**

23.1 **Form and Delivery of Notice:** All notices, requests, demands or other communications to or upon the parties in connection with this Agreement and the Security Documents or any of them shall be:

- (a) given or made in writing;
- (b) signed by the party giving the notice, or in the case of a company, a director or secretary of the company, or in the case of the Lender, signed by a manager, director, secretary or other officer of the Lender;
- (c) irrevocable, unless otherwise provided in this Agreement;
- (d) in the case of notices served by or on behalf of the Lender, deemed to be correct with respect to the information set out in the notice, if signed by a manager, director, corporate secretary or other officer of the Lender, save for manifest error or fraud;
- (e) if posted to an address outside New Zealand or posted from outside New Zealand, posted by first class airmail;
- (f) served upon or delivered to the recipient personally, or sent by post or by email to the recipient's usual, or last known place of abode or business, or in the case of a company, to the company's registered office, or the address specified below:

To the Lender: ADVANTAGE FINANCE LIMITED: C/- Harmans Lawyers, Level 2, 79-81 Cashel Street, Christchurch 8011;

To the Borrower and the Guarantor: At the address or email address of the firm of solicitors acting for the Borrower.

or if the recipient, by not less than seven (7) days' notice in writing, notifies the other parties to this Agreement of another address, or email address, then to that address or email address.

23.2 **Receipt of Notice:** A letter or email shall be deemed to have been received:

- (a) in the case of personal delivery on a Business Day, on the date of such delivery;
- (b) in the case of a letter posted from within New Zealand to a New Zealand address, on the second Business Day after posting;
- (c) in the case of a letter posted to an address outside New Zealand, or posted from outside New Zealand, on the seventh Business Day after posting (if posted by first class airmail);
- (d) in the case of an email, at the time the email enters the recipient's information system.

24. **COSTS AND EXPENSES**

24.1 **Costs and Expenses:** The Borrower shall immediately on demand reimburse the Lender for all costs, charges and expenses (including legal fees and disbursements computed on a solicitor and own client basis) incurred by the Lender in connection with the negotiation, preparation, execution and

administration of this Agreement and any Security Document.

24.2 **Enforcement Expenses:** The Borrower shall from time to time immediately on demand reimburse the Lender for all costs, charges and expenses (including legal fees and disbursements computed on a solicitor and own client basis) incurred by or in connection with the preservation or enforcement of any of the Lender's rights or remedies under this Agreement and the Security Documents or any of them.

24.3 **Taxes:** The Borrower shall pay all present and future duties (including stamp duties), taxes, registration fees, transaction duties and other like expenses which may be payable in respect of or assessed in connection with this Agreement or any Security Document. The Borrower shall indemnify the Lender, by payment of cash on demand, against all penalties, liabilities, costs and expenses in connection with any default by the Borrower in paying such duties, taxes, fees or expenses.

25. **NON-WAIVER**

No failure or delay by the Lender in exercising, of single or partial exercise, of any right, power, discretion, remedy or privilege in connection with this Agreement or the Security Documents shall operate as a waiver of that right, power, discretion or remedy. No course of dealing between the Borrower and the Lender shall operate as a waiver of any right, power, discretion, remedy or privilege of the Lender.

26. **REMEDIES CUMULATIVE**

The rights, powers and remedies provided in this Agreement and the Security Documents are cumulative and are not exclusive of any rights, powers or remedies provided by law or pursuant to any other agreements or securities granted either before or after the date of this Agreement.

27. **PARTIAL INVALIDITY**

Each of the provisions of this Agreement is severable and distinct from the others. If at any time one or more of such provisions is or becomes invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions of this Agreement shall not in any way be affected or impaired.

28. **CONFLICTS**

Where any conflict or inconsistency shall arise between any of the terms, conditions and provisions, whether express or implied, of this Agreement and those of any Security Document, the terms, conditions and provisions of this Agreement shall prevail unless otherwise determined by notice in writing to the Borrower by the Lender.

29. **AMENDMENT**

This Agreement shall not be amended or varied except in writing signed by each of the parties to this Agreement.

30. **TIME OF THE ESSENCE**

Except as otherwise provided in this Agreement, time is of the essence with respect of the obligation to pay money pursuant to this Agreement and the Security Documents or any of them.

31. **NO PARTNERSHIP**

The parties to this Agreement acknowledge that their relationship in respect of this Agreement is that of borrower and lender. Nothing in this Agreement shall be deemed or construed as creating a relationship of partnership between the Lender and Borrower.

32. **ASSIGNMENT**

32.1 **Agreement binding:** This Agreement shall be binding upon and for the benefit of the parties and their respective successors and any permitted assignee or transferee of some or all of any party's rights or obligations under this Agreement and the Security Documents.

32.2 **The Borrower may not Assign:** The Borrower shall not assign or transfer any of its rights and obligations or both under this Agreement and the Security Documents.

32.3 **The Lender may Assign:** The Lender may assign all or part of its rights and benefits under this Agreement and Security Documents or any of them to any one or more person (each an "Assignee"). If, as part of the same transaction, the Lender wishes to transfer all or part of its obligations pursuant to this Agreement that assignment shall only be effective when that transfer becomes effective in accordance with clause 32.4.

32.4 **The Lender may Transfer:** The Lender may transfer all or part of its obligations under this Agreement and the Security Documents to any one or more person pursuant to clause 32.3 (each a "Transferee"). The transfer shall become effective when the Lender has received from the Transferee an undertaking (addressed to the parties to this Agreement) stating that it agrees to be bound by this Agreement and the Security Documents and to perform the obligations transferred to it.

32.5 **Assignee treated as the Lender:** Any such Assignee or Transferee shall be and shall be treated as the Lender for all purposes of this Agreement and the Security Documents and shall be entitled to the full benefit of this Agreement.

32.6 **Disclosure:** The Lender may disclose on a confidential basis to a potential Assignee or Transferee or any other person with whom it may wish to enter into contractual relations in connection with this Agreement and the Security Documents such information about the Borrower and its financial condition, assets and properties as shall have been made available to the Lender generally provided that prior to any such disclosure the Lender will procure from a potential Assignee or participant an undertaking not to disclose any such information to another party without the consent of the Borrower.

32.7 **No Gross-Up:** In the event of any assignment by the Lender at any time of its rights and benefits under this Agreement and the Security Documents the Borrower shall not be liable to make any additional payment or gross-up pursuant to this Agreement or make any indemnification payment which on the basis of applicable law in effect on the date of such assignment the Borrower would not have been liable to make had such assignment not been made.

33. **CONTINUING SECURITIES**

33.1 **Security:** To better secure to the Lender the obligations of the Borrower in respect of the Moneys Owed the Borrower shall enter into, execute and

deliver the Security Documents to the Lender in form satisfactory to the Lender.

- 33.2 **No Prejudice:** Nothing contained or implied in this Agreement or any Security Document shall merge, extinguish, postpone, lessen or otherwise prejudicially affect any other security now or in the future held by the Lender from the Borrower on any account or any rights or remedies which the Lender now or in the future may have against the Borrower or any other person nor shall any security now or in the future held by the Lender in any way prejudicially affect the powers and provisions, contained or implied in, or the rights or remedies of the Lender under this Agreement or any Security Document.

- 33.3 **Continuing:** Each Security Document and any other security now or in the future held by the Lender to secure the Moneys Owed and the respective charges thereby created shall remain in full force and effect and shall be a running and continuing security for the payment of the Moneys Owed and for the due performance and observance of all and singular the covenants, conditions and agreements contained or implied in this Agreement or any Security Documents or any other security, deed or instrument collateral to this Agreement or any Security Document despite:

- (a) that any sum or sums may from time to time be paid to the Lender, or
- (b) that any account between the Borrower and the Lender may at any time be or appear to be in credit, or
- (c) any settlement of account or other thing or matter whatever

until a full and final discharge and release of each Security Document, other security or deed or instrument or this Agreement shall have been executed by the Lender and delivered to the Borrower.

- 33.4 **Subrogation:** The right of subrogation of the Guarantor shall not arise until the Lender has received payment in full of the Total Moneys Owed and shall be a right to securities held by the Lender and to the assets realised thereunder ranking in all respects subsequent to the rights of the Lender.

34. COUNTERPARTS

This Agreement may be signed in any number of counterparts, all of which when taken together shall constitute one and the same agreement. Any party to this Agreement may enter into this Agreement by executing a counterpart of this Agreement. If a party to this Agreement so executes a counterpart of this Agreement then that party shall execute upon demand by any other party to this Agreement such additional copies of this Agreement as may be required to obtain a copy of this Agreement signed by all parties for each of the parties to this Agreement.

35. ENTIRE AGREEMENT

This Agreement and the Security Documents contain all the terms of the agreement between the parties and supersede all prior discussions and arrangements in relation to the subject of this Agreement in the event that there is any conflict between the provisions of this Agreement and the provisions of the Security Documents then the provisions of this Agreement shall prevail.

36. LAW

- 36.1 **New Zealand Law:** This Agreement shall be governed by and construed in accordance with New Zealand law.

- 36.2 **Jurisdiction:** The parties to this Agreement hereby irrevocably submit to the non-exclusive jurisdiction of the High Court of New Zealand. Any proceedings issued in respect of any claim, dispute or other matter whatsoever arising out of or in relation to this Agreement or the Security Documents shall be issued out of the High Court of New Zealand.

- 36.3 **Other Jurisdictions:** Nothing in this Agreement shall limit the right of the Lender to commence any legal action against the Borrower or any other party to this Agreement or any Security Document or their property or assets in any other jurisdiction. The taking of proceedings in any jurisdiction shall not preclude the taking of proceedings in any other jurisdiction, concurrently or otherwise.

37. COLLATERAL SECURITY

- 37.1 Unless the Lender should elect otherwise (which the Lender is entitled to do at any time in its sole discretion by notice to the Borrower), the Security Documents are each collateral one with the other to the intent that:

- (a) each Security Document is deemed to secure the Total Moneys Owed notwithstanding that a Security Document may have been executed prior to this Agreement; and
- (b) a default under any one or more of the Security Documents or this Agreement shall be a default under all the other Security Documents and this Agreement and the Lender may exercise its rights and remedies under all or any such Security Documents and this Agreement either separately or concurrently.

- 37.2 Unless the Lender should elect otherwise (which it is entitled to do at any time by notice to the Borrower) the loan transaction and the Security Documents the subject of this agreement shall be deemed to be collateral with all other loan transactions, agreements and securities extant now or in the future between the Borrower and the Lender so that a default under any one shall be a default under all others and the Lender may exercise its rights and remedies accordingly either separately or concurrently.

38. GUARANTOR'S ACKNOWLEDGMENT

The Guarantor, by execution of this Agreement, confirms that the provision of the Loan to the Borrower has been at the Guarantor's request and that the respective Deeds of Guarantee and Indemnity forming part of the Security Documents and issued or to be issued by the Guarantor, shall be in respect of the Total Moneys Owed. Each Guarantor, by execution of this Agreement, acknowledges, agrees and confirms that it will derive real and substantial commercial benefit by virtue of its entering into and execution of this Agreement and the respective Deeds of Guarantee and Indemnity. Each Guarantor acknowledges having taken independent advice or if having declined such advice has given a written instruction accordingly, a copy of which shall be supplied to the Lender.

39 **FURTHER SECURITIES**

The Borrower and the Guarantor acknowledge and agree that the property to be mortgaged to the Lender shall include all of the Borrower's and Guarantor's interest in any land or other property whether real or personal that it may own now or in the future and whether alone or in common with any other entity and whether or not described in the Schedule of Key Terms of the Agreement and the Borrower and the Guarantor charge all such property accordingly. When called upon to do so the Borrower and Guarantor shall execute at the cost of the Borrower a registrable mortgage (on the current ADLS "All Obligations" form of mortgage) in favour of the Lender over such property. The Lender is authorised to lodge and maintain a caveat against the title to any real property referred to in this clause. The Lender is also specifically authorised to use the power of attorney granted pursuant to clause 14 of this S.T.C. to execute and register any mortgage security.

40 **TRUSTEE REPRESENTATION AND COVENANTS**

40.1 Any party that enters into this Agreement as a Trustee covenants and warrants that:

- (a) the Trust of which it is a trustee is duly constituted under the laws of New Zealand and that the Lender has been provided with a full copy of the Trust Deed and any other

documents incorporating all amendments to date;

- (b) the execution and delivery of the Security Documents has been validly authorised and will not cause the Trust to be in breach of the Trust Deed or any other obligation and that having considered all factors the trustee is of the opinion that entry into the Security Documents is for the benefit of and for the proper purposes of the Trust;
- (c) it will not resign as trustee of the Trust, amend the Trust Deed or permit any resettlement or distribution of the capital of the Trust without the prior consent of the Lender and it will not commit a breach of the terms of the Trust Deed.

40.2 The liability of any party executing this Agreement as an independent trustee of a Trust is limited to that which can be met by recourse to the assets of the Trust from time to time, except to the extent that the trustee breaches any of the warranties in clause 40.1 or loses the right to be indemnified out of the assets of the Trust as a result of the trustee's own fraud, gross negligence, or wilful breach of Trust.

For the purposes of this clause, an "independent trustee" means a trustee who is not a beneficiary of the Trust, is not related to any beneficiary, and does not have any right to or interest in the property of the Trust other than as trustee.