

DEED OF PRIORITY (LAND)

DATED 20

PARTIES

1.

(the "**Mortgagor**")

2. **Mortgage Holding Trust Company Limited**

(the "**First Mortgagee**")

3.

(the "**Second Mortgagee**")

BACKGROUND

The Mortgagor has granted, or intends to grant, the Mortgages. The parties wish to enter into this Deed to subordinate and arrange priorities in respect of the First Mortgage and the Second Mortgage.

TERMS OF THIS DEED

1. INTERPRETATION

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

“Enforcement Date” means the earlier of:

- (a) the date on which a Mortgagee enforces (including, but not limited to, appointing a receiver) that Mortgagee’s rights under its Mortgage; and
- (b) the expiry date of a notice issued in respect of a Mortgage under section 118 or 119 of the Property Law Act 2007, pursuant to which a Mortgagee enters into possession, or exercises that Mortgagee’s power of sale, of any Land.

“First Mortgage” means the mortgage described as such in Part C of the Schedule.

“First Mortgagee Amount” means the amount specified as such in Part B of the Schedule provided that:

- (a) if that amount is greater than any maximum amount either specified in the First Mortgage for the purposes of section 80A(2) of the Property Law Act 1952 or the amount that the First Mortgagee can recover under the First Mortgage in priority to any subsequent mortgage for the purposes of section 92 of the Property Law Act 2007 (as applicable), and, at the relevant time, a person (other than the Second Mortgagee) ranking subsequent to the First Mortgagee in respect of any Land is entitled under any law to be paid in priority to the Mortgagor, the First Mortgagee Amount will be that lesser amount; or
- (b) if the First Mortgage does not specify any maximum amount for the purposes of section 80A(2) of the Property Law Act 1952 or section 92 of the Property Law Act 2007 (as applicable), and that amount is greater than the lowest balance secured by, and outstanding under, the First Mortgage at any time after the First Mortgagee has notice of a person (other than the Second Mortgagee) ranking subsequent to the First Mortgagee in respect of any Land, who or which, at the relevant time, is entitled under any law to be paid in priority to the Mortgagor, the First Mortgagee Amount will be that lowest balance outstanding.

“First Mortgagee Priority Amount” means the aggregate of:

- (a) the First Mortgagee Amount;
- (b) all interest, whether capitalised or not and including default interest, accrued prior to the Enforcement Date on the balance secured by and outstanding under the First Mortgage, calculated on a daily basis;
- (c) interest, for the Interest Period commencing on the Enforcement Date, calculated on a daily basis at the highest rate payable by the Mortgagor to the First Mortgagee immediately before the Enforcement Date, on the lesser from time to time of:
 - (i) the First Mortgagee Amount; and
 - (ii) the balance secured by, and outstanding under, the First Mortgage;
- (d) the amount of all fees, bank charges, taxes and reasonable expenses (including legal expenses, remuneration of a receiver, and goods and services and similar taxes on those amounts) incurred by the First Mortgagee, or by any receiver appointed by the First Mortgagee, in protecting, or exercising any powers or rights under the First Mortgage, but in each case only to the extent that they relate to the Land;

- (e) the amount of any preferential payments required by law to be paid; and
- (f) interest, calculated on a daily basis at the greater of a rate equivalent to the cost of funds of the First Mortgagee or the relevant receiver (as the case may be) and the highest rate payable by the Mortgagor to the First Mortgagee immediately before the Enforcement Date on the amounts in (d) and (e) above from the date of payment of the relevant amounts until the date of reimbursement of those amounts to the First Mortgagee or the relevant receiver (as the case may be).

“Interest Period” means the interest period specified in Part D of the Schedule.

“Land” means the land or any part of it described in Part A of the Schedule, and includes any land which is comprised in any computer register (certificate of title) which is issued as a result of the subdivision of that land and also any land which becomes subject to the mortgages over the Land as a result of the operation of section 242 of the Resource Management Act 1991.

“Mortgages” means the First Mortgage and the Second Mortgage, and **“Mortgage”** means any of them.

“Mortgagees” means the First Mortgagee and the Second Mortgagee, and **“Mortgagee”** means either of them.

“Second Mortgage” means the mortgage instrument described as such in Part C of the Schedule.

“Second Mortgage Amount” means the amount specified as such in Part B of the Schedule provided that:

- (a) if that amount is greater than any maximum amount either specified in the Second Mortgage for the purposes of section 80A(2) of the Property Law Act 1952 or the amount that the Second Mortgagee can recover under the Second Mortgage in priority to any subsequent mortgage for the purposes of section 92 of the Property Law Act 2007 (as applicable), and, at the relevant time, a person ranking subsequent to the Second Mortgagee in respect of any Land is entitled under any law to be paid in priority to the Mortgagor, the Second Mortgage Amount will be that lesser amount; or
- (b) if the Second Mortgage does not specify any maximum amount for the purposes of section 80A(2) of the Property Law Act 1952 or section 92 of the Property Law Act 2007 (as applicable), and that amount is greater than the lowest balance secured by, and outstanding under, the Second Mortgage at any time after the Second Mortgagee has notice of a person ranking subsequent to the Second Mortgagee in respect of any Land, who or which, at the relevant time, is entitled under any law to be paid in priority to the Mortgagor upon distribution of proceeds from enforcement, the Second Mortgage Amount will be that lowest balance outstanding.

“Second Mortgage Priority Amount” means the aggregate of:

- (a) the Second Mortgage Amount;
- (b) all interest, whether capitalised or not and including default interest, accrued prior to the Enforcement Date on the balance secured by and outstanding under the Second Mortgage, calculated on a daily basis;
- (c) interest, for the Interest Period commencing on the Enforcement Date, calculated on a daily basis at the highest rate payable by the Mortgagor to the Second Mortgagee immediately before the Enforcement Date, on the lesser from time to time of:

- (i) the Second Mortgagee Amount; and
- (ii) the balance secured by, and outstanding under, the Second Mortgage;
- (d) the amount of all fees, bank charges, taxes and reasonable expenses (including legal expenses, remuneration of a receiver, and goods and services and similar taxes on those amounts) incurred by the Second Mortgagee, or by any receiver appointed by the Second Mortgagee, in protecting or exercising any powers or rights under the Second Mortgage, but in each case only to the extent that they relate to the Land;
- (e) the amount of any preferential payments required by law to be paid; and
- (f) interest, calculated on a daily basis at the greater of a rate equivalent to the cost of funds of the Second Mortgagee or the relevant receiver (as the case may be) and the highest rate payable by the Mortgagor to the Second Mortgagee immediately before the Enforcement Date on the amounts in (d) and (e) above from the date of payment of the relevant amounts until the date of reimbursement of those amounts to the Second Mortgagee or the relevant receiver (as the case may be).

1.2 **Miscellaneous:** In this Deed, unless the context otherwise requires:

a reference to **at any time** includes from time to time;

references to **clauses** and **schedules** are references to clauses of and schedules to this Deed;

if more than one person is named as the **Mortgagor**, each reference to the Mortgagor is a reference to each Mortgagor separately and to all Mortgagors together;

if more than one person is named as the **Second Mortgagee**, each reference to the Second Mortgagee is a reference to each Second Mortgagee separately and to all Second Mortgagees together;

derivatives of any defined word or term shall have a corresponding meaning;

a **gender** includes each other gender and a reference to "its" includes a reference to "his" or "her" as the context requires;

the **headings** to clauses shall be ignored in construing this Deed;

the word **including** and other similar words do not imply any limitation;

a reference to **land** includes any interest in land;

a reference to **law** includes any common law, equity and any statute;

a reference to any **legislation** is a reference to that legislation as from time to time amended, re-enacted or substituted, includes regulations, orders-in-council and other instruments from time to time issued or made under, that legislation and, unless otherwise stated, is a reference to New Zealand legislation;

a **party** to this Deed includes its successors and permitted assignees and transferees;

a **person** includes that person's successors, permitted assigns, executors, and administrators (as applicable);

the **singular** includes the **plural** and vice versa;

a **receiver** includes a receiver and manager, and a receiver of any income from any land; and

a reference to a **time of day** is to New Zealand time.

2. EXTENT OF PRIORITIES BETWEEN MORTGAGEES

- 2.1 The First Mortgage, and all moneys from time to time secured under it, will have first priority over the Second Mortgage for an amount not exceeding the First Mortgagee Priority Amount.
- 2.2 The Second Mortgage, and all moneys from time to time secured under them, will have second priority for an amount not exceeding the Second Mortgagee Priority Amount.
- 2.3 Subject to clauses 2.1 and 2.2, the First Mortgage will, have priority over the Second Mortgagee Mortgage for the balance (if any), of the moneys from time to time, secured by, and outstanding under, the First Mortgage.

3. PARAMOUNTCY AS BETWEEN MORTGAGEES

- 3.1 This Deed will have effect despite anything (including, but not limited to, any application of the rule in *Clayton's Case* (1816) 1 Mer. 529 or the rule in *Hopkinson v Rolt* (1861) 9 H.L. Cas. 514) that might alter or affect the priorities provided by this Deed.
- 3.2 Any provision in either Mortgage, or any other agreement or arrangement entered into before the date of this Deed, which is inconsistent with this Deed, will be superseded or varied to the extent necessary to give full effect to this Deed.

4. PRIORITY INSTRUMENT

If required by the First Mortgagee, the Second Mortgagee will immediately sign, and consent to the registration in the relevant land register of, a priority instrument under which the First Mortgage is granted priority over the Second Mortgage.

5. DISCHARGE OF FIRST MORTGAGE OVER LAND

- 5.1 If, at any time, the Second Mortgagee disposes of the Land under the power of sale contained in a Second Mortgage or by law, the First Mortgagee will provide the Second Mortgagee with an authorisation to discharge or a registrable discharge of the First Mortgage upon payment by the Second Mortgagee of the lesser of:
 - (a) the total amount outstanding under the First Mortgage including all interest, fees, other bank charges and taxes at the date on which that payment is to be made; and
 - (b) the First Mortgagee Priority Amount provided that all proceeds from the sale are distributed in accordance with this Deed.

6. DIRECTION TO PAY

Each Mortgagee irrevocably and unconditionally authorises and directs a liquidator, official assignee, administrator, receiver, or similar person appointed or acting in respect of the Mortgagor to pay the proceeds of the realisation of any Land in accordance with the provisions of this Deed.

7. MORTGAGOR ACKNOWLEDGEMENT

The Mortgagor acknowledges the First Mortgagee and the Second Mortgagee are entering into this Deed.

8. TRANSFER OR ASSIGNMENT

Neither Mortgagee will transfer or assign any interest or right in or to any of that Mortgagee's Mortgage to any person unless that person has agreed to be bound by this Deed.

9. COSTS

The Mortgagor agrees to pay on demand all costs incurred by the Mortgagees in connection with this Deed, its preparation, negotiation and execution.

10. GOVERNING LAW AND JURISDICTION

This Deed is governed by New Zealand law, and the parties submit to the non-exclusive jurisdiction of the courts of New Zealand.

EXECUTED AS A DEED

SIGNED by the **Mortgagor:**)
)
)
in the presence of:)

Witness signature

Full name

Address

Occupation

SIGNED by **Mortgage Holding Trust**)
Company Limited)
by its attorneys in the presence of:)

Attorney

in the presence of:

Witness signature

Full name

Address

Occupation

SIGNED by the **Second Mortgagee**)
by:)
)

in the presence of:

Witness signature

Full name

Address

Occupation

[Notes on Execution:

1. *All signatories shall clearly print their name where indicated.*
2. *Where signed by two or more Directors, the signatures do not need to be witnessed.*
3. *Where signed by only one Director, or one Director and another authorised person, or duly authorised attorneys, all signatures must be witnessed.*
4. *If signed by duly authorised attorneys, certificates of non-revocation of power of attorney must be provided.]*

SCHEDULE

Part A – The Land

The Land described in
Unique Identifier (Certificate of Title)
Registry
and includes any part of it.

Part B – The Mortgagee Amounts

First Mortgagee Amount \$

Second Mortgagee Amount \$

Part C – The Mortgages

First Mortgagee Mortgage

- The mortgage instrument dated ____/____/____ registration number _____ (if any) granted by the Mortgagor in favour of the First Mortgagee over the Mortgagor's interest in the Land (whether or not that mortgage is also over other interests in land).

Second Mortgagee Mortgage

- The mortgage instrument dated ____/____/____ registration number _____ (if any) granted by the Mortgagor in favour of the Second Mortgagee over the Mortgagor's interest in the Land (whether or not that mortgage is also over other interests in land).

Part D – Interest Period

24 Months