

# JAMES & SON (NZ) Pty Limited

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## TRADE TERMS

Please read the following terms carefully. They apply to the Account and Product supplied or arranged to be supplied by James & Son at the request of the Customer, from 01.10.2009.

### Definitions

"Account" means all accounts (however titled) provided by James & Son at the request of the Customer, to record any transaction, purchase of Product or receipt of Product prior to payment.

"Address for Service" means the Postal/email address or fax number last notified by the Customer or Guarantor, PO Box 863 Hastings 4156 for James & Son.

"Application" means the application for the Account made by the Customer.

"Customer" means the purchaser of Product; the person/legal entity described in the Application, and/or the Customer of James & Son, who apply for and open an Account or who operate the Account to record any transaction, buy Product from or through James & Son.

"Default Event" means an event where:

- a) the Customer fails, or in James & Son opinion is likely to fail, to comply with the Trade Terms, or any other contract with James & Son;
- b) the Customer commits an act of bankruptcy;
- c) the Customer enters into any composition or arrangement with creditors;
- d) if the Customer is a company:
  - aa) does anything which would make it liable to be put into liquidation;
  - bb) fails to provide a certificate of solvency within 10 days of receiving a written demand from James & Son;
  - cc) a receiver or statutory or official manager is appointed over all or any of its assets;
  - dd) a resolution is passed or an application is made for liquidation;
  - ee) the ownership or effective control of the Customer or the Customer business is transferred or the nature of the Customer business materially altered.

"Delivery Document" means a Supplier business record relating to Product.

"Due Date" means the date notified by James & Son to the Customer by which Sum Owing must be paid and if no date is specified, is by the 20<sup>th</sup> day of the month following the Statement month closing balance.

"Guarantor" means the guarantor(s) signing any Deed of Guarantee and Indemnity required by James & Son.

"James & Son" means James & Son (NZ) Pty Limited and its directors, managers and any duly authorised agent.

"PPSA" means the Personal Property Securities Act 1999.

"Product" means Product and/or services provided by James & Son, or arranged through James & Son at the request of the Customer, and recorded to the Account and Statement.

"Product Date" means the date recorded by James & Son for any Product debited to the Account.

"Recommendation" means the best option for a given situation based on sources believed to be accurate.

"Statement" means James & Son business record of Account transactions.

"Statement month closing balance" means the amount specified in the Statement month to be paid by Due Date.

"Sum Owing" means the Statement month closing balance notified by James & Son.

"Supplier" means a supplier or service provider either in a business relationship with James & Son or the Customer.

"Trade Terms" means the terms relating to the operation of the Account and the supply of Product recorded on Statement.

### Sum Owing

1. The Customer shall pay the Sum Owing to James & Son in full without any deductions, whether by way of set off, counter claim, or any other equitable legal claim.
2. The Sum Owing may include:
  - 2.1 Product and services tax and any other taxes, duties and levies payable in respect of the Product at Product Date;
  - 2.2 the amount of any increase in the cost of the Product added by a Supplier due to an accounting error.

### Payment

3. The Customer shall pay the Sum Owing to James & Son by the Due Date.
4. James & Son may apply any payment:
  - 4.1 received from or on behalf of the Customer;
  - 4.2 due by James & Son to the Customer;
  - 4.3 due by James & Son to any legal entity owned by, or effectively controlled by the Customer; in reduction of the Sum Owing as James & Son thinks fit to preserve any purchase money security interest James & Son has in the Product.
5. The Customer acknowledges:
  - 5.1 James & Son continues to supply and arrange the supply of Product on condition that all payments received by James & Son from the Customer are valid and made in the ordinary course of the Customer business;
  - 5.2 James & Son receives all payments in the ordinary course of the Customer business and in good faith and in the reasonably held belief as to the validity of those payments;
  - 5.3 the understanding of James & Son towards its business with the Customer shall apply until the Customer gives notice in writing to James & Son of the Customer inability to pay due debts and that the Customer purpose in making further payment is to enable James & Son to receive more towards satisfaction of the Sum Owing than it would otherwise have received or have been likely to have received in any liquidation/insolvency of the Customer;
  - 5.4 James & Son has, in accepting each Customer payment, altered its position in reliance on the validity of each payment:
    - 5.4.1 by delaying revocation of the authority granted to the Customer in clause 12.2;
    - 5.4.2 by the continued supply of Product after the receipt of each payment whether or not the Customer pays for the Product;
    - 5.4.3 if payment is received after Due Date by foregoing its right to commence recovery action against the Customer, or Guarantor.

### Delivery

6. The delivery of Product shall be completed upon:
  - 6.1 despatch from James & Son;
  - 6.2 despatch/supply from a Supplier when supplied direct to the Customer;
  - 6.3 Product Date for Product held for the Customer.

7. James & Son shall not:
- 7.1 be liable for failure to supply, refusal to supply, defective supply of Product;
  - 7.2 guarantee a continuing relationship with any Supplier.

#### **Risk and Security Interest**

8. Risk of any loss, damage or deterioration to the Product passes to the Customer upon supply.
9. Ownership of the Product remains with James & Son and does not pass to the Customer until the Customer pays the Sum Owing to James & Son.
10. Until payment of the Sum Owing the Customer shall insure the Product for the full insurable value with James & Son Interest noted on the relevant insurance policy.
11. The Customer grants a security interest in the Product to James & Son as security for payment of the Product, and for any other amounts from time to time owing by the Customer to James & Son, and for the performance by the Customer of all the Customer other obligations to James & Son ("Customer indebtedness and obligations"). For the purposes of, and to ensure a maximum benefit and protection for James & Son by virtue of the PPSA (s36), the Customer confirms and agrees that the Customer intends to, and does grant to James & Son, a security interest in all of the Customer present and after acquired property as security for the Customer indebtedness and obligations.
12. While ownership of the Product remains with James & Son and the Product secure the Customer indebtedness and obligations:
- 12.1 the Customer must store the Product separately, not mix the Product, and identify the Product as belonging to James & Son.
  - 12.2 James & Son authorises the Customer in the ordinary course of the Customer business to only use the Product; resale is not permitted.
  - 12.3 the authority in 12.2 is revoked when:
    - 12.3.1 a Default Event occurs;
    - 12.3.2 James & Son notifies the Customer at the Address for Service that the Customer authority is revoked.
  - 12.4 if the Product (for which payment has not been made) are not kept in a manner so as to enable the Product to be clearly identified as the property of James & Son, then James & Son is deemed to be the owner of the quantity of the Product equivalent to the quantity of the Product for which payment has not been made.
  - 12.5 The Customer must advise James & Son immediately of a Default Event or any action by third parties (including any of the Customer creditors) affecting James & Son security interest in the Product.
  - 12.6 James & Son (as the Customer agent and pursuant to an irrevocable licence granted by the Customer) may enter the premises where the Product is stored and remove the Product, without being responsible for any damage caused and the Customer shall indemnify James & Son against any claim or costs arising from such action.
  - 12.7 James & Son may resell the Product and apply the proceeds of sale in reduction of the Sum Owing.
13. The Customer agrees to promptly do anything that James & Son reasonably requires to:
- 13.1 ensure that James & Son has a first ranking perfected security interest in all of the Product (and any sale proceeds);
  - 13.2 enable registration of a financing statement or financing change statement under PPSA.
14. If the Customer resells or uses the Product before ownership in the Product has passed to the Customer, the proceeds of such sale or use shall be received and held by the Customer (in whatever form) in trust for both the Customer and James & Son. James & Son interest as beneficiary under that trust shall be that portion of the proceeds which does not exceed the Sum Owing. The balance proceeds (if any) shall be the Customer beneficial interest under that trust.
15. James & Son may commence an action for the Sum Owing when ownership of the Product may not have passed to the Customer.

#### **Contracting out of PPSA**

16. The Customer waives the right to receive a copy of the verification statement confirming registration of a financing statement or financing change statement relating to the security interest under the Trade Terms.
17. The Customer:
- 17.1 shall not register a financing statement or a change demand without the prior written consent of James & Son;
  - 17.2 agrees that sections 114, 133 and 134 of the PPSA shall not apply to these Trade Terms, or the security interest under these Trade Terms;
  - 17.3 waives and contracts out of the Customer rights as detailed in sections 107, 116 to 132 inclusive of the PPSA;
  - 17.4 shall pay all costs, expenses and other charges incurred by James & Son:
    - 17.4.1 from the filing of a financing statement or financing change statement;
    - 17.4.2 as a consequence of any dispute or negotiation with third parties claiming an interest in the Product; in connection with the Trade Terms.

#### **Claims and Liability Limitation**

18. Except as provided in any express warranty given and to the extent permitted by law, James & Son:
- 18.1 excludes all warranties, descriptions, representations or conditions whether implied by law, trade, custom or otherwise and whether relating to fitness, merchantability, suitability for purpose, Recommendation, or otherwise and all specific conditions even though such conditions may be known to James & Son;
  - 18.2 excludes liability in any way to the Customer or any third party, whether in tort (including negligence), contract, or otherwise, for any loss or damage whatsoever (including Recommendation) whether direct, indirect, special, or consequential, and the Customer indemnifies James & Son against any such claim;
  - 18.3 states that any liability in respect of the Product shall be limited to the price of the Product;
  - 18.4 advises that it does not intend to contract out of the provisions of the Consumer Guarantees Act 1993 except to the extent permitted by that Act.
19. James & Son may at its complete discretion, give credit for the Product not supplied or incorrectly recorded; or supplied and established to be defective provided that:
- 19.1 any claim or dispute of a business record on a Delivery Document or Statement must be notified to James & Son within 4 days following the Delivery Document date or the Product Date, together with all supporting documentation;
  - 19.2 all claims must specifically identify the incorrect business record or defect and, where possible in relation to the Product be accompanied by the defective Product or a sample;
  - 19.3 the Customer shall take all steps to ensure that James & Son has every opportunity to investigate the claim.
20. Unless James & Son accepts a correction should be made, the Customer acknowledges that excluding a Default Event each Statement is the only business record for the Account.
21. The decision by James & Son in respect of a Customer claim shall be accepted as conclusive and binding by the Customer.
22. If the Customer acquires the Product for business purposes the Consumer Guarantees Act 1993 does not apply to the Product. (In the absence of express written acknowledgement by James & Son to the contrary the application by the Customer for an Account is determination that the Customer acquires Product for "business purposes".)

23. If the Customer on sells the Product it shall be a term of the sale contract that the Consumer Guarantees Act 1993 does not apply if the Product is being acquired for business purposes. The Customer indemnifies James & Son against any liability or costs, incurred by James & Son under the Consumer Guarantees Act 1993, as a result of any breach by the Customer of the Trade Terms.
24. James & Son shall not be responsible for:
- 24.1 any dispute between the Customer and a third party;
  - 24.2 any dispute between the Customer and any Supplier;
  - 24.3 the actions of any Supplier;
  - 24.4 any credit due by a Supplier to a Customer until notification of such credit is received from the Supplier;
  - 24.5 any losses caused by occurrences beyond its control.
25. The Customer agrees that James & Son shall not be joined as a party to any claim involving a Supplier and expressly agree that any breach of this term is a Default Event.

#### **Default**

26. Should a Default Event occur James & Son may suspend or cancel the Account, and the Sum Owing shall immediately become due and payable notwithstanding that the Due Date has not arrived.
27. If the Customer does not pay the Sum Owing by the Due Date James & Son shall/may at its sole discretion:
- 27.1 charge interest at the rate of 2.5% per month (or such other rate as shall be notified in writing to the Address for Service in respect of the Sum Owing. Such interest shall accrue on a daily basis from the Product Date until payment in full and is charged by way of damages for failure to pay and does not imply the granting of, or extension of, credit by James & Son to the Customer;
  - 27.2 reverse any discounts recorded on the Account Statements;
  - 27.3 debit any other account the Customer may have to pay the Sum Owing;
  - 27.4 require the Customer to pay for and separately indemnify James & Son against, all Account transaction fees as may be deemed appropriate by James & Son, administration collection costs, legal costs of James & Son as between solicitor and client, and any collection commissions, incurred as a consequence of a Default Event;
  - 27.5 complete and register an all obligations mortgage (Registrar General of Land approval 1998/2072) or caveat over any property owned by the Customer to secure the Sum Owing and the Customer irrevocably appoints the manager, or any director of James & Son, as the attorney of the Customer for the purpose of completing such mortgage or caveat whilst the Sum Owing remains unpaid.

#### **Information Use**

28. The Customer and Guarantor agree that:
- 28.1 the personal information provided, obtained and retained by James & Son about them (including personal information about Customer/Guarantor directors, officers or trustees) will be held and used for any or all of the following purposes including determining eligibility for credit, the supply of Product, enforcing debt and legal obligations under the Trade Terms the marketing of Product and services including emails and market research by James & Son and any Supplier;
  - 28.2 the Trade Terms is the Customer and, Guarantor's irrevocable authority to James & Son to:
    - 28.2.1 use any personal information for the purposes in clause 28.1;
    - 28.2.2 provide any personal information (along with details of any dealings between the Customer, Guarantor and James & Son) to any third party (including a credit reporter where the personal information is able to be accessed for genuine credit related purposes by other credit inquirers);
    - 28.2.3 obtain any information concerning the Customer and Guarantor (including personal information about Customer/Guarantor directors, officers or trustees) from any other source for James & Son business with the Customer and Guarantor.
  - 28.3 the Customer and Guarantor must notify James & Son of any change in circumstances that may affect the accuracy of the information provided by them to James & Son;
  - 28.4 The Customer and Guarantor as a natural person and the Customer/Guarantor directors, officers or trustees, have rights of access to, and correction of any personal information held by James & Son.

#### **Assignment/Cancellation**

29. James & Son shall be entitled to assign to any other person or company all or part of the Sum Owing and the assignee shall be entitled to claim all or part of the Sum Owing and shall have the same rights of recovery as James & Son.
30. James & Son shall be entitled to cancel all or any part of the Trade Terms at any time with or without prior notice. Any such cancellation shall be without prejudice to James & Son rights and remedies including, but not limited to, those which may arise from any breach or non-compliance by the Customer.

#### **Other Trade Terms**

31. If there is any inconsistency between the Trade Terms and any order submitted by the Customer, or any other arrangement between the parties, the Trade Terms shall prevail unless otherwise agreed in writing by the parties.
32. The Customer shall not approach any Supplier for direct discounts, use the name of James & Son, or reveal James & Son trading terms in any attempt to obtain personal discounts from businesses not associated with James & Son. A breach of this term shall be a Default Event.

#### **Waiver**

33. If at any time James & Son does not enforce the Trade Terms, or grants the Customer time or other indulgence, James & Son shall not be construed as having waived the Trade Terms or its right to later enforce the Trade Terms.

#### **Terms Separately Binding**

34. Each clause of the Trade Terms is separately binding. Where any provision is void, unenforceable or otherwise ineffective by operation of law the enforceability or effectiveness of the remaining clauses shall not be affected.

#### **Changing the Trade Terms**

35. James & Son may add, change or remove clauses in the Trade Terms:
- 35.1 James & Son can change the Trade Terms at any time without obtaining the consent of the Customer;
  - 35.2 James & Son may advise when changes to the Trade Terms are to take effect by notice to the Customer's Address for Service;
  - 35.3 By signing the Application/Guarantee, using the Account, the Customer/Guarantor acknowledges that the Trade Terms apply to the Account;
  - 35.4 By signing the Application/Guarantee, using the Account the Customer/Guarantor acknowledged receiving a copy of the Trade Terms prior to signing the Application and that the current Trade Terms apply to the Account;
  - 35.5 A copy of the Trade Terms be obtained from James & Son at the Address for Service or by downloading from the James & Son website.

#### **Communication**

36. James & Son will send or deliver the Statement, notices, or other documents to the Address for Service. The Customer and Guarantor agree and acknowledge any:
- 36.1 Statement, notice has been received 4 days after it has been sent;
  - 36.2 facsimile has been received upon confirmation of transmission;
  - 36.3 document has been served and received on the date of delivery;
  - 36.4 email has been received within 1 day after it has been sent.

37. The Customer

- 37.1 must inform James & Son giving not less than 14 days prior notice in writing (addressed to the Director):
  - 37.1.1 of any proposed change in the Customer name;
  - 37.1.2 If the Address for Service, contact phone number/email address is changed, or the Account is to be closed; and
- 37.2 remains liable for the Sum Owing, and any Product debited to the Account where James & Son has not acknowledged in writing receipt of the Customer instructions to close the Account.

**Product use**

38. The Customer accepts the advice, information, or Recommendation provided by James & Son or a Supplier to the Customer relating to the Product, is given in good faith and based on the information provided by the Customer. The decision to order and use the Product or follow the Recommendation is that of the Customer.

**Return**

39. Where James & Son at its discretion allows the Customer to return the Product (not defective or non complying), James & Son reserves the right to charge, in addition to any delivery costs, a return fee.

**Failure to Supply**

40. James & Son shall not be liable for any failure to supply the Product, or to meet any other obligations owed to the Customer.

**Legal Forum**

41. The Customer acknowledges that any dispute or legal proceedings between the Customer and James & Son shall be filed in and be heard at either the Disputes Tribunal or the District Court at Hastings, or the High Court at Napier. The parties to the Trade Terms expressly acknowledge that the cause of action or a material part thereof arises within the jurisdiction of the Disputes Tribunal or the District Court at Hastings or the High Court at Napier.
42. The Trade Terms is subject to and governed by New Zealand law. The language of the Trade Terms shall only be 'English'.