

46/82

IN THE PRIVY COUNCIL

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O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES  
COMMON LAW DIVISION COMMERCIAL LIST  
IN PROCEEDINGS NO. 10162 of 1978

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B E T W E E N :

AUSTRALIA AND NEW ZEALAND BANKING  
GROUP LIMITED

Appellant  
(Defendant)

-v-

BENEFICIAL FINANCE CORPORATION  
LIMITED

Respondent  
(Plaintiff)

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RECORD OF PROCEEDINGS

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Allen & Overy,  
9 Cheapside,  
London EC2V 6AD.

Solicitors for the  
Appellant

Simmons & Simmons  
14 Dominion St.,  
London EC2M 2RJ.

Solicitors for the  
Respondent

IN THE PRIVY COUNCIL

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O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES  
COMMON LAW DIVISION COMMERCIAL LIST  
IN PROCEEDINGS NO. 10162 of 1978

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B E T W E E N :

AUSTRALIA AND NEW ZEALAND BANKING  
GROUP LIMITED

Appellant  
(Defendant)

-v-

BENEFICIAL FINANCE CORPORATION  
LIMITED

Respondent  
(Plaintiff)

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RECORD OF PROCEEDINGS

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BUT NOT REPRODUCED

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IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES  
COMMON LAW DIVISION COMMERCIAL LIST  
IN PROCEEDINGS NO. 10162 of 1978

B E T W E E N :

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED Appellant  
(Defendant)

10

-v-

BENEFICIAL FINANCE CORPORATION LIMITED Respondent  
(Plaintiff)

RECORD OF PROCEEDINGS

No. 1

Summons - 23rd February 1978

No. 1

Summons  
23rd February  
1978

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION

COMMERCIAL LIST

No. 10162 of 1978

20

BENEFICIAL FINANCE CORPORATION LIMITED Plaintiff

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED Defendant

S U M M O N S

THE Plaintiff claims:-

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1. A declaration that the Plaintiff is discharged from any further liability to the Defendant arising or to arise under the Agreements with the Defendant comprised in the letter bearing date 4th April, 1974 and the Instrument under seal executed by the Plaintiff in favour of the Defendant on 2nd March, 1976 copies whereof are annexed to the Affidavit of Francis John Kelly herein and marked respectively



No. 1  
Summons  
23rd February  
1978  
(cont'd)

"B" and "O".

2. Costs.

TO: Australia and New Zealand Banking Group Ltd.  
20 Martin Place, Sydney.

If there is no attendance before the Court by you or by your Counsel or Solicitor at the time and place specified below, the proceedings may be heard and you will be liable to suffer judgment or an order against you in your absence.

Before any attendance at that time you must enter an appearance in the Registry. 10

time: 9th March 1978 at 9.15 a.m.

Place: Supreme Court, Queen's Square,  
Sydney. 2000

Plaintiffs: Beneficial Finance Corporation  
Limited of 285 George Street, Sydney.

Plaintiff's address for service: Robert Ritchie Bruce,  
Bruce & Stewart, Solicitors,  
66 Clarence Street, Sydney.

Address of Registry: Queen's Square, Sydney, 2000 20

NOTICE FOR SERVICE AT DOCUMENT EXCHANGE

The Plaintiff may be served at the following exchange box in Sydney of the Australian Document Exchange Pty. Ltd. -

Bruce & Stewart, Box 132, Sydney.

Sgd. R.R. Bruce

Plaintiff's Solicitor,  
Robert Ritchie Bruce.

FILED: 1978.

30

BRUCE & STEWART,  
Solicitors,  
66 Clarence Street,  
SYDNEY 2000  
or Box 132, C.D.E.  
Phone - 29.5973 (RRB)

Affidavit of Francis John Kelly and  
Annexures - 23rd February 1978

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION

COMMERCIAL LIST

No. 10162 of 1978

BENEFICIAL FINANCE CORPORATION  
LIMITED

Plaintiff

AUSTRALIA AND NEW ZEALAND BANKING  
GROUP LIMITED

Defendant

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A F F I D A V I T

Deponent: Francis John Kelly

Sworn: 23rd February, 1978

ON 23rd February, 1978, FRANCIS JOHN KELLY of  
285 George Street, Sydney in the State of New  
South Wales, Regional Manager, says an oath:-

1. I am the Regional Manager of the Plaintiff  
and am duly authorised to make this Affidavit.

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2. On 4th April, 1974 the Plaintiff by Deed  
bearing that date (hereinafter called "the  
Principal Deed") agreed with Tacking Point Downs  
Pty. Limited ("the Borrower") and other associated  
or interested parties to furnish to the Defendant  
a "Take-Out Guarantee" in consideration, inter  
alia, of a covenant by such parties for payment  
quarterly of a fee (hereinafter called "the  
commitment fee"). Annexed hereto and marked "A"  
is a copy of the said Deed.

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3. On 4th April, 1974 the Plaintiff furnished  
to the Defendant the said Take-Out Guarantee in  
the form of a letter bearing that date from the  
Plaintiff to the Defendant. Annexed hereto and  
marked "B" is a copy of the said letter.

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4. On or about 1st May, 1974 the Defendant  
wrote to the Plaintiff confirming that the quantum  
of the liability under the Take-Out Guarantee  
would be reduced to the figure of \$1 million.  
Annexed hereto and marked "C" is a copy of such  
letter. As appears therefrom the Defendant did  
not, contrary to Recital C in the said letter  
annexure "B" hereto, acquire a first mortgage over  
the area of 56 acres. In fact the Bank's mortgage  
over the said area comprises a Third Mortgage.

No. 2  
 Affidavit of  
 Francis John  
 Kelly and  
 Annexures  
 23rd February  
 1978.  
 (cont'd)

5. Between 4th April, 1974 and 3rd February, 1975 Hudson & Wallace (Trading) Pty. Limited purchased the land referred to in Part B of the First Schedule to the Principal Deed (annexure "A") and the parties to the Principal Deed by a further Deed bearing date 3rd February, 1975 (a copy of which is annexed and marked "D") varied the Principal Deed.

6. Between 19th December, 1975 and 13th February 1976 letters passed between the Plaintiff and the Defendant as follows:- 10

<u>Date</u>	<u>From</u>	<u>To</u>	<u>Copy Annexed Marked</u>	
19th December 1975	Defendant	Plaintiff	"E"	
2nd January, 1976	Plaintiff	Defendant	"F"	
9th January, 1976	Plaintiff	Defendant	"G"	
16th January, 1976	Plaintiff	Defendant	"H"	20
19th January, 1976	Defendant	Plaintiff	"I"	
23rd January, 1976	Plaintiff	Defendant	"J"	
30th January, 1976	Plaintiff	Defendant	"K"	
5th February, 1976	Plaintiff	Defendant	"L"	
13th February, 1976	Plaintiff	Defendant	"M"	30

7. On 2nd March, 1976 the parties to the Principal Deed (Annexure "A") by a further Deed bearing that date (a copy of which is annexed and marked "N") further varied the Principal Deed and the quantum of the commitment fee.

8. On 2nd March, 1976 by a document under seal bearing that date (a copy of which is annexed and marked "O") the Plaintiff and the Defendant varied the Take-Out Guarantee. 40

9. Between 2nd March, 1976 and 7th October, 1977 the Borrower made the following payments only on account of the commitment fee:-

<u>Due date for Payment as per Annexure "O"</u>	<u>Date of Payment</u>	<u>Amount</u>	<u>No. 2</u> Affidavit of Francis John Kelly and Annexures 23rd February 1978 (cont'd)
4th July, 1976	21st July 1976	\$28,493.98	
4th October 1976	5th October 1976	\$ 9,342.42	
4th January, 1977	5th January 1977	\$10,164.83	
4th April, 1977	4th April 1977	\$11,326.93	
4th October, 1977	7th October 1977	\$26,236.45	

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No payment has been received in respect of the commitment fee due 4th January, 1978.

10. Between 21st December 1976 and 22nd February 1978 letters passed between the Plaintiff and the Defendant as follows:-

<u>Date</u>	<u>From</u>	<u>To</u>	<u>Copy Annexed Marked</u>
21st December 1976	Defendant	Plaintiff (with annexure)	"P" "Q"
4th April 1977	Defendant	Plaintiff	"R"
12th April 1977	Defendant	Plaintiff (with annexure)	"S" "T"
15th April 1977	Defendant	Plaintiff (with annexure)	"U" "V"
11th May 1977	Defendant	Plaintiff	"W"
19th July 1977	Plaintiff	Defendant	"X"
10th August 1977	Defendant	Plaintiff	"Y"
19th December 1977	Defendant	Plaintiff	"Z"
7th February 1978	Plaintiff	Defendant	"AA"
14th February 1978	Defendant	Plaintiff	"AB"
16th February 1978	Plaintiff	Defendant	"AC"
17th February 1978	Defendant	Plaintiff	"AD"

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<u>No.2</u>	<u>Date</u>	<u>From</u>	<u>To</u>	<u>Copy Annexed Marked</u>
Affidavit of Francis John Kelly and Annexures 23rd February 1978. (cont'd)	21st February 1978	Plaintiff	Defendant	"AE"
	22nd February 1978	Plaintiff	Defendant	"AF"

11. I am informed by the Plaintiff's Solicitors and verily believe that no Charge is registered at the Commission of Corporate Affairs by the Borrower in favour of the Defendant other than that whereof a true copy is annexed hereto and marked "AG".

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SWORN at Sydney )  
Before me: ) Sgd. F. Kelly  
Sgd. A.J. Porter J.P.

A Justice of the Peace

BRUCE & STEWART,  
Solicitors,  
66 Clarence Street,  
SYDNEY, 2000.  
or Box 132, C.D.E.  
Phone - 29.5973 (RRB)

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Annexure  
"A"

Annexure "A"

THIS DEED made the 4th day of April One thousand nine hundred and seventy-four BETWEEN TACKING POINT DOWNS PTY. LIMITED a company duly incorporated in the State of New South Wales and having its registered office at c/o J.V. Dulhunty, 8th Floor, 139 Macquarie Street, Sydney in the said State (hereinafter called "the Borrower") of the first part, JOHN VENOUR DULHUNTY of 10 Kara Crescent, Bayview in the State of New South Wales Company Director TERUKIM PTY. LIMITED a company duly incorporated in the State of New South Wales and having its registered office at c/o J.V. Dulhunty, 8th Floor, 139 Macquarie Street, Sydney in the said State and HALISBURY PTY. LIMITED a company duly incorporated in the Australian Capital Territory and having its registered office at c/o Phipson Nominees Pty. Ltd., 12th floor, National Mutual Centre, Darwin Place, Canberra in the said Territory (hereinafter called "the Guarantors") of the second part, VENDUL MANAGEMENT PTY. LIMITED, VENDUL INTERNATIONAL PTY. LIMITED, ROWINI HOLDINGS PTY. LIMITED and HUDSON & WALLACE TRADING PTY. LIMITED all being companies

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incorporated in the State of New South Wales and having their registered offices at c/o J.V. Dulhunty, 8th Floor, 139 Macquarie Street, Sydney in the said State (hereinafter called "the Sureties") of the third part AND BENEFICIAL FINANCE CORPORATION LIMITED a company duly registered and carrying on business in the State of New South Wales and duly registered under the Money-lenders and Infants Loans Act 1941 and having its registered office under that Act at 285 George Street, Sydney in the said State (hereinafter called "Beneficial") of the fourth part W H E R E A S :-

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "A"  
(cont'd)

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- A. The Borrower is the registered proprietor of the parcels of land at Port Macquarie described in Part A of the First Schedule hereto and has negotiated the purchase of the parcels of land at Port Macquarie described in Part B of the First Schedule hereto. The parcels of land described in Parts A and B of the First Schedule hereto are hereinafter referred to as "the Port Macquarie lands."
- B. The Borrower has requested THE AUSTRALIA & NEW ZEALAND BANKING GROUP LIMITED (hereinafter called "the Bank") to make certain loan facilities available to the Borrower on the security of (inter alia) a registered first mortgage or mortgages over the Port Macquarie lands and a floating charge over the Borrower's assets (which securities are hereinafter referred to as "the Bank's securities").
- C. It is a condition of the Bank's said agreement that the Borrower provide a guarantee to the Bank that finance up to a maximum amount of One Million one hundred thousand dollars (\$1,100,000.00) will be available to the Borrower to enable it to repay in part or in whole the Bank's loan when that loan falls due for repayment (hereinafter referred to as "the take-out guarantee").
- D. Beneficial has at the request of the Borrower, the Guarantors and the Sureties agreed to provide the take-out guarantee on the terms and subject to the covenants and conditions hereinafter set forth.

NOW THIS DEED WITNESSETH and it is hereby mutually agreed and declared as follows:-

1. BENEFICIAL agrees with the Borrower, the Guarantors and the Sureties that Beneficial will

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "A"  
(cont'd)

provide to the Bank a take-out guarantee in the form of the draft letter from Beneficial to the Bank annexed hereto and signed by the parties for the purposes of identification.

2. BENEFICIAL'S obligation to the Bank under the take-out guarantee shall be subject to the terms of the said draft letter and shall arise only if the conditions set forth therein and in this Deed shall have been duly fulfilled and the commitment fee provided for in Clause 3 hereof shall have been duly paid. 10

3. IN consideration of Beneficial agreeing to provide the take-out guarantee as aforesaid the Borrower and the Guarantors covenant and agree with Beneficial that the Borrower shall pay to Beneficial a commitment fee equivalent to One per centum (1%) per quarter calculated by reference to the maximum amount owing by the Borrower to the Bank during each quarterly period for so long as the take-out guarantee subsists. The Borrower shall pay to Beneficial at the commencement of each quarterly period a fee calculated by reference to the amount owing at the commencement of the quarter and at the expiration of the quarter shall make such further payment as may be necessary to bring the amount paid up to the figure of One per centum (1%) per quarter hereinbefore referred to 20

4. IT is a condition of Beneficial's assumption of the obligation contained in Clause 1 hereof that on the execution hereof or at such other time as Beneficial may in writing agree Beneficial shall have the benefit of the securities from the Borrower, the Guarantors and the Sureties described in the Second Schedule hereto (which are herein referred to as "Beneficial's securities) by way of security for:- 30

- (a) The commitment fee payable by the Borrower pursuant to Clause 3 hereof;
- (b) Any other moneys payable by the Borrower to Beneficial hereunder; and 40
- (c) Any moneys which may be advanced by Beneficial to for or on account of the Borrower in pursuance of the obligation assumed by Beneficial in Clause 1 hereof.

5. IN the event of Beneficial being called upon under Clause 1 hereof to pay out the Bank's loan then upon such payment being made Beneficial shall (in addition to Beneficial's securities as hereinbefore described) be entitled to take the benefit of the Bank's securities in one or other of the following manners:- 50

- (a) Beneficial may require the Bank to assign its securities and the full benefit and advantage thereon to Beneficial (as on the assignment of a mortgage debt); or
- (b) Beneficial may require that the Bank discharge its securities and that the Borrower and the Guarantors execute fresh securities in favour of Beneficial in the form of firstly a first mortgage over the Port Macquarie lands, secondly a floating charge over the Borrower's assets and undertaking including uncalled capital and thirdly a deed of guarantee from the Guarantors, such securities to be in such form as Beneficial's Solicitors shall in their absolute discretion require

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978  
Annexure "A"  
(cont'd)

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6. THE terms of repayment by the Borrower in respect of any moneys advanced by Beneficial to for or on account of the Borrower in pursuance of Clause 1 hereof shall be as follows:-

- (a) The capital sum advanced shall be repaid on or before the expiration of two (2) years from the date on which the same is provided by Beneficial as aforesaid;
- (b) The Borrower shall pay to Beneficial interest on the said capital sum at the rate of fourteen per centum (14%) per annum or such other rate as Beneficial in its absolute discretion considers to be the rate of interest then prevailing for transactions of this nature, such interest to be computed from the date upon which the capital is paid out by Beneficial and calculated on daily rests and payable on monthly rests.

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7. BY way of further consideration for Beneficial agreeing to provide the take-out guarantees aforesaid the Borrower agrees that in the event of Beneficial being called upon so to do and providing finance to pay out the Bank as provided in Clauses 1 and 8 hereof then the Borrower shall become liable to pay to Beneficial in addition to the capital sum and interest hereinbefore provided a further sum equivalent to Twenty-five per centum (25%) of the net profit (calculated as hereinafter provided) derived by the Borrower from the development of the Port Macquarie lands. The Borrower's profit as aforesaid shall be calculated on the basis set forth in the Third Schedule hereto. Any dispute between the parties as to the amount payable by the Borrower to Beneficial under this Clause shall be referred to an arbitrator appointed by the President for the time being of the Australian Institute of Chartered Accountants (New



No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "A"  
(cont'd)

South Wales) in accordance with the provisions of  
the Arbitration Act 1900 as amended

8. BENEFICIAL further agrees with the Borrower that in the event that the Bank during the term of its loan advances to the Borrower a further loan (hereinafter called "the development loan") to assist the Borrower in developing the Port Macquarie lands then PROVIDED that there shall not at the time the development loan or the first instalment thereof is advanced by the Bank be any breach or non-observance of the terms of this Deed by the Borrower or the Guarantors or the Sureties, Beneficial shall extend its take-out guarantee to the Bank so as to include the quantum of the development loan subject to the same terms and conditions as are hereinbefore expressed or are expressed in the draft letter to the Bank in relation to the Bank's initial loan of the principal sum and to the following further terms and conditions:-

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(a) Beneficial's additional liability under the take-out guarantee in respect of the development loan shall not exceed the sum of Nine hundred thousand dollars (\$900,000.00).

(b) The development loan shall be advanced by the Bank only by progress payments equivalent to expenses actually incurred by the Borrower in developing the said lands by residential subdivision.

(c) The Borrower's development plan for the residential subdivision of the said lands shall have been duly approved by the Council of the Municipality of Port Macquarie and the State Planning Authority of New South Wales (or any authority appointed or established in substitution therefor) and any other statutory local or other authority whose consent or approval to the plan is necessary for such purposes and there being no legal or other impediments to the development of the said lands by residential subdivision.

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(d) The Borrower shall pay Beneficial a commitment in respect of the development loan or so much thereof as from time to time has been advanced or shall remain unpaid at the rate of One per centum (1%) per quarter in the same manner or in provided for in Clause 3 hereof and any additional commitment fees payable to Beneficial as aforesaid shall be deemed to be received by Beneficial's securities.

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9. IN the event of any default hereunder by the Borrower or the Guarantors or the Sureties then the Borrower and the Guarantors and the Sureties hereby irrevocably appoint Beneficial and its State Manager for New South Wales for the time being jointly and each of them severally to be the true and lawful Attorney and Attorneys of the Borrowers and the Guarantors and the Sureties for the purpose of enabling Beneficial to complete on behalf of the Borrower and/or the Guarantors and/or the Sureties any of Beneficial's securities and/or to take such action as Beneficial may in its absolute discretion think fit to perfect its title under any of Beneficial's securities and generally to do any such acts matters and things in the name or names of the Borrower and/or the Guarantors and/or the Sureties (as the case may be) which Beneficial considers necessary or desirable to secure to Beneficial the due performance and observance by the Borrower and the Guarantors and the Sureties of their respective obligations to Beneficial under this Deed and under Beneficial's securities.

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "A"  
(cont'd)

10. ANY notices required to be given by any party hereunder shall be deemed to be sufficiently given if signed by or on behalf of a party by the party's Secretary or Manager or a Director and any such notices shall be deemed to be duly served if served in accordance with the provisions of Section 170 of the Conveyancing Act 1919 as amended.

11.(a) ALL covenants agreements and obligations herein contained shall be deemed to be entered into and made by and shall inure the benefit of the parties hereto and their respective personal representatives (in the case of natural persons) successors (in the case of corporations) and assigns.

(b) Where the context so admits words importing the singular number shall import the plural and vice versa and words importing any one gender shall be deemed to import the other gender.

12. THE Borrower shall pay all reasonable legal costs and disbursements incurred by Beneficial in and about the preparation execution and stamping of this agreement and the preparation execution and registration of Beneficial's securities and any matters arising herefrom or hereunder.

13. IT is agreed by and between Beneficial and the Sureties that if at any time any one or more of the Sureties wishes to sell a parcel of land

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "A"  
(cont'd)

over which Beneficial has security as provided in paragraphs (c) (d) (e) (f) and (g) of the Second Schedule hereto then Beneficial shall execute a discharge of its security over the land being sold subject to either Beneficial receiving from the Borrower or the Guarantors or the Sureties or any one or more of them a substituted security of not less value than that which Beneficial is called upon to discharge or alternatively to the Borrower's debt to the Bank in respect of which the take-out guarantee is given being reduced by an amount equivalent to the diminution in Beneficial's overall security resulting from the discharge and alternatively to up to an amount equivalent to the diminution in Beneficial's overall security as aforesaid being paid to Beneficial in reduction of any moneys due to Beneficial hereunder (whichever alternative or combination of alternatives Beneficial shall in its absolute discretion resolve). 10

14. IF at any time prior to the happening of the events referred to in Clause 9 hereof the Borrower wishes to discharge its liability to the Bank and/or cancel the take-out guarantee then Beneficial will forthwith discharge and assign all its securities to the Borrower or as it shall direct and provided that all moneys due hereunder have been duly paid and that the Bank has released Beneficial from its obligations under the take-out guarantee then as from the date of discharge or cancellation as aforesaid neither party shall be under any further or other liability to the others hereunder. 20 30

15. IF at any time any commitment fees due from the Borrower to Beneficial hereunder shall be in arrears and unpaid for the space of seven (7) days such arrears shall carry interest at the rate of Twenty per centum (20%) per annum computed from the date upon which the same fall due to payment calculated on daily balances and payable on demand.

16. IN consideration of Beneficial at the request of the Guarantors and the Sureties entering into these presents the Guarantors and the Sureties for themselves and their respective personal representatives (in the case of the said JOHN VENOUR DULHUNTY) successors (in the case of the other Guarantors and Sureties) and assigns hereby jointly and severally guarantee to Beneficial that the Borrower will duly observe and perform the covenants agreements and obligations on its part contained herein and in any securities now or at any time hereafter taken by Beneficial (whether originally or by assignment) in pursuance of this Deed and to secure any moneys due or to become due from the Borrower hereunder or to become due from the Borrower to Beneficial in the event of 40 50

Beneficial providing take-out finance as provided in Clauses 1 and 8 hereof and the Guarantors and the Sureties agree to pay to Beneficial on demand all or any moneys which the Borrower may from time to time fail to pay to Beneficial as and when the same fall due hereunder or under any securities as aforesaid and the amount of any loss or damage suffered or incurred by Beneficial in consequence of the Borrower's default as aforesaid AND it is agreed that this guarantee shall be a continuing guarantee and that the liability of the Guarantors hereunder shall not be discharged nor be otherwise affected by:-

No. 2  
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Kelly and  
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23rd February  
1978.  
Annexure "A"  
(cont'd)

10

20

- (a) The granting of any time or indulgence by Beneficial to the Borrower; or
- (b) Any omission on the part of Beneficial to enforce any covenant agreement or obligation against the Borrower; or
- (c) Any act or omission or means whereby the liability of the Guarantors and Sureties would have been discharged had the Guarantors and the Sureties been the principal debtor.

IN WITNESS the parties hereto have hereunto set their hands and seals on the day and year first hereinbefore written.

THE FIRST SCHEDULE HEREINBEFORE REFERRED TO

30

ALL THOSE parcels of land situate near Tacking Point in the Municipality of Port Macquarie and Parish and County of Macquarie being:-

PART A -

40

- (a) That parcel of 41 acres 1 rood comprised in Certificate of Title Volume 57 Folio 246.
- (b) That parcel of 2 acres 1 rood 8 perches comprised in Certificate of Title Volume 3210 Folio 34.
- (c) That parcel of 35 acres 2 roods being Portion 15 of the Parish comprised in Certificate of Title Volume 25 Folio 238.
- (d) That parcel of 28 acres 2 roods 8 perches comprised in Certificate of Title Volume 175 Folio 44.

PART B -

- (e) That parcel of 20 acres comprised in Deed

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(cont'd)

of Conveyance registered Number 439 Book  
2622.

- (f) That parcel of 20 acres 2 roods 9 perches being Portion 145 of the Parish comprised in Certificate of Title Volume 8409 Folio 186.
- (g) Lot 4 in Deposited Plan Number 25477 being the land comprised in Certificate of Title Volume 6937 Folio 102.

THE SECOND SCHEDULE HEREINBEFORE REFERRED TO

Beneficial's securities shall be as described hereunder and the documentation of such securities shall be in such form and shall contain such covenants agreements and conditions as Beneficial's solicitors shall reasonably require:- 10

- (a) A registered second mortgage over the Port Macquarie lands, being subject to a first mortgage to the Bank for advances from time to time not exceeding \$1,300,000.00.
- (b) The personal guarantees of John Venour Dulhunty and Terukim Pty. Limited. 20
- (c) Mortgages from Vendul International Pty. Limited as follows:-
  - (i) Land in Conveyance registered Number 865 Book 3081 being a third mortgage behind firstly a mortgage to M.R. Bird securing \$15,000.00 and secondly a mortgage to the Rural Bank of New South Wales securing advances from time to time with an upper limit of \$337,000.00 (hereinafter called "the Rural Bank Mortgage"). 30
  - (ii) Land in Certificates of Title Volume 11946 Foliios 111 and 112 being a second mortgage behind the Rural Bank Mortgage.
  - (iii) Land in Certificate of Title Volume 12214 Folio 160 being a second mortgage behind a first mortgage to Oakbourne Holdings Pty. Limited and others securing \$10,000.00.
- (d) Mortgages from Vendul Management Pty. Limited as follows: 40
  - (i) Land in Certificate of Title Volume 10811 Folio 240 being a second mortgage behind the Rural Bank Mortgage.
  - (ii) Land in Certificates of Title Volume

11806 Folios 68, 69 and 71 being a second mortgage behind the Rural Bank Mortgage.

No. 2

Affidavit of Francis John Kelly and Annexures 23rd February 1978. Annexure "A" (cont'd)

(iii) Land in Certificates of Title Volume 12175 Folios 28 and 30 being a third mortgage behind firstly a mortgage to R.W. Kelle securing \$140,000.00 and secondly the Rural Bank Mortgage.

10

(iv) Land in Certificate of Title Volume 11853 Folio 205 being a first mortgage.

(e) Mortgages from Hudson & Wallace Trading Pty. Limited as follows:-

(i) Land in Certificate of Title Volume 9963 Folio 175 being a second mortgage behind the Rural Bank Mortgage.

20

(ii) Land in Certificates of Title Volume 10256 Folios 185 and 186 being a second mortgage behind a mortgage to E.E. Patten securing \$29,000.00.

(f) A mortgage from Rowini Holdings Pty. Limited over the land in Certificate of Title Volume 2532 Folio 25 being a second mortgage behind the Rural Bank Mortgage.

(g) A mortgage from John Venour Dulhunty over the land in Certificate of Title Volume 11838 Folio 245 being a second mortgage behind a mortgage to N.A. Rowlison securing \$7,500.00.

THE THIRD SCHEDULE HEREINBEFORE REFERRED TO

30

The Borrower's profit on the development of the Port Macquarie lands for the purposes of Clause 8 hereof shall be calculated in accordance with the following basic principles:-

1. The expenses of the development shall comprise the following:

40

(a) The cost to the Borrower of acquiring the Port Macquarie lands, namely the purchase price of the lands and all legal costs and disbursements, stamp duties, agency commissions and the like incurred by the Borrower in relation to the acquisitions; Provided the purchase price of the land described in Part A of the First Schedule shall be deemed to be \$850,000.00.

(b) All holding charges in the way of council

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Kelly and  
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23rd February  
1978.  
Annexure "A"  
(cont'd)

- rates, water rates, land tax and other rates, taxes and statutory outgoings properly incurred or paid by the Borrower in respect of the said lands;
- (c) All interest charges and other banking charges and legal costs properly incurred by the Borrower in relation to financing the purchase and holding of the said lands pending their development and disposal;
- (d) Any other costs charges and expenses properly incurred by the Borrower in relation to the holding of the said lands and the development thereof by residential subdivision; 10
- (e) All direct development costs properly incurred by the Borrower in developing and subdividing the said lands;
- (f) All commitment fees paid to Beneficial in pursuance of this Deed and all legal costs and disbursements paid in respect of the preparation execution and stamping hereof; and 20
- (g) All costs in the way of legal fees, agency commissions, advertising and selling expenses and the like incurred in relation to the sale of subdivided allotments of the said lands. The Borrower shall not without Beneficial's prior written approval be entitled to charge up as costs of the development any internal office overheads or other internal charges or charges made by or payments made to associated persons or companies expressed to be in relation to the development, it being agreed that only direct costs and expenses are chargeable as costs of the development for the purposes of calculating the Borrower's profit in pursuance of Clause 8 hereof. 30
2. The income of the development shall comprise the gross selling prices of subdivided allotments of the said lands together with any other receipts in the way of rents and profits derived from the said lands and compensation or purchase moneys received in respect of any resumption, dedications, compulsory acquisitions or sales to statutory or local authorities of any parts of the said lands or easements or other interest relating to the said lands. 40
3. The profit of the development shall be the surplus of income as hereinbefore defined over expenses as hereinbefore defined. 50

THE COMMON SEAL of TACKING )  
POINT DOWNS PTY. LIMITED )  
was hereunto affixed in the )  
presence of: )

Sgd.  
J.V. Dulhunty  
Director

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "A"  
(cont'd)

Sgd. B.J. FLOOD  
Secretary

SIGNED SEALED AND DELIVERED )  
by the said JOHN VENOUR )  
DULHUNTY in the presence )  
of: )

Sgd.  
J.V. Dulhunty

10

Sgd. B.J. FLOOD

THE COMMON SEAL of TERUKIM )  
PTY. LIMITED was hereunto )  
affixed in the presence of: )

Sgd.  
J.V. Dulhunty  
Director

Sgd. B.J. FLOOD  
Secretary

THE COMMON SEAL of )  
HALISBURY PTY. LIMITED was )  
hereunto affixed in the )  
presence of:- )

Sgd.  
J.V. Dulhunty  
Director

20

Sgd. B.J. FLOOD  
Secretary

THE COMMON SEAL of VENDUL )  
MANAGEMENT PTY. LIMITED was )  
hereunto affixed in the )  
presence of:- )

Sgd.  
J.V. Dulhunty  
Director

Sgd. B.J. FLOOD  
Secretary

THE COMMON SEAL of VENDUL )  
INTERNATIONAL PTY.LIMITED )  
was hereunto affixed in the )  
presence of:- )

Sgd.  
J.V. Dulhunty  
Director

30

Sgd. B.J. FLOOD  
Secretary

THE COMMON SEAL of ROWINI )  
HOLDINGS PTY. LIMITED was )  
hereunto affixed in the )  
presence of: )

Sgd.  
J.V. Dulhunty  
Director

40

Sgd. B.J. FLOOD  
Secretary

THE COMMON SEAL of HUDSON )  
& WALLACE TRADING PTY. )  
LIMITED was hereunto )  
affixed in the presence of: )

Sgd.  
J.V. Dulhunty  
Director

Sgd. B.J. FLOOD  
Secretary



No. 2  
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Francis John  
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23rd February  
1978.  
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(cont'd)

SIGNED by the said BENEFICIAL )  
FINANCE CORPORATION LIMITED )  
by its Attorneys )  
and )  
who state that they have no )  
notice of the revocation of )  
Power of Attorney registered )  
Number under the )  
authority of which they have )  
executed these presents in the )  
presence of: )

10

This and the fourteen preceding pages is the  
Annexure "A" mentioned and referred to in the  
Affidavit of FRANCIS JOHN KELLY sworn the 23rd  
day of February 1978 before me:

Sgd. A.J. Porter J.P.

Justice of the Peace

Annexure "B"

Annexure "B"

BENEFICIAL FINANCE CORPORATION LIMITED,  
Beneficial House, 285-287 George Street,  
Sydney, New South Wales 2000

20

4th April, 1974.

The Senior Manager - Corporate Accounts,  
Australia & New Zealand Banking Group Limited,  
351 Collins Street,  
MELBOURNE, VIC. 3000.

Dear Sir,

re: Tacking Point Downs Pty. Limited & Ors. -  
Letter of Undertaking

A. WHEREAS Australia & New Zealand Banking  
Group Limited (the Bank) has agreed to  
provide loans, commercial bills and other  
banking accommodation to Tacking Point  
Downs Pty. Limited (the Borrower) up to a  
maximum amount of \$1.1 million (the loan).

30

B. AND WHEREAS the loan is secured (inter  
alia) by a registered first mortgage over  
107½ acres approximately owned by the  
Borrower at Port Macquarie and a floating  
debenture charge over the assets and  
undertakings of the Borrower.

40

- C. AND WHEREAS the Borrower is acquiring an additional 56 acres of land at Port Macquarie which land will be subject to a first mortgage to the Bank.
- D. AND WHEREAS as a condition precedent to the granting of the loan the Bank has requested this letter of undertaking from Beneficial Finance Corporation Limited (Beneficial).

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Affidavit of  
Francis John  
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Annexure "B"  
(cont'd)

10 NOW IT IS HEREBY AGREED as follows:-

1. In the event of the Bank's liability in respect of the loan not being satisfied on or before the expiration of two (2) years (the expiration date) from the date hereof Beneficial undertakes upon receipt of ninety (90) days notice in writing from the Bank to pay or otherwise make such arrangements (the take-out) as are satisfactory to the Bank to discharge the liability to the Bank under the said loan PROVIDED HOWEVER that upon Beneficial providing the take-out the Bank transfers and assigns its interest in the Bank's said Mortgages over the 107½ acres and 56 acres at Port Macquarie and the floating debenture charge as aforesaid to Beneficial in a manner and form satisfactory to Beneficial and its solicitors AND PROVIDED FURTHER that the Bank shall not during the term of its loan have done or omitted to do any act matter or thing (whether in the way of exercising or omitting to exercise any of the powers conferred on the Bank by the Bank's securities or otherwise) as a result of which act or omission the value or effectiveness of the Bank's securities shall have been in any way diminished or impaired (save in the manner contemplated by paragraph 3 hereof).
2. Beneficial agrees that it shall provide the take-out as outlined herein subject to its liability not exceeding \$1.1 million and the only debits which the Bank shall be entitled to charge up against its loan shall be normal banking charges relative thereto and the Bank shall not be entitled to make any further advances to the Borrower in respect of the loan without Beneficial's prior approval in writing nor shall the Bank be entitled to charge up to the Borrower's loan account any interest on the loan.
3. The Bank shall execute partial discharges of its securities in respect of subdivided residential allotments in the residential

No. 2

Affidavit of  
Francis John  
Kelly and  
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23rd February  
1978.

Annexure "B"  
(cont'd)

subdivision of the Port Macquarie lands which the Borrower contemplates so as to enable the Borrower to complete bona fide sales of such allotments or to complete compulsory acquisitions or resumptions subject to the Bank receiving and crediting to the Borrower in reduction of the principal sum an amount equal to Ninety per centum (90%) of the sale price of each allotment or the sum of Nine thousand dollars (\$9,000.00) 10 per allotment whichever shall be the lesser or an amount equal to the compensation payable to the Borrower (as the case may be), and Beneficial undertakes that it will discharge its security in respect of such lot upon being satisfied that the moneys have been paid to the Bank provided further that in the case of a sale where the purchaser grants a first mortgage to the Borrower for the balance of purchase money and such mortgage is duly sub-mortgaged to the Bank and Beneficial for their respective entitlements and priorities then and in this event Beneficial agrees that the terms of this paragraph shall have been duly complied with in respect of the allotment sold. 20

4. In the event of the liability of the Bank in respect of the loan being satisfied on or prior to the expiration date of this undertaking shall be rendered null and void and of no further effect. 30

Yours faithfully,

ALLEN CRAWFORD,  
REGIONAL MANAGER, N.S.W.

This and the two preceding pages is the Annexure "B" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn the 23rd day of February 1978 before me:

Sgd. A.J. Porter J.P. 40  
Justice of the Peace.

Annexure "C"

Annexure "C"

WDDC/bs

1st May 1974.

The Senior Manager,  
Australian & New Zealand Banking  
Group Limited,  
351 Collins Street,  
MELBOURNE, VIC. 3000.

Dear Sir,

No. 2

re: Tacking Point Downs Pty. Limited

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "C"  
(cont'd)

We refer to our letter to you dated 4th ultimo covering the take-out arrangement for Tacking Point Downs Pty. Limited.

10 We advise that we have no objection in principle to the Bank taking a registered second mortgage over the 56 acres of land at Port Macquarie being purchased by Tacking Point Downs Pty. Limited from Mr. E.J. Carving with the Vendor carrying a first mortgage of \$100,000.00 on the security of the land.

20 However it should be noted that this does have an indirect effect on our take-out arrangement, in that the Bank's security is affected. Accordingly, if at the time the take-out becomes operative the first mortgage to the Vendor is still on foot then our liability in respect of the take-out should have a limit of \$1,000,000.00 in lieu of \$1,100,000.00 because the Bank's security will effectively be worth \$100,000.00 less. We assume that this will not concern you in that we would imagine that the Bank's loan will be reduced by \$100,000.00. You might confirm that this is the case.

In all other respects we confirm that our letter of undertaking dated 4th April, 1974 shall remain in full force and effect.

30 Yours faithfully,  
Sgd.  
W.D.D. Currie.  
Branch Manager

This is the Annexure "C" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn the 23rd day of February, 1978 Before me:

Sgd. A.J. Porter J.P.

Justice of the Peace

---

Annexure "D"

Annexure "D"

STAMPED \$ 06.00

40 THIS DEED made the 3rd day of February One thousand nine hundred and seventy-five BETWEEN TACKING POINT DOWNS PTY. LIMITED a company duly incorporated in the State of New South Wales and having its registered office at C/O J.V. Dulhunty, 8th floor, 139 Macquarie Street Sydney in the said State

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Affidavit of  
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Kelly and  
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(cont'd)

(hereinafter called "the Borrower") of the first part, JOHN VENOUR DULHUNTY of Number 10 Kara Crescent Bayview in the said State Company Director TERUKIM PTY. LIMITED a company duly incorporated in the State of New South Wales and having its registered office at c/o J.V. Dulhunty 8th Floor, 139 Macquarie Street Sydney in the said State and HALISBURY PTY. LIMITED a company duly incorporated in the Australian Capital Territory and having its registered office at  
10  
in the said Territory (hereinafter called "the Guarantors") of the second part VENDUL MANAGEMENT PTY. LIMITED, VENDUL INTERNATIONAL PTY. LIMITED, ROWINI HOLDINGS PTY. LIMITED and HUDSON & WALLACE (TRADING) PTY. LIMITED all being companies incorporated in the State of New South Wales and having their registered offices at C/o J.V. Dulhunty 8th floor, 139 Macquarie Street Sydney in the said State (hereinafter called "the Sureties") of the third part AND BENEFICIAL FINANCE CORPORATION LIMITED a company duly registered and carrying on business in the State of New South Wales and duly registered under the Money-lenders and Infants Loans Act 1941 and having its registered office under that Act at Number 285 George Street Sydney in the said State (hereinafter called "Beneficial") of the fourth part W H E R E A S :-  
20

A. By Deed dated the 4th day of April 1974 made between the parties hereto (hereinafter referred to as "the Principal Agreement") the parties entered into certain mutual covenants and agreements relating to the provision by Beneficial of a take-out guarantee to The Australia and New Zealand Banking Group Limited (hereinafter called "the Bank").  
30

B. The parties have agreed to vary the terms of the Principal Agreement in the manner hereinafter set forth.

NOW THIS DEED WITNESSETH that the parties hereto for themselves and their respective successors or personal representatives (as the case may be) and assigns hereby mutually covenant and agree as follows:-  
40

1. BENEFICIAL at the request of all the other parties hereto agrees that it shall raise no objection to Hudson & Wallace (Trading) Pty. Limited (which is hereinafter referred to as "Hudson & Wallace") acquiring those portions of the lands referred to in the Principal Agreement as "the Port Macquarie lands" which are described in Part B of the First Schedule to the Principal Agreement (which lands are hereinafter referred to as "the Cunning land") in lieu of the Borrower.  
50

2. IN consideration of the said agreement on Beneficial's part all the other parties hereto hereby jointly and severally covenant with Beneficial as follows:-

No. 2  
Affidavit of  
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Kelly and  
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23rd February  
1978.  
Annexure "D"  
(cont'd)

- 10 (a) Hudson & Wallace shall forthwith on completing the acquisition of the Cunning land execute in favour of Beneficial a Memorandum of Mortgage over that part of the Cunning land which is under the provisions of the Real Property Act and a Deed of Mortgage over that part of the Cunning land which is under the Old System Title in such form as Beneficial and its solicitors shall require.
- 20 (b) Beneficial shall be entitled to register the said Mortgages as Third Mortgages over the Cunning land behind firstly a Mortgage in favour of the vendor Cunning securing not more than One hundred thousand dollars (\$100,000.00) and secondly Mortgages in favour of the Bank over the Cunning land and the residue of the Port Macquarie lands securing in total not more than One million dollars (\$1,000,000.00).
- 30 (c) Clause 5(b) of the Principal Agreement shall be deemed to provide for the execution in favour of Beneficial of First Mortgages over the Port Macquarie lands by both the Borrower and Hudson & Wallace (in respect of those portions of such land of which they are respectively the registered proprietors).
- (d) Clause 7 of the Principal Agreement and the Third Schedule thereto shall be read and construed on the basis that, if Hudson & Wallace retains ownership of the Cunning land and develops the same, the expression "the Borrower" where therein used shall include Tacking Point Downs Pty. Limited and Hudson & Wallace (Trading) Pty. Limited.

40 3. IN all other respects the parties hereto confirm the terms and conditions of the Principal Agreement.

IN WITNESS whereof the parties hereto have hereunto set their hand and seals on the day and year first hereinbefore written.

THE COMMON SEAL of TACKING )  
POINT DOWNS PTY. LIMITED )  
was hereunto affixed in the )  
presence of: )

Sgd. J.V. Dulhunty  
Director

50 Sgd. B.J. FLOOD  
Secretary

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "D"  
(cont'd)

SIGNED SEALED AND DELIVERED )  
by the said JOHN VENOUR )  
DULHUNTY in the presence of: ) Sgd.  
J.V. Dulhunty

Sgd. B.J. FLOOD

THE COMMON SEAL of TERUKIM )  
PTY. LIMITED was hereunto )  
affixed in the presence of: ) Sgd.  
J.V. Dulhunty  
Director

Sgd. B.J. FLOOD

Secretary

THE COMMON SEAL of HALISBURY )  
PTY. LIMITED was hereunto )  
affixed in the presence of: ) Sgd. 10  
J.V. Dulhunty  
Director

B.J. FLOOD

Secretary

THE COMMON SEAL of VENDUL )  
MANAGEMENT PTY. LIMITED was )  
hereunto affixed in the )  
presence of:- ) Sgd.  
J.V. Dulhunty  
Director

Sgd. B.J. FLOOD

Secretary

THE COMMON SEAL of VENDUL )  
INTERNATIONAL PTY. LIMITED )  
was hereunto affixed in the )  
presence of:- ) Sgd.  
J.V. Dulhunty  
Director

Sgd. B.J. FLOOD

Secretary

THE COMMON SEAL of ROWINI )  
HOLDINGS PTY. LIMITED was )  
hereunto affixed in the )  
presence of: ) Sgd.  
J.V. Dulhunty  
Director 30

Sgd. B.J. FLOOD

Secretary

THE COMMON SEAL of HUDSON & )  
WALLACE (TRADING) PTY. )  
LIMITED was hereunto affixed )  
in the presence of: ) Sgd.  
J.V. Dulhunty  
Director

Sgd. B.J. FLOOD

THE COMMON SEAL of BENEFICIAL )  
FINANCE CORPORATION LIMITED )  
was hereunto affixed in the )  
presence of: ) Sgd. K. ?  
Director 40

J.G. Graham  
Secretary

Annexure "E"

No. 2

Australia and New Zealand  
Banking Group Limited

New South Wales  
Administration  
20 Martin Place  
Sydney,  
P.O. Box 495  
Sydney NSW 2001

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "E"

19th December 1975

Telephone 231 0011

10 Mr. W.D.D. Currie,  
State Lending Manager,  
Beneficial Finance Corporation Limited,  
Beneficial House,  
285-287 George Street,  
SYDNEY N.S.W. 2000

Dear Mr. Currie,

re: Tacking Point Downs Pty. Limited

20 Further to our recent discussions I advise the  
Bank is prepared to assist the abovementioned  
company in an overall package relating to partial  
development of Port Macquarie sub-division as  
follows:-

1. A two year extension of existing Commercial  
Bill Non-Discount Acceptance Line \$1,000,000.  
Existing Commercial Bills are due for roll-  
over on 23rd December 1975.
2. Establishment of an indemnity/guarantee in  
favour of local council, in relation to stage  
one, covering completion of engineering works  
over two years.
- 30 3. Additional Overdraft Limit of up to  
\$200,000 to cover development expenses, to  
be taken on a separate account, upon which,  
it is a condition that all drawings will be  
countersigned by a senior executive of your  
company.
4. Fees as follows will apply - Commercial  
Bill line  
  
Acceptance Fee - 1.8% p.a.  
Line Fee - 25% p.a. each half year in  
40 advance - 10th March and September.  
- Overdraft  
Interest Rate - 12.5% p.a.

subject to your company providing an increased letter  
of take-out to \$1,450,000, including all interest and  
bank charges from 23rd December 1975 until say 31st  
March 1978.



No. 2

Affidavit of  
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Kelly and  
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23rd February  
1978.  
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(cont'd)

It should be noted that we propose to reduce our interest rate from 13.9% p.a. to 12.5% p.a. on the premise that your commitment also will be reduced from 4% p.a. to 3% p.a.

I look forward to your confirming these arrangements in early course, so that necessary documentation can be completed.

Yours faithfully,

Sgd.  
P. BRADFORD  
SENIOR MANAGER CORPORATE ACCOUNTS

10

This and the preceding page is the Annexure "E" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn the 23rd day of February 1978 before me:

Sgd. A.J. Porter J.P.  
Justice of the Peace

Annexure "F"

Annexure "F"

BENEFICIAL FINANCE CORPORATION LIMITED

Beneficial House,  
285-287 George St.,  
Sydney, N.S.W. 2000  
29-5244

20

2nd January, 1976.

Mr. P. Bradford,  
Senior Manager Corporate Accounts,  
Australian and New Zealand  
Banking Group Limited,  
20 Martin Place,  
SYDNEY 2000.

30

Dear Peter,

re: Tacking Point Downs Pty. Limited  
Takeout Agreement

On behalf of the company, I agree to extend the period within which the Takeout Agreement in respect of the subject land can be exercised by the Bank to 11th April, 1976.

It would be appreciated if you could arrange to sign the attached duplicate as an indication of the Bank's agreement to the extended period.

40

Yours faithfully,

Sgd. F.J. Kelly

F.J. KELLY - Regional Manager for N.S.W.  
for BENEFICIAL FINANCE CORPORATION LIMITED

I acknowledge acceptance of the  
above extension.

.....

for A.N.Z. Banking Group Limited

No. 2

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "F"  
(cont'd)

10

This is the Annexure "F" mentioned and referred  
to in the Affidavit of FRANCIS JOHN KELLY sworn  
the 23rd day of February 1978 Before me:

Sgd. A.J. Porter J.P.

Justice of the Peace

---

Annexure "G"

Annexure "G"

BENEFICIAL FINANCE CORPORATION LIMITED,  
Beneficial House, 285-287 George Street, Sydney,  
New South Wales 2000.  
Telephone 29 5244 G.P.O. Box 2715

FJR/bs

9th January, 1976

20

Mr. P. Bradford,  
Senior Manager Corporate Accounts,  
Australian and New Zealand Banking  
Group Limited,  
20 Martin Place,  
SYDNEY, 2000.

Dear Peter,

re: Tacking Point Downs Pty. Limited  
Takeout Agreement

30

On behalf of the Company, I agree to extend the  
period within which the Takeout Agreement in  
respect of the subject land can be exercised by  
the Bank to 18th April, 1976.

It would be appreciated if you could arrange to  
sign the attached duplicate as an indication of  
the Bank's agreement to the extended period.

Yours faithfully,  
Sgd. F.J. Kelly,

F.J. KELLY,  
REGIONAL MANAGER.

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "G"  
(cont'd)

I acknowledge acceptance of the above  
extension

.....  
for A.N.Z. Banking Group Limited

This is the Annexure "G" mentioned and referred  
to in the Affidavit of FRANCIS JOHN KELLY sworn  
the 23rd day of February 1978 Before me:

Sgd. A.J. Porter J.P.  
Justice of the Peace

Annexure "H"

Annexure "H"

BENEFICIAL FINANCE CORPORATION LIMITED 10  
Beneficial House, 285-287 George Street, Sydney,  
New South Wales 2000.  
Telephone 29 5244 G.P.O. Box 2715

FJK/bs 16th January 1976.

Mr. P. Bradford,  
Senior Manager Corporate Accounts,  
Australia and New Zealand Banking  
Group Limited,  
20 Martin Place,  
SYDNEY 2000. 20

Dear Peter,

Re: Tacking Point Downs Pty. Limited  
Takeout Agreement

On behalf of the Company, I agree to extend the  
period within which the Takeout Agreement in  
respect of the subject land can be exercised by  
the Bank to 25th April, 1976.

It would be appreciated if you could arrange to  
sign the attached duplicate as an indication of  
the Bank's agreement to the extended period. 30

Yours faithfully,  
Sgd. F.J. Kelly  
F.J. KELLY,  
REGIONAL MANAGER.

I acknowledge acceptance of the above  
extension.

..... 16 JAN 1976  
for A.N.Z. Banking Group Limited

This is the Annexure "H" mentioned and referred  
to in the Affidavit of FRANCIS JOHN KELLY sworn  
the 23rd day of February 1978 Before me: 40

Sgd. A.J. Porter J.P.  
Justice of the Peace.

Annexure "I"

No. 2

AUSTRALIA AND NEW ZEALAND  
BANKING GROUP LIMITED

New South Wales  
Administration  
20 Martin Place  
Sydney  
P.O. Box 495,  
Sydney NSW 2001

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "I"

19th January 1976

Telephone 231 0011  
RECEIVED 20 JAN 1976

10 Mr. F.J. Kelly,  
Regional Manager,  
Beneficial Finance Corporation Limited,  
Beneficial House,  
285-287 George Street, SYDNEY,  
NS.W. 2000

Dear Mr. Kelly,

Re: Tacking Point Downs Pty. Limited

20 Referring to our letter of 19th December, 1975,  
addressed to Mr. Currie and your telephone  
conversation with our Mr. Maple today, we confirm  
the under-mentioned fees shall apply on the  
proposal facilities, in addition to those already  
stated.

Commercial Bill Line - remains as stated.

Overdraft - in addition to rate 12.5% p.a.  
Limit Establishment Fee - \$250  
Unused limit fee - 1.25% p.a. charged  
each half year, June and December,  
in retrospect.

30 Indemnities/Guarantees - 1.5% p.a. each half year  
in advance on the establishment of  
each indemnity/guarantee.

Yours faithfully,

Sgd. ?

Senior <sup>M</sup>anager Corporate Accounts

This is the Annexure "I" mentioned and referred to  
in the Affidavit of FRANCIS JOHN KELLY sworn the 23rd  
day of February, 1978 before me:

Sgd. A.J. Porter JP  
Justice of the Peace

40

No. 2

Annexure "J"

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "J"

BENEFICIAL FINANCE CORPORATION LIMITED  
Beneficial House, 285-287 George Street, Sydney,  
New South Wales 2000  
Telephone 29 5244 G.P.O. Box 2715

FJK/bs

23rd January, 1976

Mr. P. Bradford,  
Senior Manager Corporate Accounts,  
Australia and New Zealand Banking  
Group Limited,  
20 Martin Place,  
SYDNEY 2000.

10

Dear Peter,

re: Tacking Point Downs Pty. Limited  
Takeout Agreement

On behalf of the Company, I agree to extend the  
period within which the Takeout Agreement in  
respect of the subject land can be exercised by  
the Bank to 1st May, 1976.

It would be appreciated if you could arrange to  
sign the attached duplicate as an indication of  
the Bank's agreement to the extended period.

20

Yours faithfully,

Sgd. F.J. Kelly,  
F.J. KELLY,  
REGIONAL MANAGER.

I acknowledge acceptance of the above  
extension

.....  
for A.N.Z. Banking Group Limited

This is the Annexure "J" mentioned and referred  
to in the Affidavit of Francis John Kelly sworn  
the 23rd day of February, 1978 Before me:

30

Sgd. A.J. Porter J.P.  
Justice of the Peace

Annexure "K"

Annexure "K"

BENEFICIAL FINANCE CORPORATION LIMITED,  
Beneficial House, 285-287 George Street, Sydney,  
New South Wales 2000  
Telephone 29 5244 G.P.O. Box 2715

30th January, 1976

40

Mr. P. Bradford,  
Senior Manager Corporate Accounts,  
Australia & New Zealand Banking  
Group Limited,  
20 Martin Place,  
SYDNEY 2000

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "K"  
(cont'd)

Dear Peter,

re: Tacking Point Downs Pty. Limited  
Takeout Agreement

10 On behalf of the Company, I agree to extend the period within which the Takeout Agreement in respect of the subject land can be exercised by the Bank to 8th May, 1976.

It would be appreciated if you could arrange to sign the attached duplicate as an indication of the Bank's agreement to the extended period.

Yours faithfully,  
Sgd. F.J. Kelly  
F.J. KELLY,  
20 REGIONAL MANAGER

I acknowledge acceptance of the above extension

.....  
for A.N.Z. Banking Group Limited

This is the Annexure "K" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn the 23rd day of February 1978 Before me:

Sgd. A.J. Porter J.P.  
Justice of the Peace

Annexure "L"

Annexure "L"

30 BENEFICIAL FINANCE CORPORATION LIMITED,  
Beneficial House, 285-287 George Street, Sydney,  
New South Wales 2000  
Telephone 29 5244 G.P.O. box 2715

FJK/bs

5th February, 1976.

Mr. P. Bradford,  
Senior Manager Corporate Accounts,  
Australia and New Zealand Banking  
Group Limited,  
20 Martin Place,  
40 SYDNEY, 2000.

Dear Peter,

No. 2

re: Tacking Point Downs Pty. Limited  
Takeout Agreement

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "L"  
(cont'd)

On behalf of the Company, I agree to extend the period within which the Takeout Agreement in respect of the subject land can be exercised by the Bank to 15th May, 1976.

It would be appreciated if you could arrange to sign the attached duplicate as an indication of the Bank's agreement to the extended period.

Yours faithfully,

10

F. KELLY (per ? )  
F.J. KELLY,  
REGIONAL MANAGER

I acknowledge acceptance of the above extension  
.Sgd...?..... 6/2/76  
for A.N.Z. Banking Group Limited

This is the Annexure "L" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn the 23rd day of February 1978 Before me

20

Sgd. A.J. Porter J.P.  
Justice of the Peace.

Annexure "M"

Annexure "M"

BENEFICIAL FINANCE CORPORATION LIMITED,  
Beneficial House, 285-287 George Street, Sydney,  
New South Wales 2000  
Telephone 29 5244 G.P.O. Box 2715

FJK/bs

13th February 1976

Mr. P. Bradford,  
Senior Manager Corporate Accounts,  
Australia and New Zealand Banking  
Group Limited,  
20 Martin Place,  
SYDNEY, 2000.

30

Dear Peter,

Re: Tacking Point Downs Pty. Limited  
Takeout Agreement

On behalf of the Company, I agree to extend the period within which the Takeout Agreement in respect of the subject land can be exercised by the Bank to 22nd May, 1976.

40

It would be appreciated if you could arrange to sign the attached duplicate as an indication of the Bank's agreement to the extended period.

Yours faithfully,

Sgd. ? for F. Kelly  
F.J. KELLY,  
REGIONAL MANAGER.

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "M"  
(cont'd)

10

I acknowledge acceptance of the above extension

Sgd ?  
.....

for A.N.Z. Banking Group Limited

This is the Annexure "M" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn the 23rd day of February 1978 before me:

Sgd. A.J. Porter J.P.  
Justice of the Peace

Annexure "N"

Annexure "N"

20

THIS DEED made the 2nd day of March One thousand nine hundred and seventy-six BETWEEN TACKING POINT DOWNS PTY. LIMITED a company duly incorporated in the State of New South Wales and having its registered office at C/o J.V. Dulhunty, 8th floor, 139 Macquarie Street, Sydney in the said State (hereinafter called "the Borrower") of the first part, JOHN VENOIR DULHUNTY of 10 Kara Crescent, Bayview in the said State, Company Director, TERUKIM PTY. LIMITED a company duly incorporated in the State of New South Wales and having its registered office at C/o J.V. Dulhunty, 8th floor, 139 Macquarie Street, Sydney in the said State and HALISBURY PTY. LIMITED a company duly incorporated in the Australian Capital Territory and having its registered office in New South Wales at C/o J.V. Dulhunty, 8th floor, 139 Macquarie Street, Sydney in the said State (hereinafter called "the Guarantors") of the second part, VENDUL MANAGEMENT PTY. LIMITED, VENDUL INTERNATIONAL PTY. LIMITED, ROWINI HOLDINGS PTY. LIMITED AND HUDSON & WALLACE (TRADING) PTY. LIMITED all being companies incorporated in the State of New South Wales and having their registered offices at C/o J.V. Dulhunty, 8th floor, 139 Macquarie Street, Sydney in the said State (hereinafter called "the Sureties") of the third part AND BENEFICIAL FINANCE CORPORATION LIMITED a company duly registered and carrying on business in the State of New South Wales and duly registered under the Money-lenders and Infants

30

40



No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexures "N"  
(cont'd)

Loans Act 1941 and having its registered office under that Act at 285 George Street, Sydney in the said State (hereinafter called "Beneficial") of the fourth part

W H E R E A S :-

- A. By Deed dated the 4th day of April 1974 made between the parties hereto (hereinafter referred to as "the Principal Agreement") the parties entered into certain mutual covenants and agreements relating to the provision by Beneficial of a take-out guarantee to The Australia and New Zealand Banking Group Limited (hereinafter called "the Bank"). 10
- B. The terms of the Principal Agreement were varied by a Deed dated the 3rd day of February 1975 made between the parties hereto (hereinafter referred to as "the Amending Deed").
- C. Beneficial has at the request of the Borrower, the Guarantors and the Sureties agreed to vary the terms of the said take-out guarantee given by Beneficial to the Bank so as to cover increased financial accommodation given by the Bank to the Borrower subject in all respects to the execution of this Deed. 20

NOW THIS DEED WITNESSETH that the parties hereto for themselves and their respective successors or personal representatives (as the case may be) and assigns hereby mutually covenant and agree as follows:- 30

1. BENEFICIAL at the request of all the other parties hereto agrees to provide to the Bank an amended take-out guarantee in the form of the draft letter from Beneficial to the Bank annexed hereto and signed by the parties for the purposes of identification.

2. THE commitment fee payable by the Borrower to Beneficial as provided for in Clause 3 of the Principal Agreement shall be varied in the following respects:- 40

- (a) A commitment fee of three-quarters of one per cent (0.75%) per quarter in advance shall be payable in respect of Beneficial's potential liability to the Bank under the amended take-out guarantee as from the date of provision of the amended take-out guarantee by Beneficial to the Bank in respect of:- 50

- (i) the Bank's liability as endorser under the Commercial Bill non-Discout Acceptance Line of One million dollars (\$1,000,000.00);
- (ii) the overdraft facilities to be extended by the Bank to the Borrower; and
- (iii) all interest and other charges from time to time owing by the Borrower to the Bank.

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexures "N"  
(cont'd)

(b) A commitment fee of one-half of one per cent (0.5%) per quarter in advance shall be payable in respect of Beneficial's potential liability to the Bank under the amended take-out guarantee in respect of the indemnity/guarantee of Two hundred and fifty thousand dollars (\$250,000.00) to be provided by the Bank to the Port Macquarie Municipal Council as from the date of establishment of the indemnity/guarantee.

(c) The commitment fee provided for in paragraph (a) hereof shall be in lieu of the fee provided for in Clause 3 of the Principal Agreement and in the event of the amended fee falling due for payment other than on a quarter day under the Principal Agreement then an appropriate adjustment on a daily basis shall be made.

3. THE Principal Agreement is further varied by deleting from paragraph (a) of Clause 8 thereof the reference to the sum of Nine hundred thousand dollars (\$900,000.00) and inserting in lieu thereof a reference to the sum of Two hundred and fifty thousand dollars (\$250,000.00) it being agreed by the parties that the maximum liability of Beneficial by way of take-out guarantee to the Bank (following any increased accommodation granted by the Bank to the Borrower as contemplated by Clause 8 of the Principal Agreement) shall be One million seven hundred thousand dollars (\$1,700,000.00).

4. BENEFICIAL agrees that upon the gazettal of an Interim Development Order permitting residential development of Stage 1 of the Borrower's Port Macquarie lands (being Portions 15 and 70 of the Parish of Macquarie) it will release the collateral securities referred to in paragraphs (c)(ii) (John's River Caravan Park), (d)(iv) (Sedger Road, Kenthurst), (e)(i) (Cairnes Road, Glenorie) and (e)(ii) Black's Road, Arcadia) of the Second Schedule to the Principal Agreement.

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexures "N"  
(cont'd)

5. THE Borrower, the Guarantors and the Sureties acknowledge that their respective obligations under the Principal Agreement (as amended by the Amending Deed) and under the guarantees and securities provided or to be provided by them or any one or more of them to Beneficial in pursuance of the terms of the Principal Agreement shall extend to and include all money which may be paid by Beneficial to the Bank under the terms of the amended take-out guarantee and the commitment fees provided for in this Deed and any other moneys payable by the Borrower to Beneficial in accordance with the terms of this Deed. 10

6. IN all other respects the parties hereto confirm the terms of the Principal Agreement (as amended by the Amending Deed and this Deed) and of the securities referred to in the Principal Agreement as Beneficial's Securities (save to the extent that the obligations on the part of the mortgage therein have been varied by this Deed) and the covenants agreements and obligations on their respective parts contained or implied in the aforesaid documents. 20

7. THE Borrower shall pay all legal costs and disbursements incurred by Beneficial in relation to the preparation execution and stamping of this Deed and the establishment of the amended take-out guarantee and the preparation and execution of the two Deeds between (inter alia) the Borrower, Beneficial, the Bank and Port Macquarie Municipal Council relative to rezoning of the Borrower's land at Port Macquarie. 30

IN WITNESS whereof the parties hereto have hereunto set their hands and seals on the day and year first hereinbefore written.

THE COMMON SEAL of TACKING )  
POINT DOWNS PTY. LIMITED ) Sgd.  
was hereunto affixed in the ) J.V. Dulhunty  
presence of:- ) Director 40

Sgd. B.J. FLOOD  
Secretary

SIGNED SEALED AND DELIVERED )  
by the said JOHN VENOIR ) Sgd.  
DULHUNTY in the presence of: ) J.V. Dulhunty

Sgd. B.J. FLOOD

THE COMMON SEAL of TERUKIM )  
PTY. LIMITED was hereunto ) Sgd.  
affixed in the presence of:- ) J.V. Dulhunty  
Director

Sgd. B.J. FLOOD  
Secretary

50

THE COMMON SEAL of HALISBURY ) Sgd.  
PTY. LIMITED was hereunto ) J.V. Dulhunty  
affixed in the presence of - ) Director

Sgd. B.J. FLOOD  
Secretary

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexures "N"  
(cont'd)

THE COMMON SEAL of VENDUL ) Sgd.  
MANAGEMENT PTY. LIMITED was ) J.V. Dulhunty  
hereunto affixed in the ) Director  
presence of:-

10 Sgd. B.J. FLOOD  
Secretary

THE COMMON SEAL of VENDUL ) Sgd.  
INTERNATIONAL PTY. LIMITED ) J.V. Dulhunty  
was hereunto affixed in the ) Director  
presence of:-

Sgd. B.J. FLOOD  
Secretary

20 THE COMMON SEAL of ROWINI ) Sgd.  
HOLDINGS PTY. LIMITED was ) J.V. Dulhunty  
hereunto affixed in the ) Director  
presence of:-

Sgd. B.J. FLOOD  
Secretary

THE COMMON SEAL of HUDSON & ) Sgd.  
WALLACE (TRADING) PTY.LIMITED ) J.V. Dulhunty  
was hereunto affixed in the ) Director  
presence of:-

Sgd. B.J. FLOOD  
Secretary

30 THE COMMON SEAL of BENEFICIAL )  
FINANCE CORPORATION LIMITED )  
was hereunto affixed in the )  
presence of:- ) Director

Secretary

---

BENEFICIAL FINANCE CORPORATION LIMITED

TO: Australia & New Zealand Banking Group Limited.

re: Tacking Point Downs Pty. Limited and other  
related companies.

W H E R E A S :-

40 A. Australia & New Zealand Banking Group Limited  
(hereinafter called "the Bank") by an  
Agreement with Beneficial Finance Corporation

No. 2

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexures "N"  
(cont'd)

Limited (hereinafter called "Beneficial") dated 4th April, 1974 (hereinafter referred to as "the original take-out letter") agreed to provide certain loans, commercial bills and other banking accommodations to Tacking Point Downs Pty. Limited and other related companies (hereinafter called "the Borrower") up to a maximum amount of \$1.1 Million.

- B. By a further Agreement between the same parties dated 1st May 1974 the advance hereinbefore referred to was reduced from \$1.1 Million to \$1 Million (hereinafter called "the original advance"). 10
- C. In the said Agreement dated 4th April 1974 Recital C erroneously refers to a first mortgage to the Bank in respect of the additional fifty six (56) acres of land referred to in the said Recital and the parties hereto acknowledge that this mortgage has always been a second mortgage ranking behind a first mortgage in favour of E.J. Cunning. 20
- D. Pursuant to the terms and conditions of the original take-out letter Beneficial agreed to pay out and discharge the Borrower's liability to the Bank in respect of the original advance.
- E. The Bank has provided or agreed to provide additional loans commercial bills and other banking accommodation to the Borrower up to a maximum amount (including the original advance) of \$1.45 Million (hereinafter called "the principal") (subject to Beneficial extending the terms of the original take-out letter to cover the said principal). 30
- F. The parties hereto have agreed to vary certain terms and conditions referred to in the Agreements dated 4th April 1974 and 1st May 1974 in the manner hereinafter set forth. 40

NOW IT IS HEREBY AGREED as follows:-

1. IN the event of the Borrower's liability to the Bank in respect of the principal not being totally discharged and satisfied on or before 31st March 1978 (hereinafter called "the expiration date") Beneficial will at the expiration of ninety (90) days notice in writing given to it by a duly authorised officer of the Bank, forthwith pay to the Bank the whole of the principal then 50

owing together with all bank interest on the principal and all bank charges of and incidental thereto, owing to the Bank by the Borrower as at the date of payment, or otherwise make such arrangements to repay the Bank as are satisfactory to the Bank to fully discharge the liability of the Borrower to the Bank under the loan at the expiration of the said ninety (90) days notice PROVIDED HOWEVER that upon Beneficial complying with the terms of this letter of take-out, the Bank will at the expense of the Borrower transfer and assign its interest in the Bank's securities (as described in the original take-out letter and subject to paragraph 3 of the original take-out letter) to Beneficial in a manner and form satisfactory to Beneficial and its Solicitors AND PROVIDED FURTHER that the Bank shall not have hitherto and shall not pending the expiration date have done or omitted to do any act matter or thing (whether in the way of exercising or omitting to exercise any of the powers conferred on the Bank by the Bank's said securities or otherwise) as a result of which act or omission the value or the effectiveness of the Bank's securities shall have been in any way diminished or impaired (save in the manner contemplated by paragraph 3 of the original take-out letter).

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexures "N"  
(cont'd)

2. SUBJECT to the proviso hereto contained Beneficial's liability hereunder is limited to the sum of \$1.45 Million which comprises:-

- (a) The Bank's liability as endorser under the Commercial Bill Non-Discount Acceptance Line of \$1 Million;
- (b) The Bank's liability under an indemnity/guarantee provided or to be provided by the Bank to the Port Macquarie Municipal Council on behalf of the Borrower in the sum of \$250,000.00; and
- (c) Overdraft facilities up to \$200,000.00 to be extended by the Bank to the Borrower to meet development expenses on the Borrower's Port Macquarie lands, all drawings on which must be countersigned by a nominee of Beneficial.

PROVIDED HOWEVER that notwithstanding anything hereinbefore contained or contained in the original letter of take-out Beneficial shall in addition to repaying the principal, pay to the Bank interest on the said principal and all other charges normally made by the Bank up to the date of discharge of its securities including but not limited to the following, namely all holding

No. 2

Affidavit of Francis John Kelly and Annexures 23rd February 1978. Annexures "N" (cont'd)

charges, rates, land tax, take-out fees, endorsement fees and indemnity guarantee fees.

3. THE liability of Beneficial under paragraph 1 hereof includes and is not in addition to its liability under the original take-out letter, the terms of which shall continue to apply save as herein varied.

4. BENEFICIAL'S liability hereunder is conditional upon the Bank procuring the due payment by the Borrower or itself paying firstly the arrears of the commitment fees totalling \$10,000.00 owing by the Borrower under the Agreement of 4th April 1974 between (inter alia) Beneficial and the Borrower such payment to be made not later than 4th April 1976 and secondly all future commitment fees payable by the Borrower to Beneficial under the terms of the said Agreement (being at the rate of 3% per annum payable quarterly in advance).

10

5. BENEFICIAL hereby acknowledges that up to the date hereof there has been no breach by the Bank of any terms or conditions of the original take-out letter and that if there has been any such breach or breaches then such breach or breaches have been waived by Beneficial.

20

6. THE Bank undertakes and agrees that if at any time after the date hereof the Bank becomes aware that the Borrower has defaulted in the due performance or observance of any covenant obligation or agreement on the part of the Borrower contained or implied in any one or more of the Bank's securities entitled the Bank to exercise its powers of entry into possession sale foreclosure or otherwise under the Bank's securities then and in any such event the Bank shall forthwith give notice in writing to Beneficial specifying the default which has occurred and at any time thereafter Beneficial may in its absolute and uncontrolled discretion elect to pay to the Bank forthwith (notwithstanding the provisions of paragraph 1 hereof) the principal and all other moneys owing by the Borrower to the Bank (as hereinbefore specified) as at the date of payment whereupon the Bank will at the expense of the Borrower transfer and assign its interest in the Bank's securities to Beneficial in a manner and form satisfactory to Beneficial and its Solicitors.

30

40

SIGNED for the purposes of identification: On the 2nd day of March, 1976.

Sgd. B.J. FLOOD  
.....

For Tacking Point Downs Pty. Limited

50

J.V. Dulhunty  
.....

John Venour Dulhunty

Sgd. J.V. Dulhunty and B.J. FLOOD  
.....

For Terukim Pty. Limited

Sgd. J.V. Dulhunty and B.J. FLOOD  
.....

For Halisbury Pty. Limited

Sgd. J.V. Dulhunty and B.J. FLOOD  
.....

For Vendul Management Pty. Limited

Sgd. J.V. Dulhunty and B.J. FLOOD  
.....

10 For Vendul International Pty. Limited

Sgd. J.V. Dulhunty and B.J. FLOOD  
.....

For Rowini Holdings Pty. Limited

Sgd. J.V. Dulhunty and B.J. FLOOD  
.....

For Hudson & Wallace (Trading) Pty. Limited

.....

For Beneficial Finance Corporation Limited

This and the nine preceding pages is the Annexure "N" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn the 23rd day of February 1978 before me:

20 Sgd. A.J. Porter J.P.  
Justice of the Peace

Annexure "O"

Annexure "O"

BENEFICIAL FINANCE CORPORATION LIMITED

TO: Australia & New Zealand Banking Group Limited.

re: Tacking Point Downs Pty. Limited and other related companies.

W H E R E A S :-

30 A. Australia & New Zealand Banking Group Limited (hereinafter called "the Bank") by an Agreement with Beneficial Finance Corporation Limited (hereinafter called "Beneficial")



No. 2

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.

Annexure "O"  
(cont'd)

- dated 4th April, 1974 (hereinafter referred to as "the original take-out letter") agreed to provide certain loans, commercial bills and other banking accommodations to Tacking Point Downs Pty. Limited and other related companies (hereinafter called "the Borrower") up to a maximum amount of \$1.1 Million.
- B. By a further Agreement between the same parties dated 1st May 1974 the advance hereinbefore referred to was reduced from \$1.1 Million to \$1 Million (hereinafter called "the original advance"). 10
- C. In the said Agreement dated 4th April 1974 Recital C erroneously refers to a first mortgage to the Bank in respect of the additional fifty six (56) acres of land referred to in the said Recital and the parties hereto acknowledge that this mortgage has always been a second mortgage ranking behind a first mortgage in favour of E.J. Cunning. 20
- D. Pursuant to the terms and conditions of the original take-out letter Beneficial agreed to pay out and discharge the Borrower's liability to the Bank in respect of the original advance.
- E. The Bank has provided or agreed to provide additional loans commercial bills and other banking accommodation to the Borrower up to a maximum amount (including the original advance) of \$1.45 Million (hereinafter called "the principal") (subject to Beneficial extending the terms of the original take-out letter to cover the said principal). 30
- F. The parties hereto have agreed to vary certain terms and conditions referred to in the Agreements dated 4th April 1974 and 1st May 1974 in the manner hereinafter set forth. 40

NOW IT IS HEREBY AGREED as follows:-

1. IN the event of the Borrower's liability to the Bank in respect of the principal not being totally discharged and satisfied on or before 31st March 1978 (hereinafter called "the expiration date") Beneficial will at the expiration of ninety (90) days notice in writing given to it by a duly authorised officer of the Bank, forthwith pay to the Bank the whole of the principal then owing together with all bank interest on the principal 50

and all bank charges of and incidental thereto, owing to the Bank by the Borrower as at the date of payment, or otherwise make such arrangements to repay the Bank as are satisfactory to the Bank to fully discharge the liability of the Borrower to the Bank under the loan at the expiration of the said ninety (90) days notice PROVIDED HOWEVER that upon Beneficial complying with the terms of this letter of take-out, the Bank will at the expense of the Borrower transfer and assign its interest in the Bank's securities (as described in the original take-out letter and subject to paragraph 3 of the original take-out letter) to Beneficial in a manner and form satisfactory to Beneficial and its Solicitors AND PROVIDED FURTHER that the Bank shall not have hitherto and shall not pending the expiration date have done or omitted to do any act matter or thing (whether in the way of exercising or omitting to exercise any of the powers conferred on the Bank by the Bank's said securities or otherwise) as a result of which act or omission the value or the effectiveness of the Bank's securities shall have been in any way diminished or impaired (save in the manner contemplated by paragraph 3 of the original take-out letter).

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "O"  
(cont'd)

2. SUBJECT to the proviso hereto contained Beneficial's liability hereunder is limited to the sum of \$1.45 Million which comprises:-

- (a) The Bank's liability as endorser under the Commercial Bill Non-Discount Acceptance Line of \$1 Million;
- (b) The Bank's liability under an indemnity/guarantee provided or to be provided by the Bank to the Port Macquarie Municipal Council on behalf of the Borrower in the sum of \$250,000.00; and
- (c) Overdraft facilities up to \$200,000.00 to be extended by the Bank to the Borrower to meet development expenses on the Borrower's Port Macquarie lands, all drawings on which must be countersigned by a nominee of Beneficial.

PROVIDED HOWEVER that notwithstanding anything hereinbefore contained or contained in the original letter of take-out Beneficial shall in addition to repaying the principal, pay to the Bank interest on the said principal and all other charges normally made by the Bank up to the date of discharge of its securities including but not limited to the following, namely all holding charges, rates, land tax, take-out fees,

No. 2

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.

Annexure "O"  
(cont'd)

endorsement fees and indemnity guarantee fees.

3. THE liability of Beneficial under paragraph 1 hereof includes and is not in addition to its liability under the original take-out letter, the terms of which shall continue to apply save as herein varied.

4. BENEFICIAL'S liability hereunder is conditional upon the Bank procuring the due payment by the Borrower or itself paying firstly the arrears of the commitment fees totalling \$10,000.00 owing by the Borrower under the Agreement of 4th April 1974 between (inter alia) Beneficial and the Borrower such payment to be made not later than 4th April 1976 and secondly all future commitment fees payable by the Borrower to Beneficial under the terms of the said Agreement (being at the rate of 3% per annum payable quarterly in advance).

10

5. BENEFICIAL hereby acknowledges that up to the date hereof there has been no breach by the Bank of any terms or conditions of the original take-out letter and that if there has been any such breach or breaches then such breach or breaches have been waived by Beneficial.

20

6. THE Bank undertakes and agrees that if at any time after the date hereof the Bank becomes aware that the Borrower has defaulted in the due performance or observance of any covenant obligation or agreement on the part of the Borrower contained or implied in any one or more of the Bank's securities entitling the Bank to exercise its powers of entry into possession sale foreclosure or otherwise under the Bank's securities then and in any such event the Bank shall forthwith give notice in writing to Beneficial specifying the default which has occurred and at any time thereafter Beneficial may in its absolute and uncontrolled discretion elect to pay to the Bank forthwith (notwithstanding the provisions of paragraph 1 hereof) the principal and all other moneys owing by the Borrower to the Bank (as hereinbefore specified) as at the date of payment whereupon the Bank will at the expense of the Borrower transfer and assign its interest in the Bank's securities to Beneficial in a manner and form satisfactory to Beneficial and its Solicitors.

30

40

SIGNED for the purposes of identification:

.....  
For Tacking Point Downs Pty. Limited

.....  
John Venour Dulhunty

.....  
 For Terukim Pty. Limited

.....  
 For Halisbury Pty. Limited

.....  
 For Vendul Management Pty. Limited

.....  
 For Vendul International Pty. Limited

.....  
 For Rowini Holdings Pty. Limited

.....  
 For Hudson & Wallace (Trading) Pty. Limited

Sgd. ?  
 .....  
 For Beneficial Finance Corporation Limited

No. 2  
 Affidavit of  
 Francis John  
 Kelly and  
 Annexures  
 23rd February  
 1978.  
 Annexure "O"  
 (cont'd)

10

The Common Seal of Beneficial  
 Finance Corporation Limited was }  
 hereunto affixed in the presence }  
 of:-

Sgd. ? ..... Sgd. ? .....  
 Secretary Director

This and the three preceding pages is the  
 Annexure "O" mentioned and referred to in the  
 Affidavit of FRANCIS JOHN KELLY sworn the 23rd  
 day of February, 1978 before me:

20

Sgd. A.J. Porter J.P.  
 Justice of the Peace

Annexure "P"

Annexure "P"

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED,  
 New South Wales Administration,  
 20 Martin Place,  
 Sydney,  
 P.O. Box 495,  
 Sydney NSW 2001  
 Telephone 231 0011

30

21st December 1976  
 Mr. P. Raper,  
 Projects Manager,  
 Beneficial Finance Corporation Limited,  
 Beneficial House,  
 285-287 George Street,  
 SYDNEY N.S.W. 2000.

No. 2

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "P"  
(cont'd)

Dear Mr. Raper,

TACKING POINT DOWNS PTY. LIMITED  
PORT MACQUARIE ESTATE

Referring to our recent discussion with Mr. J.V. Dulhunty I enclose copy of self explanatory letter to him setting out the basis under which the Bank is prepared to assist with initial development of 56 blocks.

Would you kindly advise in due course, your company's consideration to the proposed arrangements.

10

Our Pitt & Hunter Streets Sydney Branch is preparing a specified statement on the company's No. 2 account for your perusal and this should be available shortly.

Yours faithfully,

Sgd. D.M. Murphy  
D.M. MURPHY.  
SENIOR MANAGER  
CORPORATE ACCOUNTS

This is the Annexure "P" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn the 23rd day of February 1978 Before me:

20

Sgd. A.J. Porter J.P.  
Justice of the Peace

Annexure "Q"

---

Annexure "Q"

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED,  
New South Wales Administration,  
20 Martin Place,  
Sydney,  
P.O. Box 495,  
Sydney NSW 2001  
Telephone 231 0011

30

21st December 1976

Mr. J.V. Dulhunty,  
Director,  
Terukim Pty. Limited,  
8th Floor,  
139 Macquarie Street,  
SYDNEY N.S.W. 2000.

Dear Mr. Dulhunty,

40

TACKING POINT DOWNS ESTATE  
DEVELOPMENT OF 56 LOTS IN PHASE 1 STAGE 1

Referring to your recent discussion with Mr. Bradford, at which Mr. Peter Raper of Beneficial Finance Corporation Limited was present, I advise the Bank has approved the undermentioned increase facilities to assist with development of the initial phase of the estate.

No. 2  
Affidavit of Francis John Kelly and Annexures 23rd February 1978.  
Annexure "Q"  
(cont'd)

I understand development costs are as follows:

10	Development Contract - Richini		
	Constructions	say	\$200,000
	Consultants Fees		10,000
	Advertising		10,000
	Forward Agent Fees		5,000
			<u>\$225,000</u>
			=====

	Facilities o/a Tacking Point Downs		
	Pty. Limited		Limit
	Overdraft No. 3 Account		\$395,000 *
	Commercial Bills Non-Discount		
	Acceptance		1,000,000
20	Indemnities/Guarantees		201,000 *

\*Not to exceed \$446,000 in aggregate at any one time

	Peak exposure accordingly.		<u>\$1,446,000</u>
			=====

In addition, to cover accruing interest and charges on the No. 2 Account, until say 31st March 1976, Overdraft Limit is increased to

			<u>\$230,000</u>
			=====

Rates/Fees remain unaltered, but subject to review from time to time, viz:

30 Overdraft - Limit Establishment Fee, on increase - \$312-50 will be charged to the companys No. 2 account by our Pitt & Hunter Streets.

- Interest Rate - 12.5% p.a.
- Unused Limit Fee - 1.25% p.a. charged each half year June and December, in retrospect, on No. 3 Account only.

40 Commercial Bill Line - Acceptance Fee - 1.8% p.a.  
- Line Fee - 1% p.a. each half year, ended June and December but would be negated by full usage.

Indemnities/Guarantees - 1.5% p.a. each half year in advance on the establishment of each indemnity/guarantee.

No. 2

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "Q"  
(cont'd)

I understand that in addition to covering the development and associated costs \$225,000 an indemnity/guarantee for \$150,000, in favour of The Council of the Municipality of Port Macquarie, will be required. However, it is understood the indemnity/guarantee will not be required until initial progress payment is due and/or development expenditure reaches \$50,000. Prior to each progress payment being made to Richini Constructions, you envisage that Council will inspect works against Architects Certificate and issue a letter reducing amount of the indemnity/guarantee. In effect it is expected that the exposure for the development contract, relating to overdraft \$200,000 and additional indemnity/guarantee \$150,000 will never exceed \$200,000 at any one time. 10

These arrangements of course are subject to the concurrence of Beneficial Finance Corporation Limited by way of a formal variation of addendum to their Letter of Take-Out dated 2nd March 1976, currently expiring 31st March 1978, for \$1,450,000, covering: 20

Commercial Bill Non-Discount	
Acceptance Line	- \$1,000,000
Indemnities/Guarantees	- 250,000
Overdraft	- <u>200,000</u>
	\$1,450,000
	=====

plus all Bank interest, charges fees costs, etc.

I note from cash flows provided that you envisage from gross sales, at \$14,000 per block a return of some \$784,000 is anticipated before deduction of selling costs and initially you intend to test the Market with an auction during the Christmas New Year break, to gauge buyers reaction and establish a price base. 30

It would appear that if linen plan is deposited by June/July 1977 and sales/settlement cash flow progresses as envisage from August 1977, to say March 1978 at the latest, a net profit of upwards of \$280,000 could be achieved, after deducting all development and holding charges on the Banks facilities. 40

Would you kindly advise if these arrangements are acceptable, bearing in mind the concurrence of Beneficial Finance Corporation Limited is also required.

I would like to review progress with the development and results of forward sales by 31st March 1977.

c.c. Mr. P. Raper, Beneficial Finance Corporation No. 2  
Limited.

Yours faithfully,  
Sgd. D.M. Murphy

D.M. MURPHY  
SENIOR MANAGER  
CORPORATE ACCOUNTS.

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978  
Annexure "Q"  
(cont'd)

10

This is the Annexure "Q" mentioned and referred  
to in the Affidavit of FRANCIS JOHN KELLY sworn  
the 23rd day of February 1978 Before me:

Sgd. A.J. Porter J.P.  
Justice of the Peace

---

Annexure "R"

Annexure "R"

4th April 1977

Mr. D.M. Murphy,  
Senior Manager,  
A.N.Z. Bank,  
P.O. Box 495,  
SYDNEY 2001.

20

Dear Mr. Murphy,

re: Tacking Point Downs

Referring to your letter of 21st December 1976 which  
enclosed a copy of a letter of the same date sent  
to J.V. Dulhunty, Director, Terukim Pty. Ltd. We  
concur with the extended arrangements set out in that  
correspondence as follows.

30

Development Contract - Richini	
Construction say	\$200,000
Consultant Fees	10,000
Advertising	10,000
Forward Agents Fees	<u>5,000</u>
	<u>\$225,000</u>

Facilities o/a Tacking Point Downs	
Pty. Ltd.	Limit
Overdraft No. 3 Account	\$395,000 *
Commercial Bills Non-Discount	
Acceptance	1,000,000
Indemnities/Guarantees	201,000 *

40

\* Not to exceed \$446,000 in aggregate  
at any one time.

Peak exposure accordingly.	<u>\$1,446,000</u>
----------------------------	--------------------



No. 2

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "R"  
(cont'd)

In addition to cover accruing interest  
and charges on the No. 2 Account, until  
say 31st March 1976 Overdraft Limit is  
increased to \$230,000

Rates/Fees remain unaltered, but subject to  
review from time to time, viz:

Overdraft - Limit Establishment Fee, on increase -  
\$312.50 will be charged to the company's No. 2  
account by our Pitt & Hunter Streets.

10

- Interest Rate - 12.5% p.a.
- Unused Limit Fee - 1.25% p.a. charged  
each half year June and December, in retrospect,  
on No. 3 Account only.

Commercial Bill Line - Acceptance Fee - 1.8% p.a.  
- Line Fee - 1% p.a. each  
half year, ended June and December but would be  
negated by full usage.

Indemnities/Guarantees - 1.5% p.a. each half year  
in advance on the establishment of each indemnity/  
guarantee.

20

I understand that in addition to covering the  
development and associated costs \$225,000 an  
indemnity/guarantee for \$150,000 in favour of The  
Council of the Municipality of Port Macquarie,  
will be required. However, it is understood the  
indemnity/guarantee will not be required until  
initial progress payment is due and/or development  
expenditure reaches \$50,000. Prior to each  
progress payment being made to Richini Constructions,  
you envisage that Council will inspect works  
against Architects Certificate and issue a letter  
reducing amount of the indemnity/guarantee. In  
effect it is expected that the exposure for the  
development contract, relating to Overdraft  
\$200,000 and additional indemnity/guarantee  
\$150,000 will never exceed \$200,000 at any one time.

30

These arrangements of course are subject to the  
concurrence of Beneficial Finance Corporation Limited,  
by way of a formal variation of addendum to their  
Letter of Take Out dated 2nd March 1976, currently  
expiring 31st March 1978, for \$1,450,000 covering:

40

Commercial Bill Non-Discount	
Acceptance Line	- \$1,000,000
Indemnities/Guarantees	- 250,000
Overdraft	- <u>200,000</u>
	<u>\$1,450,000</u>

plus all Bank interest, charges fees costs etc.

Yours faithfully,  
Sgd. F.J. Kelly  
F.J. KELLY  
REGIONAL MANAGER.

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "R"  
(cont'd)

This and the preceding page is the Annexure "R" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn the 23rd day of February 1978 Before me:

Sgd. A.J. Porter J.P.  
Justice of the Peace

10

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Annexure "S"

Annexure "S"

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
New South Wales Administration  
20 Martin Place  
Sydney  
P.O. Box 495,  
Sydney NSW 2001  
Telephone 231 0011

12th April, 1977

20

Mr. F.J. Kelly,  
Regional Manager,  
Beneficial Finance  
Corporation Limited,  
Beneficial House,  
285-287 George Street,  
SYDNEY N.S.W. 2000.

Dear Mr. Kelly,

TACKING POINT DOWNS ESTATE.

30

Further to my letter of 21st December 1976 and your reply of 4th April 1977, I enclose a copy of my self explanatory letter today, to Mr. J.V. Dulhunty.

The limit arrangements set out therein should cover all development costs, holding charges and guarantee fee, per revised cash flow presented to us by Mr. Dulhunty at our recent discussion with him on 17th March 1977. I presume Mr. Dulhunty has also provided you with a copy of that cash flow at his subsequent discussion with you.

40

Limit arrangement of course are available subject to your companys concurrence and completion of an addendum to the Letter of Takeout dated 2nd March 1976.

No. 2

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.

Annexure "S"  
(cont'd)

As I understand matters are becoming pressing as regard meeting progress payments and issue of relative indemnity/guarantee to Port Macquarie Council, I look forward to your early advices as to whether arrangements are acceptable to your company, so that completion of the necessary documentation can be set in train.

Yours faithfully,

Sgd. D.M. Murphy

D.M. MURPHY  
SENIOR MANAGER  
CORPORATE ACCOUNTS.

10

This is the Annexure "S" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn the 23rd day of February 1978 before me:

Sgd. A.J. Porter J.P.

Justice of the Peace

---

Annexure "T"

A N Z

New South Wales Administration  
20 Martin Place  
Sydney

AUSTRALIA AND NEW ZEALAND  
BANKING GROUP LIMITED

PO Box 495  
Sydney NSW 2001

12th April, 1977.

Telephone 231 0011

Mr J.V. Dulhunty  
Director  
Terukim Pty Limited  
8th Floor  
139 Macquarie Street  
SYDNEY NSW 2000

Dear Mr Dulhunty

TACKING POINT DOWNS ESTATE  
DEVELOPMENT OF 56 LOTS IN PHASE 1 STAGE 1

Further to my letter of 21st December 1977 and our subsequent discussions, I advise the Bank has approved the undermentioned increased facilities to assist with development of the initial phase of the estate and cover holding costs, per latest cash flow presented, pending commencement of sales settlements.

Facilities o/a Tacking Point Downs Pty Limited	Limit
Overdraft No. 3 Account	\$ 495,000 *
Commercial Bills Non-Discount Acceptance, now Discount Acceptance - see later in this regard	1,000,000
Indemnities/Guarantees	221,000 *
	<hr/>
	\$1,556,000 1,566,000
	<hr/> <hr/>
	\$1,716,000
	<hr/>
	160,000
	<hr/>
	1,556,000

\*Not to exceed <sup>716,000</sup> \$566,000 in aggregate at any one time Peak exposure accordingly. <sub>160,000</sub>

In addition to cover accruing interest and charges on the No. 2 Account which by say 30th September 1977 should aggregate \$ 330,000  

---

---

2,046,000

Rates/Fees remain unaltered, from those stated in my letter of 21st December 1976. However, a further Limit Establishment Fee on increase in overdraft limits \$200,000, viz: \$250 will be charged to the company's No. 2 account by our Pitt & Hunter Streets Sydney branch.

I understand that in addition to covering the development and associated costs of the initial phase, plus holding costs and guarantee fee, an indemnity/guarantee for \$170,000 will now be required in favour of The Council of the Municipality of Port Macquarie. The additional \$20,000 represents 10% retention of development works and will remain until three months after completion of contracted works. However, it is still understood the indemnity/guarantee will not be required until after initial progress payment is due and/or development expenditure exceeds \$50,000.

Cont'd

12th April, 1977

Prior to each progress payment being made to Richini Constructions, I understand it is still envisaged that Council will inspect works against Architects Certificate and issue a letter reducing amount of the indemnity/guarantee. In effect it is expected that the exposure for the development contract, relating to Overdraft \$495,000 and increased indemnity/guarantee \$170,000 will never exceed \$556,000, in aggregate at any one time.

These arrangements of course remain subject to the concurrence of Beneficial Finance Corporation Limited by way of a formal variation of addendum to their Letter of Takeout dated 2nd March 1976 currently expiring 31st March 1978, for \$1,450,000, covering:

Commercial Bills Non-Discount Acceptance Line	-	\$1,000,000
Indemnities/Guarantees	-	250,000
Overdraft	-	200,000
		<hr/>
		\$1,450,000
		=====

plus all Bank interest, charges fees costs etc.

The Commercial bills for \$1,000,000 which matured 21st March 1977 were rolled on until 19th September 1977. These were discounted by Ord-B.T. Co. Limited, however, in the future it is preferred these are discounted by the Bank. I note gross sales are still anticipated to realise some \$728,000 net as previously advised. In this regard I would like to review progress with development and results of forward sales by say 31st July 1977.

Would you kindly advise if these arrangements are acceptable, bearing in mind the concurrence of Beneficial Finance Corporation Limited is required.

c.c. Mr F.J. Kelly, Regional Manager  
Beneficial Finance Corporation Limited

Yours faithfully

THIS and the preceding page is the Annexure "T" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn the 23rd day of February 1978 before me:

D.M. MURPHY  
SENIOR MANAGER  
CORPORATE ACCOUNTS.

A.J. Porter J.P.  
Justice of the Peace

Annexure "U"

Annexure "U"

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
New South Wales Administration  
20 Martin Place,  
Sydney  
P.O. Box 495,  
Sydney NSW 2001  
Telephone 231 0011  
15th April, 1977

Mr. F.J. Kelly,  
Regional Manager,  
Beneficial Finance Corporation Limited,  
Beneficial House,  
285-287 George Street,  
SYDNEY N.S.W. 2000

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978  
Annexure "U"  
(cont'd)

Dear Mr. Kelly,

TACKING POINT DOWNS ESTATE

10 Further to my letter of 12th April, 1974 and  
referring to telephone discussion today with  
Alvin Maple, I forward copy of self explanatory  
letter today, to Mr. J.V. Dulhunty regard peak  
exposure limit levels.

Yours faithfully,

Sgd. D.M. Murphy.

D.M. Murphy  
SENIOR MANAGER CORPORATE ACCOUNTS.

20 This is the Annexure "U" mentioned and referred  
to in the Affidavit of FRANCIS JOHN KELLY sworn  
the 23rd day of February 1978 before me:

Sgd. A.J. Porter J.P.  
Justice of the Peace

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Annexure "V"

Annexure "V"

30 AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
New South Wales Administration  
20 Martin Place,  
Sydney  
P.O. Box 495,  
Sydney NSW 2001  
Telephone 231 0011  
15th April 1977.

Mr. J.V. Dulhunty,  
Director,  
Terukim Pty. Limited,  
8th Floor,  
139 Macquarie Street,  
SYDNEY N.S.W. 2000

Dear Mr. Dulhunty,

40 TACKING POINT DOWNS ESTATE  
DEVELOPMENT OF 56 LOTS IN PHASE 1 STAGE 1

Further to my letter of 12th April, 1977, I confirm  
that the aggregate of overdraft No. 3 account and

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "V"  
(cont'd)

Indemnities/Guarantees limits is not to exceed  
\$566,000 at any one time. In addition peak  
exposure should be \$1,566,000.

Yours faithfully,

Sgd. D.M. Murphy

D.M. Murphy

SENIOR MANAGER CORPORATE ACCOUNTS	1,566,000	
G/tee Water & Sewerage	<u>51,000</u>	
	1,515,000	
G/tee Roadworks	<u>20,000</u>	10
O/D	1,495,000	

c.c. Mr. F.J. Kelly, Regional Manager  
Beneficial Finance Corporation Limited

This is the Annexure "V" mentioned and referred  
to in the Affidavit of FRANCIS JOHN KELLY sworn  
the 23rd day of February 1978 before me:

Sgd. A.J. Porter J.P.  
Justice of the Peace

Annexure "W"

Annexure "W"

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED 20  
New South Wales Administration  
20 Martin Place,  
Sydney  
P.O. Box 495,  
Sydney NSW 2001  
Telephone 231 0011  
11th May, 1977

Mr. F.J. Kelly,  
Regional Manager,  
Beneficial Finance Corporation Limited, 30  
Beneficial House,  
285-287 George Street,  
SYDNEY N.S.W. 2000.

Dear Mr. Kelly,

TACKING POINT DOWNS ESTATE

Referring to my letter of 15th April 1977 it would  
be appreciated if you could advise whether the  
proposed limit arrangements are acceptable to you;  
perhaps you may wish to discuss the situation  
before proceeding to further documentation, in 40  
connection with the Letter of Takeout. My  
immediate concern is that whilst the existing  
liabilities of Tacking Point Downs Pty. Limited

with the Bank, viz:

Overdraft No. 3 Account	Dr. \$ 341,880
Commercial Bills Non-Discount	
Acceptance	1,000,000
Indemnities/Guarantees	<u>51,000</u>
	\$1,392,880
	=====

No. 2

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "W"  
(cont'd)

is within the Letter of Takeout amount of \$1,450,000, overdraft is now in excess of the peak Overdraft Limit of \$200,000 stated therein.

10 In addition there is some \$100,000 in progress payments eventually to be paid to Richini Constructions on sub-divisional work and accordingly as you can appreciate I wish to ensure necessary documentation is completed well before hand.

Looking forward to receiving your early advices.

Yours faithfully,

Sgd. D.M. Murphy

20 D.M. MURPHY.  
SENIOR MANAGER  
CORPORATE ACCOUNTS.

This is the Annexure "W" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn the 23rd day of February 1978 before me:

Sgd. A.J. Porter J.P.  
Justice of the Peace

---

Annexure "X"

Annexure "X"

BENEFICIAL FINANCE CORPORATION LIMITED

30 Beneficial House,  
285-287 George St.,  
SYDNEY N.S.W. 2000  
29-5244

19th July, 1977

Mr. D. Murphy,  
Senior Manager,  
Corporate Accounts,  
Australian and New Zealand Banking Group Limited,  
20 Martin Place,  
SYDNEY, N.S.W. 2000

40 Dear Sir,

re: TACKING POINT DOWNS ESTATE



No. 2

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.

Annexure "X"  
(cont'd)

Further to your letter of 15th April, 1977  
addressed to J.V. Dulhunty, Director, Terukim  
Pty Limited we confirm that aggregates of  
overdraft on No. 3 account and Indemnity  
Guarantee limits is not to exceed \$566,000 at  
any one time. In addition peak exposure  
should be \$1,566,000.

Yours faithfully,

Sgd. F.J. Kelly

F.J. KELLY  
REGIONAL MANAGER

10

This is the Annexure "X" mentioned and referred  
to in the attached Affidavit of FRANCIS JOHN  
KELLY sworn 23rd February 1978, Before me:

Sgd. A.J. Porter J.P.  
A Justice of the Peace

Annexure "Y"

Annexure "Y"

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED,  
New South Wales Administration,  
20 Martin Place,  
Sydney,  
P.O. Box 495,  
Sydney NSW 2001.  
Telephone 231 0011

20

10th August 1977

Mr. F.J. Kelly,  
Regional Manager,  
Beneficial Finance Corporation Limited,  
Beneficial House,  
285-287 George St.,  
SYDNEY NSW 2000.

30

Dear Sir,

TACKING POINT DOWNS PTY. LIMITED

Referring to recent discussions between Mr. Flood  
of Tacking Point Downs Pty Ltd, Mr. Raper of your  
Company and the writer, I advise that the request  
for the following increased facilities has been  
approved.

	<u>Limit</u>	
Overdraft No. 2 Account	549,000 *	40
Commercial Bill	1,000,000	
Indemnities	<u>71,000 *</u>	
	<u>\$1,620,000</u>	

\* Not to exceed \$600,000 in aggregate at any one time. Peak exposure is therefore \$1,600,000.

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978  
Annexure "Y"  
(cont'd)

These limit arrangements are available subject to your Company's concurrence and completion of a formal addendum to the Letter of Take Out.

10 It is appreciated that such addendum will take a little time to be finalised by your Solicitors and we are therefore prepared to permit the facilities to be utilised against your confirmation that the formal addendum will be completed in early course to cover these facilities to \$1,600,000.

If you are agreeable to the facilities as shown above would you please indicate so by acknowledgment on the duplicate of this letter and return to this office.

Mr. Dulhunty has been informed along similar lines today.

20 Yours faithfully,

Sgd. D.M. Murphy  
D.M. MURPHY  
SENIOR MANAGER CORPORATE ACCOUNTS  
moc.

Acknowledged & Confirmed

.....

Beneficial Finance Corporation  
(Authorised Signature)

30 This is the Annexure "Y" mentioned and referred to in the attached Affidavit of FRANCIS JOHN KELLY sworn 23rd February, 1978, Before me:

Sgd. A.J. Porter J.P.  
Justice of the Peace

---

Annexure "Z"

Annexure "Z"

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
New South Wales Administration,  
20 Martin Place, Sydney  
P.O. Box 495, Sydney N.S.W. 2001  
Telephone 231 0011

DMM:md

40 19th December, 1977.

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "Z"  
(cont'd)

Mr. F.J. Kelly,  
Regional Manager,  
Beneficial Finance Corporation Ltd.,  
Beneficial House,  
285 George Street,  
SYDNEY NSW 2000.

Dear Frank,

TACKING POINT DOWNS PTY LTD

It is regretted that we have not replied earlier to your request regarding the building of houses on the above estate. However, you will appreciate our reasons for this.

10

In relation to the house building, the Bank is not interested in providing any further finance, even though this would be covered by your letter of take out.

Additionally you had asked of the Bank's attitude to extension of your letter of take out, as amended. This has been the reason for our delay as this aspect has been given considerable thought. The Bank has decided it will call under the letter of take out on the expiry of it, on 31st March 1978. Mr. Dulhunty has today been informed of the Bank's decision.

20

I am on leave until 23rd January and it is suggested that after that date arrangements be made to discuss in detail, any aspects.

Yours sincerely,

Sgd. D.M. Murphy

DENNIS M. MURPHY  
SENIOR MANAGER CORPORATE ACCOUNTS

30

This is the Annexure "Z" mentioned and referred to in the attached Affidavit of FRANCIS JOHN KELLY sworn 23rd February, 1978, Before me:

Sgd. A.J. Porter J.P.  
Justice of the Peace

Annexure "AA"

Annexure "AA"

7th February 1978  
FJK.EW

Mr. D.M. Murphy  
Senior Manager Corporate Accounts,  
Australia & New Zealand Banking Group Limited,  
20 Martin Place,  
SYDNEY N.S.W. 2000

40

Dear Sir,

Re: Tacking Point Downs Pty. Limited

We acknowledge receipt of your letter of the 19th December, 1977.

10 The terms of the letter and the circumstances leading to its despatch have caused us to critically examine our position. Accordingly, we must point out that there has occurred non-fulfilment with the condition contained in Clause 4 of the Undertaking of 2 March 1976 and that accordingly, our liability under Clause 1 to "take-out" cannot and will not be accepted on our part. The non-fulfilment comprises at least the non-payment of the last commitment fee to fall due and payable under the terms of the relevant Agreement with the Borrower on 4 January, 1978.

In addition to Clause 4, there has occurred non-fulfilment of the following further contractual conditions:

- 20 (i) That contained in Clause 6 of the 2 March 1976 Undertaking, relating to the giving to us of notice specifying defaults. You would doubtless be aware of all relevant defaults. No notice thereof has ever been given to us.
- 30 (ii) That contained in Clause 2 of the letter of undertaking dated 4 April 1974, as preserved by Clause 3 of the 2 March 1976 Undertaking, relating to the making of further advances without our consent. Again, you would doubtless have full details of such advances.
- (iii) That contained in the second proviso to Clause 1 of the 2 March 1976 Undertaking relating to acts or omissions diminishing or impairing the value or effectiveness of the Bank's securities.

40 Additionally, contrary to Recital B contained in the letter of 4 April 1974, no floating debenture charge over the assets and undertakings of the Borrower then existed, nor was in fact obtained until 23 December 1975; both of the undertakings referred to in this letter were predicated, whether expressly or by implication, on the charge having been in existence on or before 4 April 1974 and upon such charge being ultimately available for transfer contemporaneously with "take-out".

For the foregoing and any other grounds which may be presently available to us, we repeat that we must decline liability to "take-out" under Clause 1

No. 2

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978  
Annexure "AA"  
(cont'd)

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "AA"  
(cont'd)

of the 2 March 1976 Undertaking. In case you dispute our entitlement to so decline liability, we have instructed our solicitors to prepare a Summons for declaratory relief so that any such dispute can be conveniently determined by the Supreme Court as early as possible. Could you please let us know your views on the matter within the next ten days.

Yours faithfully,  
Sgd. F.J. Kelly,  
F.J. KELLY  
REGIONAL MANAGER.

10

c.c. Mr. D.E. Moore, Managing Director.

c.c. Mr. T.N. Siegele, Operations Manager B.S.P.

This and the preceding page is Annexure "AA" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn 23rd February 1978, Before me:

Sgd. A.J. Porter J.P.  
A Justice of the Peace

20

Annexure "AB"

---

Annexure "AB"

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED,  
New South Wales Administration,  
20 Martin Place, Sydney,  
P.O. Box 495, Sydney NSW 2001  
Telephone 231 0011

AEB:md

14th February, 1978

RECEIVED 17 FEB 1978

Mr. F.J. Kelly,  
Regional Manager,  
Beneficial Finance Corporation Limited,  
285-287 George Street,  
SYDNEY NSW 2000.

30

Dear Sir,

TACKING POINT DOWNS PTY LIMITED

We acknowledge receipt of your letter of the 7th instant indicating that your Company intends to deny liability to make payment to the Bank pursuant to the Letter of Take Out dated 4th April 1974 and subsequent amendments to the same which were executed by your Company.

40

With respect to the various matters raised in your letter of the 7th instant as reasons why your Company considered it was not under liability to the Bank we reply as follows:

No. 2  
Affidavit of Francis John Kelly and Annexures 23rd February 1978. Annexure "AB" (cont'd)

1. With regard to your statement that the last commitment fee due on 4th January, 1978 has not been paid it is noted that you did not inform the Bank of this before your letter of the 7th instant, and further, that as your Company is required under account authority to countersign all cheques of Tacking Point Downs Pty Limited your Company had adequate means of seeing that payment was made at the correct time or of informing the Bank if it was not. Pursuant to Clause 4 of the amending Agreement of 2nd March 1976 we have endeavoured to arrange issue of a cheque to cover the amount of the Commitment Fee to 4/1/78 but our efforts have been thwarted by your refusal to allow issue of a cheque form from the book which is held by you and in terms of the Bank Authority we are aware that such cheques are to be countersigned by officers of your Company.
2. With regard to the giving to your Company under Clause 6 of the amending Agreement of 2nd March 1976 notice of defaults under the securities held by the Bank, we would enquire what defaults your Company alleges have occurred. The Bank, not having had notice of any defaults under the securities, has not been required to give any notice of defaults to your Company.
3. With regard to the suggestion that the Bank has made further advances to Tacking Point Downs Pty Limited without your Company's consent, this is emphatically denied. Your Company has at all times been aware of increases granted and its representatives in fact have been involved with the interviews held with the Bank to arrange increases. Your Company's representative actually signed acknowledgement and confirmation of the last arrangement for increase contained in the Bank's letter to your Company of 10th August 1977.
4. With regard to the suggestion that the Bank has by its acts or omissions impaired the value or effectiveness of the Bank's securities, this is also emphatically denied. We would suggest that you specify such acts and omissions of the Bank as your Company alleges have occurred and have had the effect above-mentioned.

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "AB"  
(cont'd)

5. With regard to your Company's complaint that the floating debenture charge referred to in Recital B of the Letter of Take Out of 4th April, 1974 was not in fact obtained by the Bank until 23rd December 1975, it is pointed out, first, that the Letter of Take Out is addressed by your Company to the Bank and executed by your Company and is not addressed to your Company or executed by the Bank; secondly, that the floating debenture charge was in fact obtained and is still subsisting and available for assignment to your Company on Take Out; thirdly, there is no evidence of any kind that your Company's position has been or will be prejudiced by the fact that the floating debenture charge was not in existence at 4th April, 1974. 10
6. Finally, in relation to all the foregoing matters, we would call your Company's attention to Clause 5 of the amending Agreement of March 2nd 1976 which was executed by your Company which states that up to the date of that Agreement there had been no breach by the Bank of the original Letter of Take Out, of 4th April, 1974 and that if there had been any such breach then the breach had been waived by your Company. 20

The Bank considers that your Company is bound by the Letter of Take Out, as amended, and intends to enforce its rights against your Company. In these circumstances we see no merit in the application to Court for declaratory relief proposed by you. 30

Yours faithfully,

Sgd. A.E. Bown

A.E. BOWN

SENIOR MANAGER CORPORATE ACCOUNTS

This and the preceding page is the Annexure "AB" mentioned and referred to in the attached Affidavit of FRANCIS JOHN KELLY sworn 23rd February, 1978, Before me: 40

Sgd. A.J. Porter J.P.

A Justice of the Peace

Annexure "AC"

16th February, 1978  
F.J.K. LW

The Secretary,  
A.N.Z. Banking Group Limited,  
20 Martin Place,  
SYDNEY, N.S.W. 2000

ATTENTION: MR. A. BOWN

No. 2

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978  
Annexure "AC"

Dear Sir,

10 We have been requested by Mr. B. Flood of Tacking  
Point Downs Pty. Limited to sign certain cheques  
on the No. 3 Account, which requires signature by  
a representative of our Company and a represen-  
tative of your Bank. Given the terms of our  
letter to you of the 7 inst., we believe that it  
would be inappropriate for us to continue to be  
involved with any matters of this nature.  
20 Accordingly, we return the cheque book pertaining  
to the account and an invoice from radio station  
2KM and will leave it to you to make alternative  
arrangements with your customer for operation  
of the account. Please take this letter as notice  
for cancellation of the authority for officers  
of this Company to operate on the subject  
account.

30 If you are in difficulties, in that there are  
payments from the account which urgently need to  
be made, and you are unable to organise the  
manner of operation of the account in a sufficient  
period of time, then we would consider signing  
cheques at your request subject to such action on  
our part in signing the cheques being without  
prejudice to the stance adopted by this Company  
in our letter to you of the 7th inst.

40 You will also find enclosed 10 incomplete  
authorities addressed to you and signed on behalf  
of Tacking Point Downs Pty. Limited. These have  
been sent to us by the company but as we have  
cancelled authority as above they will no longer  
require execution by or on behalf of this Company.

On the 14th February 1978, we wrote to you with  
certain discharges of our registered securities to  
facilitate settlements.

You might let us know what procedure you would  
like to follow for the future.

Yours faithfully,

Sgd. F.J. Kelly

F.J. KELLY  
REGIONAL MANAGER.

50



No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978  
Annexure "AC"  
(cont'd)

c.c. Mr. R. Bruce, Messrs. Bruce & Stewart

c.c. Mr. T. Siegele, O/M B.S.P.

This and the preceding page is the Annexure "AC" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn 23rd February 1978, Before me:

Sgd. A.J. Porter J.P.

A Justice of the Peace

Annexure "AD"

Annexure "AD"

10

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED,  
New South Wales Administration,  
20 Martin Place,  
Sydney, P.O. Box 495,  
Sydney NSW 2001.  
Telephone 231 0011

AEB/md

17th February, 1978

RECEIVED 20 FEB 1978

Mr. F.J. Kelly,  
Regional Manager  
Beneficial Finance Corporation Limited,  
Beneficial House,  
285-287 George Street,  
SYDNEY NSW 2000.

20

Dear Sir,

TACKING POINT DOWNS PTY LIMITED

We acknowledge receipt of your letter of 16th instant, indicating that your Company does not wish to remain involved with the signing of cheques etc on the above account.

30

At the outset we must point out that the statement in your letter that a representative of this Bank is involved in the signing of cheques on the account is incorrect. No officer of this Bank is required to countersign cheques issued by the Company.

So far as cancellation of the existing authority is concerned the Bank requires Tacking Point Downs Pty Limited to initiate any amendment to the signing authority in accordance with their

40

Articles of Association. In terms of our usual instructions we require our form of Variation of authorised Signatures duly completed.

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978  
Annexure "AD"  
(cont'd)

In respect of your comment that if we are in difficulties regarding payments from the account we would suggest that you also take this matter up with Tacking Point Downs Pty Ltd as they are the only ones likely to experience any difficulties.

10 You will appreciate of course that settlement for sale of the 10 blocks of land at Port Macquarie will not proceed until this matter of the amended authority has been arranged in accordance with usual Bank practice. However, for your further information we have not yet received the discharges you refer to.

20 The enclosures with your letter have been forwarded to Tacking Point Downs Pty Limited and we have informed that Company to expect advices from you in early course.

Yours faithfully,

Sgd. A.E. Bown

A.E. BOWN  
SENIOR MANAGER CORPORATE ACCOUNTS.

This is the Annexure "AD" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn 23rd February 1978, Before me;

Sgd. A.J. Porter J.P.

A Justice of the Peace.

30

No. 2

Annexure "AE"

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "AE"

21st February, 1978

by hand

The Manager,  
Australian & New Zealand Banking Group,  
20 Martin Place,  
SYDNEY, N.S.W. 2000

Dear Sir,

RE: Tacking Point Downs

We refer to the correspondence that has passed  
between us since our letter of 7th February 1978.

10

We have recently received the enclosed Section  
88B Instrument and Linen Plan which in principle  
appears to be in order, bearing in mind the  
Mortgagors need to realise the subject land in  
the most advantageous way. As we still have a  
registered mortgage over the lands in question we  
have executed the document as a registered Mortgagee  
but our action in so doing should not be taken as  
in any way derogating from our position as taken  
in our letter of 7th February.

20

We leave it to you to contact your customers as  
to the enclosures. Please acknowledge receipt on  
the enclosed duplicate of this letter.

Yours faithfully,

Sgd.

Roger Cornforth,  
Securities Manager.

Received ..... this 21st day of February 1978.

This is the Annexure "AE" mentioned and referred  
to in the Affidavit of FRANCIS JOHN KELLY sworn 23rd  
February, 1978, Before me:

30

Sgd. A.J. Porter J.P.

A Justice of the Peace

Annexure "AF"

Annexure "AF"

BENEFICIAL FINANCE CORPORATION LIMITED  
Beneficial House, 285-287 George Street, Sydney,  
New South Wales 2000. Telephone: 29 5244.

22nd February, 1978

FJK:EW

Mr. A.E. Bown,  
Senior Manager Corporate Accounts,  
Australia & New Zealand Banking Group Limited,  
20 Martin Place,  
SYDNEY N.S.W. 2000.

No. 2

Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "AF"  
(cont'd)

Dear Mr. Bown,

re: Tacking Point Downs Pty. Limited

10 Your letter of the 14th February reached us on  
the 17th. We maintain that we have properly  
disclaimed liability despite your assertion to  
the contrary. So that there be no misunderstanding  
as to our present position, we comment on the  
points raised by you as follows:-

- 20 1. It was the obligation of the Bank, not this  
Company, to ensure payment by due date of  
commitment fees from your borrower and our  
officers only became signatories to the No.  
3 Account at your insistence. It is quite  
wrong to suggest that we thwarted any attempt  
on your part to procure payment of commitment  
fee by withholding the cheque book.

The borrower did present a cheque to us late  
last Friday afternoon and we have returned it  
unsigned re-confirming our request that the  
previous bank authority involving our officers  
be withdrawn by reason of our disclaiming  
liability under the arrangements that had  
previously existed between us.

- 30 2. You are referred to your registered securities,  
the terms thereof, and each and every default  
thereunder of which we have not received notice.

3 & 4. We are at issue.

- 40 5. The letter of take-out dated 4th April 1974  
was furnished at the request of the Bank and  
it was a condition that there would be  
included in the Bank's securities an Equitable  
Charge that it did not ultimately take until  
23rd December 1975. This Company's position  
was thereby prejudiced. Whilst the Bank might  
not have been a party to the second amending  
take-out letter it clearly is bound by the  
terms of that document.

6. The breaches by the Bank are of such a  
fundamental and continuing nature that they  
are not negated by the alleged waiver.

As you do not appear to accept our position we have  
no alternative but to institute proceedings for  
declaratory relief and will do so forthwith.

No. 2  
Affidavit of  
Francis John  
Kelly and  
Annexures  
23rd February  
1978.  
Annexure "AF"  
(cont'd)

As to the letter of 7th February we acknowledge that your officers were not signatories to the No. 3 Account but this does not affect the condition that the Bank would procure payment and moreover your officers did supervise the account. We have advised Tacking Point Downs that we have disclaimed liability to provide take-out facility and that arrangements should be made for a new authority on the No. 3 Account not involving our officers. You might in due course let us know what arrangements you suggest as to discharge or transfer of our securities.

10

Yours faithfully,  
Sgd. F.J. Kelly  
F.J. KELLY  
REGIONAL MANAGER.

This and the preceding page is the Annexure "AF" mentioned and referred to in the affidavit of FRANCIS JOHN KELLY sworn 23rd February 1978  
Before me:

20

Sgd. A.J. Porter J.P.  
A Justice of the Peace

Annexure "AG"

Annexure "AG"

NEW SOUTH WALES

Companies Act 1961

Sections 100(1) and 102(1)

STAMPED 19 JAN 1976

Form 26.

STATEMENT OF PARTICULARS TO BE LODGED  
WITH CHARGE

TACKING POINT DOWNS PTY. LIMITED

30

TO THE CORPORATE AFFAIRS COMMISSION

1. The charge is given by: Tacking Point Downs Pty. Limited.
2. The date of the creation of the charge is: Twenty third December 1975.
3. The description of the instrument creating or evidencing the charge is: Mortgage Debenture
4. The amount secured by the charge is: Advances from time to time

40

5. A short description of the property affected is: All assets and undertaking including uncalled capital and unpaid calls.
6. The names and addresses of the persons entitled to the charge are: Australia and New Zealand Banking Group Limited, 68 Pitt Street, Sydney.

No. 2  
Affidavit of Francis John Kelly and Annexures 23rd February 1978.  
Annexure "AG" (cont'd)

Dated the twenty third day of December 1975.

Sgd. B.J. FLOOD

Secretary

10

Lodged by: Mansell & Norton,  
68 Pitt Street,  
Sydney

Phone No. 232-6966

Fee - \$23 including fee for certificate.

Time for Filing: within 30 days after the creation of the charge, or in the circumstances to which section 102(1) or section 104 applies, within the periods referred to therein.

20

This is the Annexure "AG" mentioned and referred to in the Affidavit of FRANCIS JOHN KELLY sworn 23rd February, 1978, Before me:

Sgd. A.J. Porter, J.P.

A Justice of the Peace.

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No. 3

Affidavit of Albert Kevin Robert Watson with Annexures - 14th March, 1978

No. 3  
Affidavit of Albert Kevin Robert Watson and Annexures 14th March 1978

30

IN THE SUPREME COURT OF NEW SOUTH WALES  
COMMON LAW DIVISION

COMMERCIAL LIST

No. 10162 of 1978

BENEFICIAL FINANCE CORPORATION LIMITED Plaintiff  
and

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

Defendant

A F F I D A V I T

Affidavit of  
Albert Kevin  
Robert Watson  
and Annexures  
14th March 1978  
(cont'd)

I, ALBERT KEVIN ROBERT WATSON, of 1 Myee Crescent,  
Lane Cove, Bank Officer, say as follows:

1. I am Assistant State Manager, Corporate  
Banking in the N.S.W. Administration of Australia  
and New Zealand Banking Group Limited  
(hereinafter called "the Bank") which is the  
defendant herein, and am duly authorised to make  
this affidavit on its behalf.

2. I refer to Annexure "AA" to the Affidavit of 10  
F.J. Kelly sworn on 23rd February 1978 and filed  
herein namely the letter from Beneficial Finance  
Corporation Limited (hereinafter called "Beneficial")  
to the Bank dated 7th February 1978 which purports  
to set out the reasons why Beneficial alleges that  
it is not liable to the Bank under the "take-out"  
letter of guarantee.

3. In reply to Beneficial's allegation that it 20  
is not liable to the Bank because of non payment  
by Tacking Point Downs Pty. Limited (hereinafter  
called "the Borrower") of the latest commitment  
fee due on 4th January 1978, I say as follows:

(a) I am informed by Bank officers and verily 30  
believe that any cheque drawn by the Borrower  
in payment of the commitment fee required  
the signature of the chairman of the Borrower  
or any two directors of the Borrower together  
with any one of two officers of Beneficial  
pursuant to the Bank's authority for operations  
on account dated 3rd March 1976.

(b) I am informed and verily believe that the  
first notification received by the Bank  
that the commitment fee due on 4th January  
1978 had not been paid by the Borrower to  
Beneficial was in Beneficial's letter to the  
Bank dated 7th February 1978 (Annexure "AA"  
of the Affidavit of F.J. Kelly filed  
herein).

(c) I am informed by Mr. E. Myatt, a Bank officer 40  
under my control, that on 14th February 1978  
he telephoned Mr. B. Flood, secretary and a  
director of the Borrower, requesting Mr.  
Flood to issue to Beneficial a cheque in  
payment of the commitment fee, namely  
\$14,402.82. I am further informed by Mr.  
Myatt that Mr. Flood on that day went to the  
offices of Beneficial who at that time had  
possession of the relevant cheque book and  
that an officer of Beneficial refused to  
hand a cheque form to Mr. Flood. 50

(d) Annexed hereto and marked "ANZ-A" is a copy letter dated 16th February 1978 from Beneficial to the Bank wherein, inter alia, Beneficial refuses to countersign any cheques to enable payment of the commitment fee and with which letter Beneficial returned the cheque book to the Bank.

No. 3  
Affidavit of  
Albert Kevin  
Robert Watson  
and Annexures  
14th March 1978  
(cont'd)

10 (e) Annexed hereto and marked "ANZ-B" is a copy letter dated 17th February 1978 from the Bank to the Borrower. Attached with the original of the said letter to the Borrower was the relevant cheque book and in that letter the Bank, inter alia, sought the Borrower to obtain the necessary signature of Beneficial to the commitment fee cheque.

20 (f) Annexed hereto and marked "ANZ-C" is a copy letter from the Borrower to Beneficial dated 17th February 1978 enclosing the said cheque in the sum of \$14,402.82.

(g) Annexed hereto and marked "ANZ-D" is a copy letter from Beneficial to the Borrower, the effect of which is to again refuse to sign the cheque, dated 21st February 1978.

30 (h) Annexed hereto and marked "ANZ-E" is a copy letter dated 7th March 1978 from the Bank to Beneficial again enclosing a Bank cheque in the sum of \$14,402.82 whereby the Bank itself attempted to pay the commitment fee. The said cheque was returned to the Bank by Beneficial on 9th March 1978.

4. In reply to Beneficial allegation that the Bank has failed to give Beneficial notice of defaults, I and, to the best of my knowledge and belief, other officers of the Bank are not aware of any defaults by the Borrower under the Bank's securities and the Bank has consequently not given any notice of default to Beneficial.

40 5. In reply to Beneficial's allegation that the Bank has advanced further moneys to the Borrower without the consent of Beneficial, the Bank denies such allegation and asserts that Beneficial was aware of all such advances.

6. IN reply to Beneficial's allegation that the Bank has by unspecified acts or omissions impaired the value and effectiveness of the Bank's security, the Bank denies such allegations.

50 7. In reply to Beneficial's allegation that the Bank has breached an undertaking to it by the Bank's



No. 3  
Affidavit of  
Albert Kevin  
Robert Watson  
and Annexures  
14th March 1978  
(cont'd)

delay in taking and registering a mortgage debenture from the Borrower to the Bank, the Bank denies giving any such undertaking and denies that the registration of the mortgage debenture which is dated 23rd December 1975 has in any way prejudiced Beneficial.

8. In addition to denying of the breaches asserted against the Bank by Beneficial I say that Beneficial has expressly waived any of the breaches which it now asserts prior to 2nd March 1976, by its execution of the agreement dated 2nd March 1976, in particular clause 5 thereof.

SIGNED by the Deponent  
on the 14th day of March  
1978, at Sydney before  
me, } Sgd. A.K.R. Watson

Sgd. ?

NORTON SMITH & CO. Solicitors,  
20 Martin Place,  
Sydney - 2000.  
Phone: 232.8833 (RGW)  
DX 119 Sydney.

Annexure "ANZ-A"

Annexure "ANZ-A"

BENEFICIAL FINANCE CORPORATION LIMITED,  
Beneficial House, 285-287 George Street,  
Sydney, New South Wales 2000  
Telephone 29 5244 Code Address BENFINANCE

16th February, 1978  
FJK.EW

The Secretary,  
A.N.Z. Banking Group Limited,  
20 Martin Place,  
SYDNEY N.S.W. 2000

ATTENTION: MR. A. BOWN

Dear Sir,

We have been requested by Mr. B. Flood of Tacking Point Downs Pty. Limited to sign certain cheques on the No. 3 Account, which requires signature by a representative of our Company and a representative of your Bank. Given the terms of our letter to you of the 7 inst., we believe that it would be inappropriate for us to continue to be involved with any matters of this nature. Accordingly, we return the cheque book pertaining to the account and an invoice from radio station 2KM and will

leave it to you to make alternative arrangements with your customer for operation of the account. Please take this letter as notice for cancellation of the authority for officers of this Company to operate on the subject account.

No. 3

Affidavit of  
Albert Kevin  
Robert Watson  
and Annexures  
14th March 1978  
Annexure "ANZ-A"  
(cont'd)

10 If you are in difficulties, in that there are payments from the account which urgently need to be made, and you are unable to organise the manner of operation of the account in a sufficient period of time, then we would consider signing cheques at your request subject to such action on our part in signing the cheques being without prejudice to the stance adopted by this Company in our letter to you of the 7th instant.

20 [ This and the following page is the Annexure marked "ANZ-A" referred to in the Affidavit of ALBERT KEVIN ROBERT WATSON sworn on the 14th day of March, 1978, before me,

Sgd. ?  
A Justice of the Peace ]

You will also find enclosed 10 incomplete authorities addressed to you and signed on behalf of Tacking Point Downs Pty. Limited. These have been sent to us by the company but as we have cancelled authority as above they will no longer require execution by or on behalf of this Company.

30 on the 14th February 1978, we wrote to you with certain discharges of our registered securities to facilitate settlements.

You might let us know what procedure you would like to follow for the future.

Yours faithfully,

Sgd. F.J. Kelly

F.J. KELLY  
REGIONAL MANAGER.

---

Annexure "ANZ-B"

Annexure "ANZ-B"

40 AEB:md  
17th February, 1978.

The Secretary,  
Tacking Point Downs Pty Ltd.,  
8th Floor, 139 Macquarie Street,  
SYDNEY NSW 2000.

Dear Sir,

No. 3

Affidavit of  
Albert Kevin  
Robert Watson  
and Annexures  
14th March 1978  
Annexure  
"ANZ-B"  
(cont'd)

We have been informed by Beneficial Finance Corporation Ltd that they no longer wish to be involved in the signing of cheques on your account. This is as a result of their apparent decision to contest liability under a Letter of Take Out and for your information we attach copy of their letter to us and our reply.

We have informed Beneficial Finance Corporation Ltd that we are unable to act unless authorised to do so by yourselves and in accordance with your Articles of Association.

10

We enclose cheque book, 10 settlement authorities and invoice from Radio Kempsey Ltd which Beneficial forwarded to us.

It is understood that the Commitment fee due 4/1/78 has not yet been paid and we would like you to attend to this matter immediately. Accordingly would you please forward your cheque to Beneficial under advice to ourselves. It will of course be necessary for an authorised representative of Beneficial to countersign the cheque at this point of time as the existing authority remains in force until a Variation of Authorised Signatures is lodged with us.

20

Yours faithfully,

Sgd. A.E. Bown

A.E. BOWN

SENIOR MANAGER CORPORATE ACCOUNTS

This is the Annexure marked "ANZ-B" referred to in the Affidavit of ALBERT KEVIN ROBERT WATSON sworn on the 14th day of March 1978, before me,

30

Sgd. ?

A Justice of the Peace.

Annexure "ANZ-C"

Annexure "ANZ-C"

February 17, 1978

The Manager,  
Beneficial Finance Corporation Limited,  
285 George Street,  
SYDNEY, N.S.W., 2000.

Attention: Mr. F.J. Kelly

40

Dear Sir,

Enclosed is a cheque in the sum of \$14,402-82 representing the guarantee fee due to your company in respect of the quarter ended 4th

April 1978.

No. 3

Kindly note that this cheque requires the signature of one of your representatives prior to your banking it.

Affidavit of  
Albert Kevin  
Robert Watson  
and Annexures  
14th March 1978  
Annexure "ANZ-C"  
(cont'd)

Yours faithfully,  
TACKING POINT DOWNS PTY.  
LIMITED

Encl.

10 This is the Annexure marked "ANZ-C" referred to in the Affidavit of ALBERT KEVIN ROBERT WATSON sworn on the 14th day of March 1978, before me,

Sgd. ?  
A Justice of the Peace.

---

Annexure "ANZ-D"

Annexure "ANZ-D"

BENEFICIAL FINANCE CORPORATION LIMITED,  
Beneficial House, 285-287 George Street,  
Sydney, New South Wales 2000  
Telephone 295244 Code Address BENFINANCE

20 21st February 1978  
FJK.EW

The Secretary,  
Tacking Point Downs Pty. Limited,  
8th Floor, 139 Macquarie Street,  
SYDNEY N.S.W. 2000.

Dear Sir,

We refer to your letter of 17th February.

30 On 7th February we notified the Australian New Zealand Banking Group Limited that this Company would withdraw the take-out facility by reason of breaches on the part of the Bank of the arrangements that had pre-existed the date of our letter. Inter alia, the non-payment to us of the commitment fee due on 4th January, 1978 was one of the matters of which this Company complained.

In the circumstances we return herewith your cheque and would ask that you make arrangements with the Bank for fresh authorities not involving officers of this Company as a signatory to the No. 3 Account.

Yours faithfully,

40 Sgd F.J. Kelly  
F.J. KELLY  
REGIONAL MANAGER.

No. 3  
Affidavit of  
Albert Kevin  
Robert Watson  
and Annexures  
14th March 1978  
Annexure "ANZ-D"  
(cont'd)

This is the Annexure marked "ANZ-D" referred to  
in the Affidavit of ALBERT KEVIN ROBERT WATSON  
sworn on the 14th day of March 1978, before me,

Sgd. ?

A Justice of the Peace.

Annexure "ANZ-E"

Annexure "ANZ-E"

7th March 1978

The Manager,  
Beneficial Finance Corporation Limited,  
Beneficial House,  
George Street,  
SYDNEY, N.S.W. 2000.

10

Dear Sir,

Tacking Point Downs Pty. Ltd.

We enclose our Bank Cheque for \$14,402.82  
covering Commitment fee for the period ended  
4/4/78 in connection with your Letter of Take Out  
on account of the above company.

Yours faithfully,

Sgd. A.E. Bown.

20

A.E. Bown,  
Senior Manager Corporate Accounts,  
sv.

This is the Annexure marked "ANZ-E" referred to  
in the Affidavit of ALBERT KEVIN ROBERT WATSON  
sworn on the 14th day of March, 1978, before me,

Sgd. ?

A Justice of the Peace

No. 4  
Amended Points  
of Claim and  
Annexed  
Documents  
5th October  
1978.

No. 4

Amended Points of Claim and Annexed  
Documents - 5th October, 1978

30

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION

COMMERCIAL LIST

No. 10162 of 1978

BENEFICIAL FINANCE CORPORATION  
LIMITED

Plaintiff

No. 4

AUSTRALIA AND NEW ZEALAND BANKING  
GROUP LIMITED

Defendant

Amended Points  
of Claim and  
Annexed  
Documents  
5th October  
1978.  
(cont'd)

Robert Ritchie Bruce,  
BRUCE & STEWART, Solicitors,  
66 Clarence Street,  
SYDNEY 2000 or Box 132 C.D.E.  
Phone - 29.5973.

10

AMENDED POINTS OF CLAIM

(Amended pursuant to leave granted by  
Mr. Justice Meares on 28th September  
1978)

20

1. By letter bearing date 4th April, 1974 the Plaintiff undertook to the Defendant that in the event of the Defendant's liability in respect of the Defendant's loan (as therein defined) to Tacking Point Downs Pty. Limited (therein and hereinafter referred to as "the Borrower") not being satisfied on or before the expiration of two (2) years from the date thereof, the Plaintiff would upon receipt of ninety (90) days' notice in writing from the Defendant "take-out" (as therein defined) the said loan. A true copy of the said letter dated 4th April, 1974 is annexed to these Points of Claim by way of schedule hereto and is hereinafter referred to as the "1974 Undertaking".

30

2. By letter bearing date 1st May, 1974 the Plaintiff consented to a variation of the 1974 Undertaking conditional upon its liability thereunder being limited to \$1,000,000.00 in lieu of \$1,100,000.00 as provided in the 1974 Undertaking. A true copy of the said letter dated 1st May, 1974 is annexed to these Points of Claim by way of schedule hereto.

40

3. By divers letters thereafter written by the Plaintiff to the Defendant, the Plaintiff agreed to various extensions to the said time for take-out, the last such time being 22nd May, 1976.

4. By instrument under seal executed by the Plaintiff on or about 2nd March, 1976, the 1974 Undertaking was varied whereby the Plaintiff undertook to the Defendant that in the event of the Borrower's liability to the Defendant in respect of the principal (as therein defined) not being totally discharged and satisfied on or before 31st March, 1978, the Plaintiff would at the expiration of ninety (90) days' notice in writing from the Defendant forthwith pay to the Defendant the whole

No. 4  
Amended Points  
of Claim and  
Annexed  
Documents  
5th October  
1978.  
(cont'd)

of the principal then owing together with all bank interest on the principal and all bank charges of and incidental thereto owing to the Defendant by the Borrower, subject to the limitation of liability on the Plaintiff's part as in Clause 2 thereof set forth. A true copy of the said instrument under seal executed on or about 2nd March, 1976 is annexed to these Points of Claim by way of schedule hereto and is hereinafter referred to as the "1976 Undertaking".

10

5. By letter bearing date 10th August, 1977 written by the Defendant to the Plaintiff and acknowledged and confirmed at the foot thereof by the Plaintiff, the Defendant gave notice of approval of the increased facilities to the Borrower as therein set forth. One effect of the said letter as between the Plaintiff and the Defendant was to limit the liability of the Plaintiff to the Defendant under the 1976 Undertaking to the sum of \$1,600,000.00. A true copy of the said letter dated 10th August, 1977 is annexed to these Points of Claim by way of schedule hereto.

20

6. As appears by Clause 3 of the 1976 Undertaking it was thereby provided that the terms of the 1974 Undertaking should continue to apply save as varied by the 1976 Undertaking.

7. (a) By the 1974 Undertaking it was recited that the loan was secured inter alia by a floating debenture charge over the assets and undertakings of the Borrower, meaning thereby that a security of such description was then in existence and held by the Defendant as Mortgagee from the Borrower as Mortgagor;

30

(b) It was a condition precedent to the Plaintiff's liability under the 1974 Undertaking that the Defendant should in exchange for satisfaction of its said liability transfer and assign to the Defendant inter alia a floating charge of the said description, that is to say, a floating charge in existence on or prior to 4th April, 1974 given by the Borrower as Mortgagor in favour of the Defendant as Mortgagee.

40

(c) The said condition precedent was not varied by the 1976 Undertaking but instead repeated and expressly incorporated therein by Clause 1 thereof;

(d) The said condition precedent is and always has been incapable of fulfilment for the reason that no such floating charge was in existence on or prior to 4th April, 1974.

8. (a) It was a further condition precedent to the Plaintiff's liability under the 1974 Undertaking as in Clause 2 thereof set forth, that:

50

10 "... the only debits which the Bank  
(meaning thereby the Defendant) shall be  
entitled to charge up against its loan  
(referring thereby to the sum of  
\$1,100,000.00) shall be normal banking  
charges relative thereto and the Bank shall  
not be entitled to make any further  
advances to the Borrower in respect of the  
loan without Beneficial's prior approval  
in writing nor shall the Bank be entitled  
to charge up to the Borrower's loan account  
any interest on the loan."

(b) The said condition was not varied by the  
1976 Undertaking, save and except to the extent  
set forth in Clause thereof, which was in the  
following terms:

"SUBJECT to the proviso hereto contained  
Beneficial's liability hereunder is limited  
to the sum of \$1.45 Million which comprises:-

- 20 (a) The Bank's liability as endorser under  
the Commercial Bill Non-Discount  
Acceptance Line of \$1 Million;
- (b) The Bank's liability under an indemnity/  
guarantee provided or to be provided by  
the Bank to the Port Macquarie Municipal  
Council on behalf of the Borrower in the  
sum of \$250,000.00; and
- 30 (c) Overdraft facilities up to \$200,000.00  
to be extended by the Bank to the Borrower  
to meet development expenses on the  
Borrower's Port Macquarie lands, all  
drawings on which must be countersigned  
by a nominee of Beneficial.

40 PROVIDED HOWEVER that notwithstanding anything  
hereinbefore contained or contained in the  
original letter of take-out Beneficial shall  
in addition to repaying the principal, pay to  
the Bank interest on the said principal and  
all other charges normally made by the Bank up  
to the date of discharge of its securities  
including but not limited to the following,  
namely all holding charges, rates, land tax,  
take-out fees, endorsement fees and indemnity  
guarantee fees."

50 (c) Prior to the correspondence hereinafter  
referred to, two bank accounts of the Borrower with  
the Defendant were established, one styled "No. 2  
Account" against which interest and the other charges  
referred to in the foregoing proviso to the said  
Clause 2 were to be debited and the other styled



No. 4  
Amended Points  
of Claim and  
Annexed  
Documents  
5th October  
1978.  
(cont'd)

"No. 3 Account" against which advances the subject of the facilities referred to in sub-clauses (b) and (c) of the said Clause 2 were to be debited.

(d) By letter dated 4th April, 1977 from the Plaintiff to the Defendant, the Plaintiff agreed inter alia as follows:

"...We concur with the extended arrangements .... as follows:  
....

Facilities o/a Tacking Point Downs Pty. Ltd.	Limit	10
Overdraft No. 3 Account	\$395,000 *	
Commercial Bills Non-Discount Acceptance	1,000,000	
Indemnities Guarantees	201,000 *	
* Not to exceed \$446,000 in aggregate at any one time.		
Peak exposure accordingly.	<u>\$1,446,000</u>	

In addition to cover accruing interest and charges on the No. 2 Account, until say 31st March 1976 Overdraft Limit is increased to \$230,000 " 20

(e) By letter dated 19th July, 1977 from the Plaintiff to the Defendant the Plaintiff agreed as follows:-

"Further to your letter of 15th April, 1977 addressed to J.V. Dulhunty, Director, Terukim Pty. Limited we confirm that aggregates of overdraft on No. 3 account and Indemnity Guarantee Limits is not to exceed \$566,000 at any one time. In addition peak exposure should be \$1,566,000." 30

The Defendant's letter of 15th April, 1977 referred to in the letter extracted above referred to a certain letter dated 12th April, 1977 from the Defendant to Mr. J.V. Dulhunty, a director of the Borrower, the material portion thereof reading as follows:

"Dear Mr. Dulhunty,  
TACKING POINT DOWNS ESTATE  
DEVELOPMENT OF 56 LOTS IN PHASE 1 STAGE 1 40

Further to my letter of 21st December 1977 and our subsequent discussions, I advise the Bank has approved the undermentioned increased facilities to assist with development of the initial phase of the estate and cover holding

costs, per latest cash flow presented,  
pending commencement of sales  
settlements.

No. 4  
Amended Points  
of Claim and  
Annexed  
Documents  
5th October  
1978.  
(cont'd)

Facilities o/a Tacking Point  
Downs Pty. Limited Limit

Overdraft No. 3 Account \$ 495,000 \*  
Commercial Bills Non-Discount  
Acceptance, now Discount  
Acceptance - see later in  
this regard 1,000,000  
Indemnities/Guarantees 221,000 \*

---

\$1,556,000

10

\* Not to exceed \$566,000 in aggregate  
at any one time Peak exposure  
accordingly.

In addition to cover accruing interest  
and charges on the No. 2 Account  
which by say 30th September 1977  
should aggregate \$330,000 "

20

(f) By letter dated 10th August, 1977 from  
the Defendant to the Plaintiff referred to in para.  
5 of this Points of Claim and by virtue of the  
Plaintiff's acknowledgement therein referred to,  
it was agreed as follows:

"... the request for the following increased  
facilities has been approved.

Limit

Overdraft No. 2 account 549,000 \*  
Commercial Bill 1,000,000  
Indemnities 71,000 \*

---

\$1,620,000

30

\* Not to exceed \$600,000 in aggregate at any  
one time. Peak exposure is therefore  
\$1,600,000."

(i) On or about 19th September, 1977 and  
again on or about 20th March, 1978  
negotiated certain bills of exchange  
for the Borrower and debited to the  
said No. 2 Account the following  
charges in respect thereof:

40

<u>Date</u>	<u>Stamp Duty</u>	<u>Discount</u>	<u>Acceptance Fee</u>
19.9.77	1,200.00	49,613.70	8,975.34
20.3.78	1,000.00	26,178.00	4,487.67;

No.4  
Amended Points  
of Claim and  
Annexed  
Documents  
5th October  
1978.  
(cont'd)

(ii) Debited to the said No. 2 Account  
interest as follows:

<u>Date</u>	<u>Interest</u>
6.9.77	3,255.54
29.9.77	14,101.30
29.9.77	24,678.20
30.3.78	57,734.90.

By reason of the foregoing, the amount debited to the said No. 2 account by 30th March, 1978 was \$413,034.07. Consequently, if the reference in the said letter of 10th August 1977 to "Overdraft No. 2 Account" was meant by the Defendant to read "Overdraft No.3 Account", then without the consent of the Plaintiff, the sum of \$330,000.00 referred to in the letter of 12th April, 1977 (sub-para. (e) hereof) was exceeded and remained exceeded.

10

(h) On and after 20th October, 1977 the Defendant honoured cheques drawn by the Borrower on the No. 3 Account and in consequence thereof, if the reference in the said letter of 10th August, 1977 to "Overdraft No. 2 Account" was meant by the Defendant to Read "Overdraft No. 3 Account", the limit of \$549,000.00 referred to in the said letter of 10th August 1977 was exceeded and remained exceeded.

20

(i) Alternatively, if the reference in the said letter of 10th August, 1977 to "Overdraft No. 2 Account" was correct, in consequence of cheques of the Borrower honoured by the Defendant on the No. 3 Account on and after 10th October, 1977, the limit of \$495,000.00 referred to in the letter of 12th April, 1977 (sub-para. (e) hereof) was exceeded and remained exceeded.

30

(j) By reason of the foregoing matters, the condition precedent the subject of Clause 2 of the 1974 Undertaking, notwithstanding the extent to which the same may have been varied by the 1976 Undertaking and the correspondence hereinbefore referred to, was not fulfilled.

40

9. (a) AS appears therefrom, it was a condition precedent to the Plaintiff's liability under the 1976 Undertaking that the Defendant should procure the due payment by the Borrower or should itself pay inter alia all future commitment fees thereafter to become payable by the Borrower to the Plaintiff under the terms of the Plaintiff's Agreement of 4th April, 1974 between (inter alia) the Plaintiff and the Borrower;

(b) The Defendant did not procure the due payment by the Borrower or itself pay inter alia the commitment fee payable on 4th January, 1978 under the terms of the Plaintiff's said Agreement with the Borrower.

No. 4  
Amended Points  
of Claim and  
Annexed  
Documents  
5th October  
1978.  
(cont'd)

10 10. (a) As appears therefrom, it was a condition precedent to the Plaintiff's liability under the 1976 Undertaking that if at any time after the date thereof the Defendant became aware that the Borrower had defaulted in the due performance or observance of any covenant obligation or agreement on the part of the Borrower contained or implied in any one or more of the Defendant's securities thereby entitling the Defendant to exercise its powers of entry into possession sale foreclosure or otherwise under the Defendant's securities, the Defendant should then and in any such event forthwith give notice in writing to the Plaintiff specifying the default which had  
20 occurred;

(b) Although after the date of the 1976 Undertaking the Defendant did become aware that the Borrower had defaulted in the due performance or observance of covenants obligations and agreements on the part of the Borrower contained and implied in the Defendant's securities, thereby having entitled the Defendant to exercise its powers of entry into possession sale foreclosure and otherwise thereunder, yet the Defendant did not forthwith give notice in writing to the Plaintiff specifying the default, or  
30 at all.

11. By reason of the foregoing matters set forth in paragraphs 7, 8, 9 and 10 hereof, the Plaintiff is under no further liability to the Defendant arising or to arise under any of the said undertakings as so varied or otherwise.

12. Alternatively, the limit of any such liability on the Plaintiff's part is the sum of \$1,600,000.00.

Sgd. R.R. Bruce

Plaintiff's Solicitor

40 Filed: 5th October, 1978

---

BENEFICIAL FINANCE CORPORATION LIMITED  
Beneficial House, 285-287 George Street,  
Sydney, New South Wales 2000.  
Telephone 29 5244 Code Address BENFINANCE GPO Box 2715

4th April, 1974

The Senior Manager - Corporate Accounts,  
Australia & New Zealand Banking Group Limited,  
351 Collins Street,  
50 MELBOURNE, VIC. 3000.

No. 4

Amended Points  
of Claim and  
Annexed  
Documents  
5th October  
1978.  
(cont'd)

Dear Sir,

Re: Tacking Point Downs Pty. Limited & Ors. -  
Letter of Undertaking

- A. WHEREAS Australia & New Zealand Banking Group Limited (the Bank) has agreed to provide loans, commercial bills and other banking accommodation to Tacking Point Downs Pty. Limited (the Borrower) up to a maximum amount of \$1.1 million (the loan).
- B. AND WHEREAS the loan is secured (inter alia) 10  
by a registered first mortgage over 107½  
acres approximately owned by the Borrower at  
Port Macquarie and a floating debenture charge  
over the assets and undertakings of the  
Borrower.
- C. AND WHEREAS the Borrower is acquiring an  
additional 56 acres of land at Port Macquarie  
which land will be subject to a first mortgage  
to the Bank.
- D. AND WHEREAS as a condition precedent to the 20  
granting of the loan the Bank has requested  
this letter of undertaking from Beneficial  
Finance Corporation Limited (Beneficial).

NOW IT IS HEREBY AGREED as follows:-

1. In the event of the Bank's liability in  
respect of the loan not being satisfied on  
or before the expiration of two (2) Years  
(the expiration date) from the date hereof  
Beneficial undertakes upon receipt of ninety 30  
(90) days notice in writing from the Bank  
to pay or otherwise make such arrangements  
(the take-out) as are satisfactory to the  
Bank to discharge the liability to the Bank  
under the said loan PROVIDED HOWEVER that  
upon Beneficial providing the take-out the  
Bank transfers and assigns its interest in  
the Bank's said Mortgages over the 107½ acres  
and 56 acres at Port Macquarie and the  
floating debenture charge as aforesaid to 40  
Beneficial in a manner and form satisfactory  
to Beneficial and its solicitors AND PROVIDED  
FURTHER that the Bank shall not during the  
term of its loan have done or omitted to do any  
act matter or thing (whether in the way of  
exercising or omitting to exercise any of  
the powers conferred on the Bank by the Bank's  
securities or otherwise) as a result of which  
act or omission the value or effectiveness of  
the Bank's securities shall have been in any  
way diminished or impaired (save in the manner 50  
contemplated by paragraph 3 hereof).

No. 4  
Amended Points  
of Claim and  
Annexed  
Documents  
5th October  
1978.  
(cont'd)

- 10 2. Beneficial agrees that it shall provide the take-out as outlined herein subject to its liability not exceeding \$1.1 million and the only debits which the Bank shall be entitled to charge up against its loan shall be normal banking charges relative thereto and the Bank shall not be entitled to make any further advances to the Borrower in respect of the loan without Beneficial's prior approval in writing nor shall the Bank be entitled to charge up to the Borrower's loan account any interest on the loan.
- 20 3. The Bank shall execute partial discharges of its securities in respect of subdivided residential allotments in the residential subdivision of the Port Macquarie lands which the Borrower contemplates so as to enable the Borrower to complete bona fide sales of such allotments or to complete compulsory acquisitions or resumptions subject to the Bank receiving and crediting to the Borrower in reduction of the principal sum an amount equal to Ninety per centum (90%) of the sale price of each allotment or the sum of Nine thousand dollars (\$9,000.00) per allotment whichever shall be the lesser or an amount equal to the compensation payable to the Borrower (as the case may be), and Beneficial undertakes that it will discharge its security in respect of such lot upon being satisfied that the moneys have been paid to the Bank provided further that in the case of a sale where the purchaser grants a first mortgage to the Borrower for the balance of purchase money and such mortgage is duly sub-mortgaged to the Bank and Beneficial for their respective entitlements and priorities then and in this event Beneficial agrees that the terms of this paragraph shall have been duly complied with in respect of the allotment sold.
- 30
- 40 4. In the event of the liability of the Bank in respect of the loan being satisfied on or prior to the expiration date of this undertaking shall be rendered null and void and of no further effect.

Yours faithfully,

50 ALLEN CRAWFORD,  
REGIONAL MANAGER, N.S.W.

No. 4

WDDC/bs

1st May 1974.

Amended Points  
of Claim and  
Annexed  
Documents  
5th October  
1978.  
(cont'd)

The Senior Manager,  
Australian & New Zealand Banking  
Group Limited,  
351 Collins Street,  
MELBOURNE, VIC. 3000.

Dear Sir,

Re: Tacking Point Downs Pty. Limited

We refer to our letter to you dated 4th ultimo  
covering the take-out arrangement for Tacking  
Point Downs Pty. Limited.

10

We advise that we have no objection in principle  
to the Bank taking a registered second mortgage  
over the 56 acres of land at Port Macquarie being  
purchased by Tacking Point Downs Pty. Limited from  
Mr. E.J. Carving with the Vendor carrying a first  
mortgage of \$100,000.00 on the security of the land.

However, it should be noted that this does have an  
indirect effect on our take-out arrangement, in  
that the Bank's security is affected. Accordingly,  
if at the time the take-out becomes operative the  
first mortgage to the Vendor is still on foot then  
our liability in respect of the take-out should have  
a limit of \$1,000,000.00 in lieu of \$1,100,000.00  
because the Bank's security will effectively be  
worth \$100,000.00 less. We assume that this will  
not concern you in that we would imagine that the  
Bank's loan will be reduced by \$100,000.00. You  
might confirm that this is the case.

20

In all other respects we confirm that our letter  
of undertaking dated 4th April, 1974 shall remain  
in full force and effect.

30

Yours faithfully,

Sgd. W.D.D. Currie,

W.D.D. CURRIE,  
BRANCH MANAGER.

---

BENEFICIAL FINANCE CORPORATION LIMITED

TO: Australia & New Zealand Banking Group Limited.

re: Tacking Point Downs Pty. Limited and other  
related companies.

40

W H E R E A S :-

A. Australia & New Zealand Banking Group Limited

(hereinafter called "the Bank") by an Agreement with Beneficial Finance Corporation Limited (hereinafter called "Beneficial") dated 4th April, 1974 (hereinafter referred to as "the original take-out letter") agreed to provide certain loans, commercial bills and other banking accommodations to Tacking Point Downs Pty. Limited and other related companies (hereinafter called "the Borrower") up to a maximum amount of \$1.1 Million.

No. 4  
Amended Points  
of Claim and  
Annexed  
Documents  
5th October  
1978.  
(cont'd)

- 10
- B. By a further Agreement between the same parties dated 1st May 1974 the advance hereinbefore referred to was reduced from \$1.1 Million to \$1 Million (hereinafter called "the original advance").
- 20
- C. In the said Agreement dated 4th April 1974 Recital C erroneously refers to a first mortgage to the Bank in respect of the additional fifty six (56) acres of land referred to in the said Recital and the parties hereto acknowledge that this mortgage has always been a second mortgage ranking behind a first mortgage in favour of E.J. Cunning.
- 30
- D. Pursuant to the terms and conditions of the original take-out letter Beneficial agreed to pay out and discharge the Borrower's liability to the Bank in respect of the original advance.
- E. The Bank has provided or agreed to provide additional loans commercial bills and other banking accommodation to the Borrower up to a maximum amount (including the original advance) of \$1.45 Million (hereinafter called "the principal") (subject to Beneficial extending the terms of the original take-out letter to cover the said principal).
- 40
- F. The parties hereto have agreed to vary certain terms and conditions referred to in the Agreements dated 4th April 1974 and 1st May 1974 in the manner hereinafter set forth.

NOW IT IS HEREBY AGREED as follows:-

50

1. IN the event of the Borrower's liability to the Bank in respect of the principal not being totally discharged and satisfied on or before 31st March 1978 (hereinafter called "the expiration date") Beneficial will at the expiration of ninety (90) days notice in writing given to it by a duly authorised officer of the Bank, forthwith pay to the Bank the



No. 4

Amended Points  
of Claim and  
Annexed  
Documents  
5th October  
1978.  
(cont'd)

whole of the principal then owing together with all bank interest on the principal and all bank charges of and incidental thereto, owing to the Bank by the Borrower as at the date of payment, or otherwise make such arrangements to repay the Bank as are satisfactory to the Bank to fully discharge the liability of the Borrower to the Bank under the loan at the expiration of the said ninety (90) days notice PROVIDED HOWEVER that upon Beneficial complying with the terms of this letter of take-out, the Bank will at the expense of the Borrower transfer and assign its interest in the Bank's securities (as described in the original take-out letter and subject to paragraph 3 of the original take-out letter) to Beneficial in a manner and form satisfactory to Beneficial and its Solicitors AND PROVIDED FURTHER that the Bank shall not have hitherto and shall not pending the expiration date have done or omitted to do any act matter or thing (whether in the way of exercising or omitting to exercise any of the powers conferred on the Bank by the Bank's said securities or otherwise) as a result of which act or omission the value or the effectiveness of the Bank's securities shall have been in any way diminished or impaired (save in the manner contemplated by paragraph 3 of the original take-out letter).

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20

2. SUBJECT to the proviso hereto contained Beneficial's liability hereunder is limited to the sum of \$1.45 Million which comprises:-

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- (a) The Bank's liability as endorser under the Commercial Bill Non-Discount Acceptance Line of \$1 Million;
- (b) The Bank's liability under an indemnity/guarantee provided or to be provided by the Bank to the Port Macquarie Municipal Council on behalf of the Borrower in the sum of \$250,000.00; and
- (c) Overdraft facilities up to \$200,000.00 to be extended by the Bank to the Borrower to meet development expenses on the Borrower's Port Macquarie lands, all drawings on which must be countersigned by a nominee of Beneficial.

40

PROVIDED HOWEVER that notwithstanding anything hereinbefore contained or contained in the original letter of take-out Beneficial shall in addition to repaying the principal, pay to the Bank interest on the said principal and all other charges normally made by the Bank up to the date of discharge of its securities including but not limited to the following, namely all holding charges, rates, land

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tax, take-out fees, endorsement fees and indemnity guarantee fees.

No. 4

Amended Points  
of Claim and  
Annexed  
Documents  
5th October  
1978.  
(cont'd)

3. THE liability of Beneficial under paragraph 1 hereof includes and is not in addition to its liability under the original take-out letter, the terms of which shall continue to apply save as herein varied.

10

4. BENEFICIAL'S liability hereunder is conditional upon the Bank procuring the due payment by the Borrower or itself paying firstly the arrears of the commitment fees totalling \$10,000.00 owing by the Borrower under the Agreement of 4th April 1974 between (inter alia) Beneficial and the Borrower such payment to be made not later than 4th April 1976 and secondly all future commitment fees payable by the Borrower to Beneficial under the terms of the said Agreement (being at the rate of 3% per annum payable quarterly in advance).

20

5. BENEFICIAL hereby acknowledges that up to the date hereof there has been no breach by the Bank of any terms or conditions of the original take-out letter and that if there has been any such breach or breaches then such breach or breaches have been waived by Beneficial.

30

6. THE Bank undertakes and agrees that if at any time after the date hereof the Bank becomes aware that the Borrower has defaulted in the due performance or observance of any covenant obligation or agreement on the part of the Borrower contained or implied in any one or more of the Bank's securities entitling the Bank to exercise its powers of entry into possession sale foreclosure or otherwise under the Bank's securities then and in any such event the Bank shall forthwith give notice in writing to Beneficial specifying the default which has occurred and at any time thereafter Beneficial may in its absolute and uncontrolled discretion elect to pay to the Bank forthwith (notwithstanding the provisions of paragraph 1 hereof) the principal and all other moneys owing by the Borrower to the Bank (as hereinbefore specified) as at the date of payment whereupon the Bank will at the expense of the Borrower transfer and assign its interest in the Bank's securities to Beneficial in a manner and form satisfactory to Beneficial and its Solicitors.

40

SIGNED for the purposes of identification: On the 2nd day of March, 1976.

50

.....  
For Tacking Point Downs Pty. Limited

No. 4  
 Amended Points  
 of Claim and  
 Annexed  
 Documents  
 5th October  
 1978.  
 (cont'd)

.....  
 John Venour Dulhunty  
 .....  
 For Terukim Pty. Limited  
 .....  
 For Halisbury Pty. Limited  
 .....  
 For Vendul Management Pty. Limited  
 .....  
 For Vendul International Pty. Limited  
 .....  
 For Rowini Holdings Pty. Limited  
 .....  
 For Hudson & Wallace (Trading) Pty. Limited  
 Sgd. ?  
 .....  
 For Beneficial Finance Corporation Limited

The Common Seal of Beneficial )  
 Finance Corporation Limited was ) 10  
 hereunto affixed in the Presence )  
 of:- )

..... ? ..... ?  
 SECRETARY DIRECTOR

-----  
 AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED,  
 New South Wales Administration,  
 20 Martin Place,  
 Sydney, P.O. Box 495,  
 Sydney NSW 2001  
 Telephone 231 0011 20

10th August 1977  
 Mr. F.J. Kelly,  
 Regional Manager,  
 Beneficial Finance Corporation Limited,  
 Beneficial House,  
 285-287 George St.,  
 SYDNEY NSW 2000.

Dear Sir,

TACKING POINT DOWNS PTY. LIMITED

Referring to recent discussions between Mr. Flood 30  
 of Tacking Point Downs Pty Ltd. Mr. Raper of your  
 Company and the writer, I advise that the request  
 for the following increased facilities has been  
 approved.

	<u>Limit</u>	<u>No. 4</u>
Overdraft No. 2 Account	549,000 *	Amended Points of Claim and Annexed Documents 5th October 1978. (cont'd)
Commercial Bill	1,000,000	
Indemnities	<u>71,000 *</u>	
	<u>\$1,620,000</u>	

\*Not to exceed \$600,000 in aggregate at any one time. Peak exposure is therefore \$1,600,000.

10 These limit arrangements are available subject to your Company's concurrence and completion of a formal addendum to the Letter of Take Out.

It is appreciated that such addendum will take a little time to be finalised by your Solicitors and we are therefore prepared to permit the facilities to be utilised against your confirmation that the formal addendum will be completed in early course to cover these facilities to \$1,600,000.

20 If you are agreeable to the facilities as shown above would you please indicate so by acknowledgement on the duplicate of this letter and return to this office.

Mr. Dulhunty has been informed along similar lines today.

Yours faithfully,  
Sgd. D.M. Murphy

D.M. MURPHY  
SENIOR MANAGER CORPORATE ACCOUNTS  
moc.

Acknowledged & Confirmed

30  
\_\_\_\_\_  
Beneficial Finance Corporation Ltd.  
(Authorised Signature)  
Sgd. F.J. Kelly Dated 16/8/77.

No. 5

Points of Cross - Claim - 1st May, 1978

\_\_\_\_\_  
IN THE SUPREME COURT OF NEW SOUTH WALES  
COMMON LAW DIVISION  
COMMERCIAL LIST

No. 10162 of 1978

No. 5

Points of  
Cross-Claim  
1st May 1978

No. 5

Points of  
Cross-Claim  
1st May 1978  
(cont'd)

BENEFICIAL FINANCE CORPORATION  
LIMITED Plaintiff

AUSTRALIA AND NEW ZEALAND BANKING  
GROUP LIMITED Defendant

AUSTRALIA AND NEW ZEALAND BANKING  
GROUP LIMITED Cross Claimant

BENEFICIAL FINANCE CORPORATION  
LIMITED Cross Defendant

POINTS OF CROSS CLAIM

1. The Cross Claimant repeats paragraphs 1 to 4 of the Points of Claim. 10

2. The Cross Claimant says that on a proper construction of the letter dated 10th August 1977 its meaning is to limit the liability of the Plaintiff to the Defendant to the sum of \$1,600,000 plus interest accruing at normal bank overdraft rates.

3. By demand made 3rd April 1978 the Cross Claimant demanded that the Plaintiff pay to it the said sum of \$1,973,026.20 at the expiration of 90 days of the said demand. 20

4. By reason of the matters pleaded in the Points of Claim herewith the Cross Defendant has indicated that it does not intend to carry out its contractual obligations to the Cross Claimant pursuant to the documents set out in the Points of Claim.

The Cross Claimant therefore claims:-

- (1) A declaration that the Cross Defendant is obliged to pay to the Cross Claimant the sum of \$1,973,026.20 and interest thereon on or after 2nd July 1978. 30
- (2) Liberty to the Cross Claimant to enter judgment in the said sum of \$1,973,026.20 and interest thereon on or after 2nd July 1978.
- (3) Alternatively, damages of \$1,973,026.20 in respect of the anticipatory breach of contract alleged in paragraph 3 of these Points of Cross Claim.

Sgd. R.G. Williams

Roger Gilronan Williams 40  
Solicitor for the Cross Claimant

FILED: 1.5.78.

NORTON SMITH & CO., Solicitors,  
20 Martin Place, Sydney - 2000.  
Phone: 232.8833 (RGW) DX 119 Sydney.

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION

COMMERCIAL LIST

No. 10162 of 1978

BENEFICIAL FINANCE CORPORATION  
LIMITED

Plaintiff

AUSTRALIA AND NEW ZEALAND BANKING  
GROUP LIMITED

Defendant

10

AMENDED POINTS OF DEFENCE (Amended  
pursuant to leave granted by Mr.  
Justice Sheppard on 19/3/79)

1. As to paragraphs 6, 7, 9 and 10 of the Amended Points of Claim the Defendant does not admit that the Amended Points of Claim correctly interpret the relevant documents.

2. As to paragraph 7, the Defendant says:

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(a) It does not accept the construction put on the 1974 undertaking by the said paragraph;

(b) It denies that the existence of a charge on or prior to 4 April, 1974 was a condition precedent;

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(c) It relies on paragraph 5 of the 1976 undertaking whereby the Plaintiff acknowledged that as at the date of that undertaking there had been no breach by the Defendant of any of the terms or conditions of the original take-out letter or that if there had been any such breach or breaches the same were waived by the Plaintiff;

(d) The Plaintiff is estopped by deed from asserting that there was no floating charge in existence on or prior to 4 April 1974.

3. As to paragraph 8:

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(a) The Defendant admits that the reference in the letter of 10 August 1977 from the Defendant to the Plaintiff to "Overdraft No. 2 Account" should have read "Overdraft No. 3 Account".

No. 6

Amended Points  
of Defence  
26th March 1979  
(cont'd)

- (b) Denies that the matter set out in paragraphs 8(a) and (b) was either a condition or a condition precedent to the Plaintiff's liability as alleged.
- (c) Denies that the sum of \$330,000 referred to in the letter of 15 April, 1977 was an agreed overdraft limit.
- (d) As to paragraph (h) the Defendant denies that the overdraft limit of No. 3 Account was exceeded. 10
- (e) The Defendant denies any breach of condition or condition precedent as alleged by the Plaintiff.
4. As to paragraph 9:
- (a) The Defendant denies that any requirement to pay a commitment fee was either a condition or a condition precedent to the Plaintiff's liability under the 1976 undertaking;
- (b) The Defendant says that the same was tendered by it to the Plaintiff before a demand for the moneys due under the undertaking was made; 20
- (c) The Defendant further says that any non fulfilment of the alleged condition precedent was waived and excused by the Plaintiff.
5. As to paragraph 10:
- (a) The Defendant denies that the terms set out in paragraph 10(a) of the Points of Claim were a condition or a condition precedent; 30
- (b) The Defendant denies that it became aware of a default by the borrower as alleged in paragraph 10(b);
- (c) The Defendant further says that if there was any default by the borrower which came to the notice of the Defendant (and it is denied that there were any) the same were well known to the Plaintiff;
6. The Defendant denies paragraph 11. 40

Sgd. R.G. Williams  
Roger Gilronan Williams  
Solicitor for the Defendant.

Filed 26 March 1979

Norton Smith & Co. Solicitors,  
20 Martin Place, Sydney, 2000.  
Tel. 232 8833 D.X. 119 Ref. RGW

No. 7

Points of Defence to Cross-Claim  
30th March 1979

No. 7

Points of  
Defence to  
Cross-Claim  
30th March 1979

IN THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION

COMMERCIAL LIST

No. 10162 of 1978

BENEFICIAL FINANCE CORPORATION  
LIMITED

Plaintiff  
and Cross Defendant

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AUSTRALIA AND NEW ZEALAND BANKING  
GROUP LIMITED

Defendant  
and Cross Claimant

POINTS OF DEFENCE TO CROSS CLAIM

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By reason of all the facts alleged in paragraphs  
5 to 12 of the amended Points of Claim the Cross  
Defendant says that it is under no liability to  
the Cross Claimant or alternatively the limit of  
any such liability on the Cross Defendant's part is  
One million six hundred thousand dollars  
(\$1,600,000.00).

FILED: 30th March, 1979

Sgd. R.R. Bruce  
Cross Defendant's Solicitor.

BRUCE & STEWART, Solicitors,  
66 Clarence Street,  
Sydney, 2000.  
29-5973 (RRB)

No. 8

Proceedings - 19th April 1979

No. 8

Proceedings  
19th April 1979

30

IN THE SUPREME COURT OF NEW SOUTH WALES  
COMMON LAW DIVISION  
COMMERCIAL LIST

No. 10162 of 1978

CORAM: SHEPPARD J.

THURSDAY, 19TH APRIL, 1979.

BENEFICIAL FINANCE CORPORATION LIMITED v. A.N.Z.  
BANKING GROUP LIMITED

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MR. BAINTON, Q.C., appeared with MR. DONOHOE for the  
plaintiff.  
MR. YOUNG, Q.C., appeared with MR. RUNDLE for the  
defendant cross-claimant.



No. 8

(Mr. Bainton outlined the case to his Honour).

Proceedings  
19th April 1979  
(cont'd)

(No issue between the parties concerning the documents annexed to the points of claim and these were regarded as being in evidence.)

(Agreed that there was in fact no floating charge as recited in the document of 4th April 1974.)

(Agreed that an equitable charge was given by Tacking Point Downs Pty. Limited to the Defendant on 23rd December, 1975.)

(Copy of page No. 16 of Tacking Point Downs Pty. Limited No. 3 account with the defendant bank and copy of p.21 of Tacking Point Downs Pty. Limited No. 2 account with the defendant bank admitted without objection and marked Exhibit A.) 10

(Copy of agreement of 4th April, 1974 between Tacking Point Downs Pty. Limited and a number of other persons and companies and the plaintiff admitted without objection and marked Exhibit B. Variation dated 2nd March 1976 added to Exhibit B.)

(The following correspondence was admitted without objection and marked Exhibit C. 20

Letter from defendant of 18th December, 1977.

Letter of 7th February, 1978 from the plaintiff to the defendant.

Reply of the defendant of 14th February, 1978.

Letter of 17th February, 1978 from Tacking Point Downs tendering payment of instalment due on 4th January, 1978.

Letter from plaintiff to Tacking Point Downs of 21st February 1978. 30

Letter of 7th March, 1978 from the defendant tendering a bank cheque, which was returned to the bank on 8th March, 1978.

Copies tendered in each case.)

(Floating charge dated 23rd December, 1975 and three memoranda of mortgage under the Real Property Act admitted without objection and marked Exhibit D.)

(Interrogatories Nos.. 10(e)(f) and (g), together with the answers thereto, admitted without objection and marked Exhibit E.) 40

(Interrogatories Nos. 11, 12 and 13, and the answers thereto, admitted without objection and marked Exhibit F.)

No. 8

Proceedings  
19th April 1979  
(cont'd)

(Noted that there were numerous requests for accounts by the defendant of Tacking Point Downs Pty. Limited and these were not complied with, save for the one referred to in the answer to the interrogatories).

(Close of evidence for the plaintiff.)

10 (Copy of schedule of dates on which commitment fees were payable admitted without objection and marked Exhibit 1.)

(Close of evidence for the defendant, subject to quantum).

(Counsel addressed.)

(Court reporter excused from further attendance.)

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No. 9

Judgment of His Hon. Mr. Justice Sheppard  
22nd June, 1979

No. 9

Judgment of  
His Hon. Mr.  
Justice  
Sheppard  
22nd June 1979

20 IN THE SUPREME COURT OF NEW SOUTH WALES  
COMMON LAW DIVISION  
COMMERCIAL LIST

No. 10162 of 1978

CORAM: SHEPPARD, J.

Friday, 22nd June, 1979

BENEFICIAL FINANCE CORPORATION LIMITED v.  
A.N.Z. BANKING GROUP LIMITED

JUDGMENT

30 HIS HONOUR: The plaintiff seeks a declaration that it is not liable to the defendant pursuant to a letter written by the plaintiff to the defendant on 4th April, 1974. The terms of the letter (in the language of the parties described as a take-out letter or guarantee) were varied by a further letter dated 1st May, 1974 and by a notice to the defendant dated 2nd March, 1976. By its cross-claim the defendant seeks a declaration that the plaintiff is liable to it under the letter and judgment for the amount which it claims to be due.  
40 The issues raised by the claim and the cross-claim are similar, subject to there being a question as to

No. 9  
Judgment of  
His Hon. Mr.  
Justice  
Sheppard  
22nd June 1979  
(cont'd)

the amount to be paid by the plaintiff to the defendant if the defendant is entitled to succeed. That question has been left to be dealt with after I have published reasons for judgment on the question of whether or not the plaintiff is liable under the letter. I propose, therefore, to decide the matters which were argued in relation to that question and to publish reasons for those decisions, but I shall not make any final declaration or order until counsel have had an opportunity of considering what I have said and putting submissions, in the event that agreement cannot be reached, in relation to the amount which would be payable if the defendant were correct.

10

By a deed dated 4th April, 1974 made between a company Tacking Point Downs Pty. Limited (hereinafter called "Tacking Point Downs"), a Mr. J.V. Dulhunty, a number of other companies and the plaintiff, the plaintiff agreed to provide the take-out letter, the construction of which is here in question, for Tacking Point Downs, Mr. Dulhunty and the other companies mentioned in the deed. The defendant was not a party to the deed but the recitals thereto establish that it had agreed to make "certain loan facilities" available to Tacking Point Downs on the security of a number of mortgages and of a floating charge over the assets of Tacking Point Downs. It was a condition of the defendant's agreement to provide the financial accommodation that Tacking Point Downs provide the defendant with a guarantee from another person or company guaranteeing the repayment of what was owed to it. The plaintiff had agreed to provide the guarantee (the take-out letter) upon the terms provided for in the deed.

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Clause 1 of the deed provided that the plaintiff agreed with the other parties to the deed that it would provide to the defendant "a take-out guarantee" in the form of the draft letter from the plaintiff to the defendant which was annexed to the deed. The letter annexed to the deed is in terms identical with the letter which was in fact written by the plaintiff to the defendant on 4th April, 1974. Clause 3 of the deed provided for the payment by Tacking Point Downs to the plaintiff of a commitment fee as therein provided for. The times when the fee was to be paid were also specified. Clause 4 of the deed provided that it was a condition of the plaintiff's assumption of the obligation provided for in cl. 1 of the deed that on the execution of it the plaintiff should have the benefit of the securities from the other parties to the deed as described in the second schedule thereto by way of security for the commitment fee payable pursuant to cl. 3, any other moneys payable by Tacking Point Downs to the plaintiff and any moneys

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which might be advanced by the plaintiff pursuant to the obligation assumed by it in cl.1. Other provisions of the deed contemplated that there might be loans made by the plaintiff to Tacking Point Downs.

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His Hon. Mr.  
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Sheppard  
22nd June 1979  
(cont'd)

10 The letter of 4th April, 1974 was addressed by the plaintiff to the Senior Manager, Corporate Accounts, of the defendant in Melbourne. It was headed "Tacking Point Downs Pty. Limited & Ors. - Letter of Undertaking". There then followed four recitals which were as follows:

- 20 "A. WHEREAS Australia & New Zealand Banking Group Limited (the Bank) has agreed to provide loans, commercial bills and other banking accommodation to Tacking Point Downs Pty. Limited (the Borrower) up to a maximum amount of \$1.1 million (the loan).
- B. AND WHEREAS the loan is secured (inter alia) by a registered first mortgage over 107½ acres approximately owned by the Borrower at Port Macquarie and a floating debenture charge over the assets and undertakings of the Borrower.
- C. AND WHEREAS the Borrower is acquiring an additional 56 acres of land at Port Macquarie which land will be subject to a first mortgage to the Bank.
- 30 D. AND WHEREAS as a condition precedent to the granting of the loan the Bank has requested this letter of undertaking from Beneficial Finance Corporation Limited (Beneficial)."

The principal obligation imposed by the letter upon the plaintiff is to be found in par. 1 which is as follows:

40 "In the event of the Bank's liability in respect of the loan not being satisfied on or before the expiration of two (2) years (the expiration date) from the date hereof Beneficial undertakes upon receipt of ninety (90) days notice in writing from the Bank to pay or otherwise make such arrangements (the take-out) as are satisfactory to the Bank to discharge the liability to the Bank under the said loan PROVIDED HOWEVER that upon Beneficial providing the take-out the Bank transfers and assigns its interest in the Bank's said  
50 Mortgages over the 107½ acres and 56 acres at Port Macquarie and the floating debenture

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Judgment of  
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Sheppard  
22nd June 1979  
(cont'd)

charge as aforesaid to Beneficial in a manner and form satisfactory to Beneficial and its solicitors AND PROVIDED FURTHER that the Bank shall not during the term of its loan have done or omitted to do any act matter or thing (whether in the way of exercising or omitting to exercise any of the powers conferred on the Bank by the Bank's securities or otherwise) as a result of which act or omission the value or effectiveness of the Bank's securities shall have been in any way diminished or impaired (save in the manner contemplated by paragraph 3 hereof)." 10

Paragraph 2 of the letter was as follows:

"Beneficial agrees that it shall provide the take-out as outlined herein subject to its liability not exceeding \$1.1 million and the only debits which the Bank shall be entitled to charge up against its loan shall be normal banking charges relative thereto and the Bank shall not be entitled to make any further advances to the Borrower in respect of the loan without Beneficial's prior approval in writing nor shall the Bank be entitled to charge up to the Borrower's loan account any interest on the loan." 20

It is unnecessary to refer to the remaining paragraphs of the letter.

The Plaintiff's letter to the defendant of 1st May, 1974 had the effect of reducing somewhat the contingent liability of the plaintiff under the letter of 4th April, 1974. Its notice of 2nd March, 1976 needs to be read in conjunction with a deed dated 2nd March, 1976 made between the same parties as the earlier deed of 4th April, 1974. The recitals to the deed referred to the earlier deed and to the fact that the plaintiff had, at the request of the other parties to the deed, agreed to vary the terms of the "take-out guarantee" given by the plaintiff to the defendant "so as to cover increased financial accommodation" given by the defendant to Tacking Point Downs. Clause 1 of the deed provided that the plaintiff at the request of the other parties agreed to provide to the defendant an amended take-out guarantee in the form of the draft letter from the plaintiff to the defendant which was annexed. That letter was in all respects similar to the notice which was signed on behalf of the plaintiff on 2nd March, 1976 and delivered to the Defendant. 30 40 50

That notice recited the original letter of 4th April, 1974 and the variation thereof of 1st May, 1974. It also recited some other matters to

which I need not refer and the fact that it had been agreed to vary certain terms and conditions referred to in the earlier "agreements". Paragraph 1 of the notice is as follows:

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22nd June 1979  
(cont'd)

10 "In the event of the Borrower's liability to the Bank in respect of the principal not being totally discharged and satisfied on or before 31st March, 1978 (hereinafter called 'the expiration date') Beneficial will at the expiration of ninety (90) days notice in writing given to it by a duly authorised officer of the Bank, forthwith pay to the Bank the whole of the principal then owing together with all bank interest on the principal and all bank charges of and incidental thereto, owing to the Bank by the Borrower as at the date of payment, or otherwise make such arrangements to repay the Bank as are satisfactory to the Bank to fully discharge the liability of the Borrower to the Bank under the loan at the expiration of the said ninety (90) days notice PROVIDED HOWEVER that upon Beneficial complying with the terms of this letter of take-out, the Bank will at the expense of the Borrower transfer and assign its interest in the Bank's securities (as described in the original take-out letter and subject to paragraph 3 of the original take-out letter) to Beneficial in a manner and form satisfactory to Beneficial and its Solicitors AND PROVIDED FURTHER that the Bank shall not have hitherto and shall not pending the expiration date have done or omitted to do any act matter or thing (whether in the way of exercising or omitting to exercise any of the powers conferred on the Bank by the Bank's said securities or otherwise) as a result of which act or omission the value or the effectiveness of the Bank's securities shall have been in any way diminished or impaired (save in the manner contemplated by paragraph 3 of the original take-out letter)."

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50 It is not material to refer to par.3. Paragraph 2 provided for the limitation of the plaintiff's liability to the sum of \$1,450,000 which was made up as provided for in pars. (a), (b) and (c) of the clause. A proviso to the paragraph required the plaintiff also to pay interest and certain other charges which were therein specified. Paragraphs 4, 5 and 6 of the notice were as follows:

"4. BENEFICIAL'S liability hereunder is conditional upon the Bank procuring the due payment by the Borrower or itself paying firstly the arrears of the commitment

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Sheppard  
22nd June 1979  
(cont'd)

fees totalling \$10,000.00 owing by the Borrower under the Agreement of the 4th April, 1974 between (inter alia) Beneficial and the Borrower such payment to be made not later than 4th April, 1976 and secondly all future commitment fees payable by the Borrower to Beneficial under the terms of the said Agreement (being at the rate of 3% per annum payable quarterly in advance).

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5. BENEFICIAL hereby acknowledges that up to the date hereof there has been no breach by the Bank of any terms or conditions of the original take-out letter and that if there has been any such breach or breaches then such breach or breaches have been waived by Beneficial.

6. THE Bank undertakes and agrees that if at any time after the date hereof the Bank becomes aware that the Borrower has defaulted in the due performance or observance of any covenant obligation or agreement on the part of the Borrower contained or implied in any one or more of the Bank's securities entitling the Bank to exercise its powers of entry into possession sale foreclosure or otherwise under the Bank's securities then and in any such event the Bank shall forthwith give notice in writing to Beneficial specifying the default which has occurred and at any time thereafter Beneficial may in its absolute and uncontrolled discretion elect to pay to the Bank forthwith (notwithstanding the provisions of paragraph 1 hereof) the principal and all other moneys owing by the Borrower to the Bank (as hereinbefore specified) as at the date of payment whereupon the Bank will at the expense of the Borrower transfer and assign its interest in the Bank's securities to Beneficial in a manner and form satisfactory to Beneficial and its Solicitors."

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The Plaintiff relies on four grounds as providing reasons why it is not liable to indemnify the defendant. Each of these matters is an alleged failure on the part of the defendant either to comply with what is said to be a condition precedent to the plaintiff's liability or of an event to take place said to be a prerequisite to the plaintiff being liable. The acceptance of any one of the four submissions which were made would be sufficient to entitle the plaintiff to succeed.

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I am clearly of opinion that its submissions in respect of two of the matters relied upon should be rejected. The first of these was based upon Cl. 6 of the notice of 2nd March, 1976 which obliged the defendant to notify the plaintiff of any default made by Tacking Point Downs in the due performance or observance of any covenant, obligation or agreement on its part contained or implied in any one or more of the defendant's securities. The breaches alleged were failures on the part of Tacking Point Downs to provide at the intervals provided for in cl.15 of an equitable mortgage, an audited balance sheet and trading and profit and loss accounts and to pay interest upon moneys secured by certain mortgages of real property. There was a submission on behalf of the defendant that there had been no failure on the part of Tacking Point Downs to pay interest, but in the view that I take of the matter it is unnecessary to decide that question. For the purposes of reaching a decision I assume that Tacking Point Downs was in breach of both provisions. The consequence of a breach is provided for in cl.6 of the notice of 2nd March, 1976 which I have earlier set out. The consequence is that the plaintiff may in its absolute and uncontrolled discretion elect to pay to the Bank forthwith the principal and all other moneys owing by Tacking Point Downs to the defendant in return for an assignment of the defendant's securities. On no basis could it be said that the failure of the defendant to notify the plaintiff of a breach by Tacking Point Downs of its obligations was a condition precedent to the plaintiff's liability. At the most it would be entitled to maintain an action for damages, such damages being the loss suffered by the plaintiff as a result of being deprived of the opportunity to make the election provided for in cl.6.

The second matter relied upon, which in my opinion plainly cannot entitle the plaintiff to succeed, was an alleged breach of par. 2 of the take-out letter of 4th April, 1974 as subsequently varied. The effect of that provision was that the defendant was not to be entitled to make any further advances to Tacking Point Downs "in respect of the loan" without the plaintiff's prior approval in writing, nor was the defendant entitled to charge up to that company's loan account any interest on the loan. For the purposes of the submission I assume that the evidence has established breaches of these provisions. Nevertheless the plaintiff's argument, in my opinion, fails because the breaches are not of provisions which are conditions precedent to the plaintiff's liability.

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22nd June 1979  
(cont'd)

More substantial questions arise in relation to the other two matters relied upon by the plaintiff. The first of these is failure on the part of the defendant to see to it that the provisions of par. 4 of the notice of 2nd March, 1976 were complied with. In particular there were arrears of the commitment fee outstanding when the plaintiff's liability was said to have arisen on 31st March, 1978. It was the defendant's submission that there was no breach of the clause by it and that it was sufficient if it tendered the amount outstanding prior to making its claim to be indemnified. It did tender a bank cheque for what was agreed to have been the amount outstanding in respect of the commitment fee as at 31st March 1978 but the tender was rejected. 10

The material words of par. 4 of the notice of 2nd March, 1976 are as follows:

"BENEFICIAL'S liability hereunder is conditional upon the Bank procuring the due payment by the Borrower or itself paying ... all future commitment fees payable by the Borrower to Beneficial under the terms of the said Agreement (being at the rate of 3% per annum payable quarterly in advance)". 20

An analysis of the competing submissions made by the parties discloses that the difference between them lies in their respective contentions as to the category of case which this is. The plaintiff relied upon authorities that insist upon strict compliance with conditions found in agreements for the exercise of an option or some similar right. In Weston v. Collins (1865) 34 L.J. Ch. 353 at pp.354-5) Westbury, L.C. said:- 30

"The covenant by the defendant, on which this suit is founded, is so worded as to impose on the lessee ... the obligation of doing certain things as precedent conditions to any obligation arising on the part of the lessor. If the lessee chooses to comply with the conditions the lessor is bound, but previously there is no mutuality of contract; for whilst the lessor is bound to accept the requisition of the lessee if the conditions are fulfilled, there is no obligation on the part of the lessee to fulfill them, or to avail himself of the lessor's engagement. It is in fact a conditional offer by the lessor, and the condition must be observed before the offer becomes binding. It is a mistake to apply to a stipulation of this kind the rules which are applicable in this Court to ordinary contracts for the sale of real estate. In ordinary contracts of purchase both parties are at once bound, and 40 50

unless there be some special stipulation, or some peculiar circumstances, the time for payment of the purchase-money or for conveyance of the estate, is not deemed of the essence of the contract; but here, from the very form of the stipulation certain things must be done before a binding agreement can arise. If it be clear that any particular act is a condition precedent, it is immaterial whether it be or be not reasonable to require that it shall be first done on the one side before any obligation arises on the other ... Passing to the construction of the unilateral covenant before me, I think it clear that the delivery of the notice and payment of the purchase-money in the manner prescribed by the covenant are precedent conditions to be fulfilled by the owner of the lease before any contract arises binding the lessor."

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The distinction referred to by Lord Westbury in *Weston v. Collins* between the two classes of contract was more recently referred to by Diplock, L.J. (as Lord Diplock then was) in *United Dominions Trust (Commercial) Limited v. Eagle Aircraft Services Limited* (1968) 1 W.L.R. 74 at pp.82-3. His Lordship said:

"In *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* (1962) 2 Q.B. 26 a decision of this court upon which the judge relied, I was careful to restrict my own observations to synallagmatic contracts. The insertion of this qualifying adjective was widely thought to be a typical example of gratuitous philological exhibitionism; but the present appeal does turn upon the difference in legal character between contracts which are synallagmatic (a term which I prefer to bilateral, for there may be more than two parties), and contracts which are not synallagmatic but only unilateral, an expression which, like synallagmatic, I have borrowed from French law (Code Civile Articles 1102 and 1103). Under contracts of the former kind each party undertakes to the other party to do or to refrain from doing something, and in the event of his failure to perform his undertaking, the law provides the other party with a remedy. The remedy of the other party may be limited to recovering monetary compensation for any loss which he has sustained as a result of the failure, without relieving him from his own obligation to do that which he himself has undertaken to do and has not yet done or to continue to refrain from doing that which he himself has undertaken

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to refrain from doing. Or it may, in addition, entitle him, if he so elects, to be released from any further obligation to do or to refrain from doing anything. The Hong Kong Fir case was concerned with the principles applicable in determining what kind of failure by one party to a synallagmatic contract to perform his undertaking releases the other party from an obligation, which *ex hypothesi* has already come into existence, to continue to perform the undertaking given by him in the contract. The mutual obligations of parties to a synallagmatic contract may be subject to conditions precedent, that is to say, they may not arise until a described event has occurred; but the event must not be one which one party can prevent from occurring, for if it is, it leaves that party free to decide whether or not he will enter into any obligations to the other party at all. The obligations under the contract lack that mutuality which is an essential characteristic of a synallagmatic contract." 10  
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Does the obligation here arise out of a unilateral contract, using that expression in the sense used by Lord Westbury and Lord Diplock, or is the obligation to be found in a contract which is bilateral or, to use Lord Diplock's words, a synallagmatic contract?

In my opinion the better view is that the obligation is to be found in a bilateral contract with the result that the option cases relied upon by the plaintiff have no application. I have reached this conclusion because the parties, prior to the notice of 2nd March, 1976 being sent, were already in contract. Already there were mutual rights and obligations in existence between them which had arisen out of the earlier documents of 4th April, 1974 and 1st May, 1974. It was the plain intention of the parties that the existing arrangement between them should continue but be varied as provided for in the notice of 2nd March, 1976. Although par. 4 of the notice was expressed as a condition of the plaintiff's liability under the original letter, it must be read in the context of a situation in which there were existing mutual rights and obligations between the parties and of a situation in which that would continue to be the position. In a case where an option is conferred upon one party to purchase the property of the other, whether in an option agreement dealing only with that matter, or in a lease, the situation is quite different. There may be existing rights and obligations between the parties in relation to the lease itself but there are no such continuing rights and obligations in relation to the matter of the 30  
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option. They will only arise if the party having the benefit of the option exercises it. In order that he may exercise it he must comply with the conditions to which its exercise is subject. If he does not comply with those conditions, any purported exercise of it will be no exercise at all.

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10 Accordingly, I put the option cases aside. But, notwithstanding the dichotomy of the submissions of the parties, that is not the end of the matter. As always, the determining consideration is the intention of the parties as gleaned from the words they have used in the contractual documents.

20 There can be no question but that the payment of the commitment fee was, from the plaintiff's point of view, an all-important obligation imposed on the defendant and upon Tacking Point Downs. It was the entirety of the consideration to be received by the plaintiff for exposing itself to the very substantial liability it agreed to undertake. It would appear that the commitment fee had been in arrears prior to the giving of the notice of 2nd March, 1976. The purpose of par. 4 was to see to it that arrears were brought up to date (no question here arises as to that part of the paragraph) and that further instalments of the commitment fee would be paid. The defendant undertook an obligation to see that this occurred, it previously having been the obligation of Tacking Point Downs and not that of the defendant at all.

40 The obligation imposed by par. 4 was thus of the utmost importance. Nevertheless, it was an obligation requiring the defendant and Tacking Point Downs to make the payments within a specified time. It was accordingly an obligation as to time to which s.13 of the Conveyancing Act, 1919 applied. It is said in Chitty on Contracts (24th ed., vol. 1, par. 1271) that there are only three cases where time will be regarded as being of the essence of the contract. Those cases are:

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- (a) Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with;
  - (b) Where the circumstances of the contract or the nature of the subject matter indicate that the fixed date must be exactly complied with;
  - (c) Where time was not originally of the essence of the contract but one party has been guilty

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of undue delay, the other party may give notice requiring the contract to be performed within a reasonable time.

Neither the circumstances mentioned in par. (a) or par. (c) have any application here. There may have been a question as to whether the obligation to pay the arrears of \$10,000 was peremptory as to time. But notwithstanding the use of the expression "due payment" in the second line of the paragraph, I do not think that there is any basis for saying that the obligation as to payment of future commitment fees was of the essence of the contract, at least insofar as the express words of the parties are concerned.

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The question is whether the case falls within the class of case referred to by Chitty in par.(b). The strength of the plaintiff's case lies in the use in the relevant paragraph of the notice of the words, "Beneficial's liability hereunder is conditional upon the Bank procuring ..." On the other hand, if the plaintiff be right, the situation would be, as counsel for the defendant submitted, one in which there would be no liability on the part of the plaintiff under the letter if the fee were paid a week or even a day late. Having reflected on the matter, I do not think that the case does fall within par.(b) of Chitty. If the fee were paid repeatedly late, it would be open to the plaintiff to have given the defendant and Tacking Point Downs notice to pay within a reasonable time, and I suppose if the breach were continuous and often repeated, one might reach a stage where one would be inclined to say that the defendant and Tacking Point Downs had repudiated their obligations under the contract, evincing an intention no longer to be bound thereby. That repudiation could have been accepted by the plaintiff and the contract discharged. But none of those events has happened. Accordingly, the failure of the defendant to see to it that the commitment fee was paid on time does not provide a reason why the plaintiff is not liable under its letter.

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I turn to the final matter relied upon by the plaintiff. At the date of the letter of 4th April, 1974 there was, notwithstanding the provisions of recital B and of the first proviso to par. 1, no floating charge over the assets and undertaking of Tacking Point Downs. Such a floating charge was, however, executed by that company in favour of the defendant on 23rd December, 1975, that is prior to the notice of 2nd March, 1976 which varied the original letter. There is no evidence that the plaintiff was aware of the fact that there was no charge when it signed

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the letter of 4th April, 1974, nor that it became aware of the existence of the charge executed in 1975 between that time and its signing of the notice on 2nd March, 1976. I should therefore approach the matter upon the basis that the plaintiff was at all times unaware that the charge referred to in the original letter did not then exist and upon the basis that when it came to sign the notice of 2nd March, 1976 it was under the impression that the charge had existed since before the original letter of 4th April, 1974. Counsel for the plaintiff submitted that that was the way in which the matter should be approached; counsel for the defendant did not submit otherwise.

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The plaintiff submitted that it had promised to guarantee a liability described in the letter of 4th April, 1974 as a liability secured by "a floating debenture charge over the assets and undertakings" of Tacking Point Downs. Since at the date of the letter the liability was not so secured, there was no liability such as was described in the letter. The plaintiff placed reliance upon the decision of the House of Lords in Greer v. Kettle (1938) A.C. 156. In that case a guarantee recited that a lender had, at the request of another company, advanced to the borrower a sum of \$250,000 "on the security of a charge dated March 20, 1929 on the shares particulars of which are set out in the schedule hereto". The operative part of the guarantee was:

"In consideration of the corporation having at the request of the guarantors advanced to the borrowers the said sum of \$250,000, the guarantors hereby covenant with the corporation that in the event of the borrowers failing to repay the said sum of \$250,000 and interest as provided in the said charge on June 20 next forthwith to repay to the corporation the said sum of \$250,000 together with all interest due ..."

It was held by the House of Lords that what the guarantors agreed to guarantee was the repayment of a debt effectively secured by shares in a company, and as in fact the debt was not so secured, the guarantors were under no liability; nor were they estopped by the terms of the recital in the guarantee.

Apart from submitting that the case was distinguishable from Greer v. Kettle because the loan here was not by description a loan secured by a floating charge over the assets and undertaking of Tacking Point Downs, the defendant submitted that the provisions of par. 5 of the notice of 2nd March,

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1976, could have no application because it was concerned with breaches of terms and conditions of the original letter; the plaintiff was not relying on a breach of any term or condition, but upon the fundamental point that, if the defendant were entitled to an indemnity, it was an indemnity against a liability which was secured in the manner described in the relevant recital. True it had undertaken to the defendant that it would pay the indebtedness of Tacking Point Downs to it if the events provided for in the letter came about. But the indebtedness or liability was, upon the true construction of the letter, a liability secured in the way described in the recital. It was not, at the date of the letter, secured to the extent therein stated. The plaintiff's premise did not therefore extend to it. Thus no question of any breach by the defendant of a term or condition of the agreement arose. Paragraph 5 of the notice of 2nd March, 1976, dealing, as it did, with the waiver of breaches of terms and conditions had no application. On the contrary, it was a case where, there being no equitable charge in existence at the date of the original letter, no liability of the kind promised to be assumed had ever existed. In my opinion the plaintiff's submission is correct. The paragraph is not, if the plaintiff's construction of the letter is right, of any assistance to the defendant. In this respect I compare, although it is a case in a different field of the law of contract, the decision of the High Court in George Wills & Co. Limited v. Davids Pty. Limited, 98 C.L.R. 77.

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I turn next to the question of construction which is involved. In order to test the matter, I propose to assume that neither the mortgages referred to in recital B and the first proviso to par. 1 of the original letter, any more than the equitable charge, were in existence at the date of that letter. If that had been the position, the debt would in fact have been an unsecured one. In that event ought the position be regarded as one in which the parties intended that the liability should nevertheless be assumed by the plaintiff, it having the right to claim damages for breach of an implied promise on the defendant's part that the indebtedness was secured in the way provided for; or do the words of the parties mean that they intended that it was only a liability which was secured as provided for in the original letter which the plaintiff was to undertake? The question being one of construction, the decision of the House of Lords in Greer v. Kettle is not decisive unless the wording of the agreement in that case is indistinguishable from that in the present one. I think there are differences in the wording. But,

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as in this case, the reference to the indebtedness being secured was in a recital and not in the operative part of the guarantee. I am therefore of opinion that, although Greer v. Kettle is distinguishable, it has similarities to the present case and provides some guide as to what the outcome should be. Apart from that consideration, I think that the better view is that the proper construction of the letter is, as the plaintiff submits, that the parties intended that there should be guaranteed only a liability which was secured as stated therein. In order to throw up the problem I made the assumption that the indebtedness was totally unsecured. In fact it was secured by the mortgages which are referred to but not by the floating charge. But it was not secured to the extent that the parties contemplated it would be, and I am thus of opinion that the plaintiff is entitled to succeed on this point.

The defendant submitted that it did not matter when the charge was taken. The important consideration was that it should have existed at the time when the plaintiff was called upon to pay the amount of the liability of Tacking Point Downs under the guarantee. I do not agree with this submission. The securities referred to in the letter of 4th April, 1974 (including the equitable charge) were, notwithstanding the variation of the agreement which was brought about by the plaintiff's notice of 2nd March, 1976, at all times intended by the parties to be the securities of which the plaintiff would have the benefit if it were called upon to indemnify the defendant. I refer to the terms of the first proviso of par. 1 of the notice of 2nd March, 1976. If it came to a contest, there might be a nice question as to whether the parties could be said to have intended that the equitable charge which was taken on 23rd December, 1975, was picked up by the words used in that proviso. And, in the event of there being an earlier charge by the plaintiff, the acceptance of the submission that the position was cured by the taking of the charge on 23rd December, 1975, would mean that the plaintiff would have to be satisfied by the provision of a security which might be later in point of time to an earlier charge granted to some other person. The fact that there is no evidence or suggestion that there is any earlier charge is not to the point. It is a question of determining the intention of the parties by reference to the words they have used and to events which might, in their reasonable contemplation, well have occurred. The agreement as varied provided for the guarantee by the



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plaintiff of a liability which was secured, inter alia, by a floating charge which was in existence at the date of the original letter. There was no such floating charge. Accordingly, no liability of a kind which the plaintiff promised to guarantee ever existed.

My conclusion upon the final matter which I have dealt with means that the plaintiff is entitled to the relief which it seeks and that the defendant fails in its cross-claim. The only cross-claim brought by the defendant was for the recovery of the amount said to be due to be paid by the plaintiff in the event that it was obliged to indemnify the defendant under the letter. I have given no consideration as to whether the defendant is entitled to recover from the plaintiff any payments which may have been made by it in respect of the commitment fee, the plaintiff never having been, in my opinion, liable under the letter at all.

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I propose to stand this matter over for a short time to enable counsel to consider what I have said. When it is again in the list, counsel for the plaintiff are to bring in short minutes of a declaration to give effect to my decision. My conclusion makes it unnecessary for there to be quantified the amount which the defendant would have been entitled to recover if it had been successful, but if it be desired for any reason to have that sum quantified, I am prepared, when the matter is again in the list, to note any agreement about it or to hear evidence concerning it with a view to making a finding, if that is what the parties wish.

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I certify that this and the 15 preceding pages are a true copy of the reasons for judgment herein of The Honourable Mr. Justice Sheppard.

Sgd. S.J. Firth

Associate

Dated 22nd June, 1979.

No. 10  
Judgment  
Order - 17th  
August 1979

No. 10

Judgment Order - 17th August, 1979

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IN THE SUPREME COURT OF NEW SOUTH WALES  
SYDNEY REGISTRY  
COMMON LAW DIVISION  
COMMERCIAL LIST

No. 10162 of 1978

BENEFICIAL FINANCE CORPORATION  
LIMITED

Plaintiff

No. 10

AUSTRALIA AND NEW ZEALAND BANKING  
GROUP LIMITED

Defendant

Judgment  
Order - 17th  
August 1979  
(cont'd)

AUSTRALIA AND NEW ZEALAND BANKING  
GROUP LIMITED

Cross-Claimant

BENEFICIAL FINANCE CORPORATION  
LIMITED

Cross-Defendant

O R D E R

10 THE COURT DECLARES THAT the Plaintiff does not have  
nor did it ever have any liability to the Defendant  
arising under the agreements with the Defendant  
comprised in the letter bearing date 4th April 1974  
and the instrument under seal executed by the  
Plaintiff in favour of the Defendant on 2nd March  
1976.

THE COURT ORDERS THAT:

1. The Defendant pays the Plaintiff's costs of  
these proceedings.
- 20 The cross-claim be dismissed.
3. Leave be granted to the Defendant, Australia  
and New Zealand Banking Group Limited (hereinafter  
called "the Appellant") to appeal to Her Majesty  
in Council from the declaration herein and orders  
1 and 2 of this Court made this day upon the  
following conditions:

[not printed]

ORDERED: 17th August, 1979

ENTERED: 12 NOV 1979

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By the Court  
(SGD.) G.J. BERECRY L.S.  
Chief Clerk.

NORTON SMITH & CO.  
Solicitors,  
20 Martin Place,  
Sydney, NSW 2000  
Phone: 232.8833 (RGW)  
DX 119 Sydney.

No. 11

Order granting  
final leave to  
appeal to Her  
Majesty in  
Council - 4th  
December 1980

No. 11

Order granting final leave to appeal  
to Her Majesty in Council - 4th  
December 1980

IN THE SUPREME COURT OF NEW SOUTH WALES

SYDNEY REGISTRY

No. 10162 of 1978

COMMON LAW DIVISION  
COMMERCIAL LIST

BENEFICIAL FINANCE CORPORATION LIMITED	Plaintiff (Respondent)	10
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED	Defendant (Appellant)	
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED	Cross Claimant	
BENEFICIAL FINANCE CORPORATION LIMITED	Cross Defendant	

O R D E R

THE COURT ORDERS that:

1. Final leave to appeal to Her Majesty in  
Council from the Judgment of his Honour Mr.  
Justice Sheppard given and made herein on 22nd  
June 1979 be granted to the Defendant. 20

2. Upon payment by the Defendant of the costs  
of the preparation of the transcript record the  
sum of Fifty dollars (\$50) deposited into Court  
by the Defendant as security for and towards the  
costs thereof be paid out of Court to the  
Defendant.

ORDERED 4 December 1980

AND ENTERED 11 December 1980 30

By the Court,

Registrar,  
Common Law Division.

NORTON SMITH & CO.,  
Solicitors,  
20 Martin Place,  
Sydney, N.S.W. 2000.  
Phone: 232.8833 (RAR)  
DX 119 Sydney.

E X H I B I T S

Exhibits

"A" - Page No. 16 of Tacking Point  
Downs Pty. Limited No. 3 Account and  
Page 21 of No. 2 Account

"A"  
Page No. 16 of  
Tacking Point  
Downs Pty.  
Ltd. No. 3  
Account and  
Page 21 of No.  
2 Account.

\_\_\_\_\_  
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

PITT AND HUNTER STREETS, SYDNEY (19) 76-78041  
Branch Account No.

233 0655  
Branch Telephone Numbers

10 TACKING POINT DOWNS PTY. LIMITED NO. 3  
ACCOUNT  
C/- J.V. DULHUNTY  
139 MACQUARIE ST.,  
SYDNEY 2000

Issue  
31 31-10-77 16  
Code Date of Issue Page No.

Date	Detail	<u>Cheques and Other Debits</u>		Balance; see reverse for adjustments
		<u>Amount</u>		
30- 9-77	FWD			489945.78 DR
6-10-77	453774	2216.58		492162.36 DR
7-10-77	453777	83.10		492245.46 DR
10-10-77	453778	26236.45		518481.91 DR
11-10-77	453776	5265.00		523746.91 DR
20-10-77	453779	51000.00		574746.91 DR

Exhibits

"A"  
Page No. 16 of  
Tacking Point  
Downs Pty.  
Ltd. No. 3  
Account and  
Page 21 of No.  
2 Account.  
(cont'd)

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

PITT AND HUNTER STREETS, SYDNEY (19) 76-78084  
Branch Ad. Val No.

EXTRA COPY STATEMENT

233 0655  
Branch Telephone Numbers

TACKING POINT DOWNS PTY. LIMITED

NUMBER 2 ACCOUNT

Issue  
31 31-3-78  
Code Date of Issue

21  
Page No.

Date	Detail	<u>Cheques and Other Debits</u>		Balance; see reverse for adjust- ments
		Amount	Detail	
8-2-78	FWD			323618.42 I
4-3-78	PROD.OF DOCS.	15.00		323633.42 DR
10.-3-78	S.O.	1000.00	ACCEPT.	329121.09 I
21-3-78	DISCOUNT MIS	26178.08	MIS	4487.67 355299.17 DR
10-3-78	INT	57734.90		413034.07 I

"B" - Agreement between Tacking Point  
Downs Pty. Limited and Other Persons  
and Companies - 4th April 1974

Exhibits  
"B"  
Agreement  
between Tacking  
Point Downs Pty  
Ltd. and Other  
Persons and  
Companies - 4th  
April 1974

NEW SOUTH WALES    § 0300 STAMP DUTY

THIS DEED made the 4th day of April One thousand  
nine hundred and seventy-four BETWEEN TACKING  
POINT DOWNS PTY. LIMITED a company duly  
incorporated in the State of New South Wales and  
having its registered office at c/o J.V. Dulhunty,  
8th Floor, 139 Macquarie Street, Sydney in the  
said State (hereinafter called "the Borrower") of  
the first part, JOHN VENOUR DULHUNTY of 10 Kara  
Crescent, Bayview in the State of New South Wales  
Company Director TERUKIM PTY. LIMITED a company  
duly incorporated in the State of New South Wales  
and having its registered office at c/o J.V. Dulhunty,  
8th Floor, 139 Macquarie Street, Sydney in the said  
State and HALISBURY PTY. LIMITED a company duly  
incorporated in the Australian Capital Territory  
and having its registered office at c/o Phipson  
Nominees Pty. Ltd. 12th floor, National Mutual Centre,  
Darwin Place, Canberra, in the said Territory  
(hereinafter called "the Guarantors") of the  
second part, VENDUL MANAGEMENT PTY. LIMITED, VENDUL  
INTERNATIONAL PTY. LIMITED, ROWINI HOLDINGS PTY.  
LIMITED and HUDSON & WALLACE TRADING PTY. LIMITED  
all being companies incorporated in the State of  
New South Wales and having their registered offices  
at c/o J.V. Dulhunty, 8th Floor, 139 Macquarie  
Street, Sydney in the said State (hereinafter  
called "the Sureties") of the third part AND  
BENEFICIAL FINANCE CORPORATION LIMITED a company  
duly registered and carrying on business in the  
State of New South Wales and duly registered under  
the Money-lenders and Infants Loans Act 1941 and  
having its registered office under that Act at  
285 George Street, Sydney in the said State  
(hereinafter called "Beneficial") of the fourth  
part W H E R E A S :-

- A. The Borrower is the registered proprietor  
of the parcels of land at Port Macquarie  
described in Part A of the First Schedule  
hereto and has negotiated the purchase of the  
parcels of land at Port Macquarie described  
in Part B of the First Schedule hereto. The  
parcels of land described in Parts A and B of  
the First Schedule hereto are hereinafter  
referred to as "the Port Macquarie lands."
- B. The Borrower has requested THE AUSTRALIA & NEW  
ZEALAND BANKING GROUP LIMITED (hereinafter  
called "the Bank") to make certain loan  
facilities available to the Borrower on the  
security of (inter alia) a registered first

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mortgage or mortgages over the Port Macquarie lands and a floating charge over the Borrower's assets (which securities are hereinafter referred to as "the Bank's securities").

It is a condition of the Bank's said agreement that the Borrower provide a guarantee to the Bank that finance up to a maximum amount of One million one hundred thousand dollars (\$1,100,000.00) will be available to the Borrower to enable it to repay in part or in whole the Bank's loan when that loan falls due for repayment (hereinafter referred to as "the take-out guarantee").

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D. Beneficial has at the request of the Borrower, the Guarantors and the Sureties agreed to provide the take-out guarantee on the terms and subject to the covenants and conditions hereinafter set forth.

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NOW THIS DEED WITNESSETH and it is hereby mutually agreed and declared as follows:-

1. BENEFICIAL agrees with the Borrower, the Guarantors and the Sureties that Beneficial will provide to the Bank a take-out guarantee in the form of the draft letter from Beneficial to the Bank annexed hereto and signed by the parties for the purposes of identification.

2. BENEFICIAL'S obligation to the Bank under the take-out guarantee shall be subject to the terms of the said draft letter and shall arise only if the conditions set forth therein and in this Deed shall have been duly fulfilled and the commitment fee provided for in Clause 3 hereof shall have been duly paid.

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3. IN consideration of Beneficial agreeing to provide the take-out guarantee as aforesaid the Borrower and the Guarantors covenant and agree with Beneficial that the Borrower shall pay to Beneficial a commitment fee equivalent to One per centum (1%) per quarter calculated by reference to the maximum amount owing by the Borrower to the Bank during each quarterly period for so long as the take-out guarantee subsists. The Borrower shall pay to Beneficial at the commencement of each quarterly period a fee calculated by reference to the amount owing at the commencement of the quarter and at the expiration of the quarter shall make such further payment as may be necessary to bring the amount paid up to the figure of One per centum (1%) per quarter hereinbefore referred to.

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10 4. IT is a condition of Beneficial's assumption of the obligation contained in Clause 1 hereof that on the execution hereof or at such other time as Beneficial may in writing agree Beneficial shall have the benefit of the securities from the Borrower, the Guarantors and the Sureties described in the Second Schedule hereto (which are herein referred to as "Beneficial's securities) by way of security for:-

- (a) The commitment fee payable by the Borrower pursuant to Clause 3 hereof;
- (b) Any other moneys payable by the Borrower to Beneficial hereunder; and
- (c) Any moneys which may be advanced by Beneficial to for or on account of the Borrower in pursuance of the obligation assumed by Beneficial in Clause 1 hereof.

20 5. IN the event of Beneficial being called upon under Clause 1 hereof to pay out the Bank's loan then upon such payment being made Beneficial shall (in addition to Beneficial's securities as hereinbefore described) be entitled to take the benefit of the Bank's securities in one or other of the following manners:-

- (a) Beneficial may require the Bank to assign its securities and the full benefit and advantage thereon to Beneficial (as on the assignment of a mortgage debt); or
- 30 (b) Beneficial may require that the Bank discharge its securities and that the Borrower and the Guarantors execute fresh securities in favour of Beneficial in the form of firstly a first mortgage over the Port Macquarie lands, secondly a floating charge over the Borrower's assets and undertaking including uncalled capital and
- 40 thirdly a deed of guarantee from the Guarantors, such securities to be in such form as Beneficial's Solicitors shall in their absolute discretion require.

6. THE terms of repayment by the Borrower in respect of any moneys advanced by Beneficial to for or on account of the Borrower in pursuance of Clause 1 hereof shall be as follows:-

- (a) The capital sum advanced shall be repaid on or before the expiration of two (2) years from the date on which the same is provided by Beneficial as aforesaid;



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(b) The Borrower shall pay to Beneficial interest on the said capital sum at the rate of fourteen per centum (14%) per annum or such other rate as Beneficial in its absolute discretion considers to be the rate of interest then prevailing for transactions of this nature, such interest to be computed from the date upon which the capital is paid out by Beneficial and calculated on daily rests and payable on monthly rests.

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7. BY way of further consideration for Beneficial agreeing to provide the take-out guarantee as aforesaid the Borrower agrees that in the event of Beneficial being called upon so to do and providing finance to pay out the Bank as provided in Clauses 1 and 8 hereof then the Borrower shall become liable to pay to Beneficial in addition to the capital sum and interest hereinbefore provided a further sum equivalent to Twenty-five per centum (25%) of the net profit (calculated as hereinafter provided) derived by the Borrower from the development of the Port Macquarie lands. The Borrower's profit as aforesaid shall be calculated on the basis set forth in the Third Schedule hereto. Any dispute between the parties as to the amount payable by the Borrower to Beneficial under this Clause shall be referred to an arbitrator appointed by the President for the time being of the Australian Institute of Chartered Accountants (New South Wales) in accordance with the provisions of the Arbitration Act 1900 as amended.

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8. BENEFICIAL further agrees with the Borrower that in the event that the Bank during the term of its loan advances to the Borrower ~~with Beneficial's~~ ~~approval~~ a further loan (hereinafter called "the development loan") to assist the Borrower in developing the Port Macquarie lands then PROVIDED that there shall not at the time the development loan or the first instalment thereof is advanced by the Bank be any breach or non-observance of the terms of this Deed by the Borrower or the Guarantors or the Sureties, Beneficial shall extend its take-out guarantee to the Bank so as to include the quantum of the development loan subject to the same terms and conditions as are hereinbefore expressed or are expressed in the draft letter to the Bank in relation to the Bank's initial loan of the principal sum and to the following further terms and conditions:-

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(a) Beneficial's additional liability under the take-out guarantee in respect of the development loan shall not exceed the sum of Nine hundred thousand dollars (\$900,000.00).

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- (b) The development loan shall be advanced by the Bank only by progress payments equivalent to expenses actually incurred by the Borrower in developing the said lands by residential subdivision.
- (c) The Borrower's development plan for the residential subdivision of the said lands shall have been duly approved by the Council of the Municipality of Port Macquarie and the State Planning Authority of New South Wales (or any authority appointed or established in substitution therefor) and any other statutory local or other authority whose consent or approval to the plan is necessary for such purposes and there being no legal or other impediments to the development of the said lands by residential subdivision.
- (d) The Borrower shall pay Beneficial a commitment in respect of the development loan or so much thereof as from time to time has been advanced or shall remain unpaid at the rate of One per centum (1%) per quarter in the same manner or in provided for in Clause 3 hereof and any additional commitment fees payable to Beneficial as aforesaid shall be deemed to be received by Beneficial's securities.

9. IN the event of any default hereunder by the Borrower or the Guarantors or the Sureties then the Borrower and the Guarantors and the Sureties hereby irrevocably appoint Beneficial and its State Manager for New South Wales for the time being jointly and each of them severally to be the true and lawful Attorney and Attorneys of the Borrower and the Guarantors and the Sureties for the purpose of enabling Beneficial to complete on behalf of the Borrower and/or the Guarantors and/or the Sureties any of Beneficial's securities and/or to take such action as Beneficial may in its absolute discretion think fit to perfect its title under any of Beneficial's securities and generally to do any such acts matters and things in the name or names of the Borrower and/or the Guarantors and/or the Sureties (as the case may be) which Beneficial considers necessary or desirable to secure to Beneficial the due performance and observance by the Borrower and the Guarantors and the Sureties of their respective obligations to Beneficial under this Deed and under Beneficial's securities.

10. ANY notices required to be given by any party hereunder shall be deemed to be sufficiently given if signed by or on behalf of a party by the party's Secretary or Manager or a Director and any such

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notices shall be deemed to be duly served if served in accordance with the provisions of Section 170 of the Conveyancing Act 1919 as amended.

11. (a) ALL covenants agreements and obligations herein contained shall be deemed to be entered into and made by and shall inure for the benefit of the parties hereto and their respective personal representatives (in the case of natural persons) successors (in the case of corporations) and assigns.

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(b) Where the context so admits words importing the singular number shall import the plural and vice versa and words importing any one gender shall be deemed to import the other gender.

12. THE Borrower shall pay all reasonable legal costs and disbursements incurred by Beneficial in and about the preparation execution and stamping of this agreement and the preparation execution and registration of Beneficial's securities and any matters arising herefrom or hereunder.

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13. IT is agreed by and between Beneficial and the Sureties that if at any time any one or more of the Sureties wishes to sell a parcel of land over which Beneficial has security as provided in paragraphs (c)(d)(e)(f) and (g) of the Second Schedule hereto then Beneficial shall execute a discharge of its security over the land being sold subject to either Beneficial receiving from the Borrower or the Guarantors or the Sureties or any one or more of them a substituted security of not less value than that which Beneficial is called upon to discharge or alternatively to the Borrower's debt to the Bank in respect of which the take-out guarantee is given being reduced by an amount equivalent to the diminution in Beneficial's overall security resulting from the discharge and alternatively to up to an amount equivalent to the diminution in Beneficial's overall security as aforesaid being paid to Beneficial in reduction of any moneys due to Beneficial hereunder (whichever alternative or combination of alternatives Beneficial shall in its absolute discretion resolve).

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14. IF at any time prior to the happening of the events referred to in Clause 9 hereof the Borrower wishes to discharge its liability to the Bank and/or cancel the take-out guarantee then Beneficial will forthwith discharge and assign all its securities to the Borrower or as it shall direct and provided that all moneys due hereunder

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have been duly paid and that the Bank has released Beneficial from its obligations under the take-out guarantee then as from the date of discharge or cancellation as aforesaid neither party shall be under any further or other liability to the others hereunder.

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15. IF at any time any commitment fees due from the Borrower to Beneficial hereunder shall be in arrears and unpaid for the space of seven (7) days such arrears shall carry interest at the rate of Twenty per centum (20%) per annum computed from the date upon which the same fall due to payment calculated on daily balances and payable on demand.

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16. IN consideration of Beneficial at the request of the Guarantors and the Sureties entering into these presents the Guarantors and the Sureties for themselves and their respective personal representatives (in the case of the said JOHN VENOUR DULHUNTY) successors (in the case of the other Guarantors and Sureties) and assigns hereby jointly and severally guarantee to Beneficial that the Borrower will duly observe and perform the covenants agreements and obligations on its part contained herein and in any securities now or at any time hereafter taken by Beneficial (whether originally or by assignment) in pursuance of this Deed and to secure any moneys due or to become due from the Borrower hereunder or to become due from the Borrower to Beneficial in the event of Beneficial providing take-out finance as provided in Clauses 1 and 8 hereof and the Guarantors and the Sureties agree to pay to Beneficial on demand all or any moneys which the Borrower may from time to time fail to pay to Beneficial as and when the same fall due hereunder or under any securities as aforesaid and the amount of any loss or damage suffered or incurred by Beneficial in consequence of the Borrower's default as aforesaid AND it is agreed that this guarantee shall be a continuing guarantee and that the liability of the Guarantors hereunder shall not be discharged nor be otherwise affected by:-

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- (a) The granting of any time or indulgence by Beneficial to the Borrower; or
- (b) Any omission on the part of Beneficial to enforce any covenant agreement or obligation against the Borrower; or
- (c) Any act or omission or means whereby the liability of the Guarantors and Sureties would have been discharged had the Guarantors and the Sureties been the principal debtor.

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I N W I T N E S S the parties hereto have  
hereunto set their hands and seals on the day and  
year first hereinbefore written.

THE FIRST SCHEDULE HEREINBEFORE REFERRED TO

ALL THOSE parcels of land situate near Tacking Point  
in the Municipality of Port Macquarie and Parish and  
County of Macquarie being:-

PART A -

- (a) That parcel of 41 acres 1 rood comprised in  
Certificate of Title Volume 57 Folio 246. 10
- (b) That parcel of 2 acres 1 rood 8 perches  
comprised in Certificate of Title Volume 3210  
Folio 34.
- (c) That parcel of 35 acres 2 roods being Portion  
15 of the Parish comprised in Certificates  
of Title Volume 25 Folio 238.
- (d) That parcel of 28 acres 2 roods 8 perches  
comprised in Certificate of Title Volume 175  
Folio 44.

PART B -

- (e) That parcel of 20 acres comprised in Deed of  
Conveyance registered Number 439 Book 2622. 20
- (f) That parcel of 20 acres 2 roods 9 perches  
being Portion 145 of the Parish comprised in  
Certificate of Title Volume 8409 Folio 186.
- (g) Lot 4 in Deposited Plan Number 25477 being  
the land comprised in Certificate of Title  
Volume 6937 Folio 102.

THE SECOND SCHEDULE HEREINBEFORE REFERRED TO

Beneficial's securities shall be as described  
hereunder and the documentation of such securities  
shall be in such form and shall contain such  
covenants agreements and conditions as Beneficial's  
solicitors shall reasonably require:- 30

- (a) A registered second mortgage over the Port  
MacQuarie lands, being subject to a first  
mortgage to the Bank for advances from time  
to time not exceeding \$1,300,000.00.
- (b) The personal guarantees of John Venour  
Dulhunty and Terukim Pty. Limited. 40
- (c) Mortgages from Vendul International Pty.  
Limited as follows:-

- 10 (i) Land in Conveyance registered Number 865 Book 3081 being a third mortgage behind firstly a mortgage to M.R. Bird securing \$15,000.00 and secondly a mortgage to the Rural Bank of New South Wales securing advances from time to time with an upper limit of \$337,000.00 (hereinafter called "the Rural Bank Mortgage").
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- (ii) Land in Certificates of Title Volume 11946 Folios 111 and 112 being a second mortgage behind the Rural Bank Mortgage.
- (iii) Land in Certificate of Title Volume 12214 Folio 160 being a second mortgage behind a first mortgage to Oakbourne Holdings Pty. Limited and others securing \$10,000.00.
- 20 (d) Mortgages from Vendul Management Pty. Limited as follows:-
- (i) Land in Certificate of Title Volume 10811 Folio 240 being a second mortgage behind the Rural Bank Mortgage.
- (ii) Land in Certificates of Title Volume 11806 Folios 68, 69 and 71 being a second mortgage behind the Rural Bank Mortgage.
- 30 (iii) Land in Certificates of Title Volume 12175 Folios 28 and 30 being a third mortgage behind firstly a mortgage to R.W. Kelle securing \$140,000.00 and secondly the Rural Bank Mortgage.
- (iv) Land in Certificate of Title Volume 11853 Folio 205 being a first mortgage.
- (e) Mortgages from Hudson & Wallace Trading Pty. Limited as follows:-
- 40 (i) Land in Certificate of Title Volume 9963 Folio 175 being a second mortgage behind the Rural Bank Mortgage.
- (ii) Land in Certificates of Title Volume 10256 Folios 185 and 186 being a second mortgage behind a mortgage to E.E. Patten securing \$29,000.00.
- (f) A mortgage from Rowini Holdings Pty. Limited over the land in Certificate of Title Volume 2532 Folio 25 being a Second mortgage behind

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the Rural Bank Mortgage.

- (g) A mortgage from John Venour Dulhunty over the land in Certificate of Title Volume 11838 Folio 245 being a second mortgage behind a mortgage to N.A. Rowlison securing \$7,500.00.

THE THIRD SCHEDULE HEREINBEFORE REFERRED TO

The Borrower's profit on the development of the Port Macquarie lands for the purposes of Clause 8 hereof shall be calculated in accordance with the following basic principles:-

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1. The expenses of the development shall comprise the following:-

- (a) The cost to the Borrower of acquiring the Port Macquarie lands, namely the purchase price of the lands and all legal costs and disbursements, stamp duties, agency commissions and the like incurred by the Borrower in relation to the acquisitions; Provided the purchase price of the land described in Part A of the First Schedule shall be deemed to be \$850,000.00.
- (b) All holding charges in the way of council rates, water rates, land tax and other rates, taxes and statutory outgoings properly incurred or paid by the Borrower in respect of the said lands;
- (c) All interest charges and other banking charges and legal costs properly incurred by the Borrower in relation to financing the purchase and holding of the said lands pending their development and disposal;
- (d) Any other costs charges and expenses properly incurred by the Borrower in relation to the holding of the said lands and the development thereof by residential subdivision;
- (e) All direct development costs properly incurred by the Borrower in developing and subdividing the said lands;
- (f) All commitment fees paid to Beneficial in pursuance of this Deed and all legal costs and disbursements paid in respect of the preparation execution and stamping hereof; and
- (g) All costs in the way of legal fees, agency commissions, advertising and selling expenses and the like incurred in relation to the sale of subdivided allotments of the said lands.

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The Borrower shall not without Beneficial's Exhibits  
 prior written approval be entitled to charge up as costs of the development any internal office overheads or other internal charges or charges made by or payments made to associated persons or companies expressed to be in relation to the development, it being agreed that only direct costs and expenses are chargeable as costs of the development for the purposes of calculating the Borrower's profit in pursuance of Clause 8 hereof.

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10

2. The income of the development shall comprise the gross selling prices of subdivided allotments of the said lands together with any other receipts in the way of rents and profits derived from the said lands and compensation or purchase moneys received in respect of any resurreptions dedications, compulsory acquisitions or sales to statutory or local authorities of any parts of the said lands or easements or other interests relating to the said lands.

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3. The profit of the development shall be the surplus of income as hereinbefore defined over expenses as hereinbefore defined.

THE COMMON SEAL of TACKING )  
 POINT DOWNS PTY. LIMITED )  
 was hereunto affixed in the presence of: )  
 Sgd. J.V. Dulhunty C.S.  
 Director

30

Sgd. B.J. Flood  
 Secretary

SIGNED SEALED AND DELIVERED )  
 by the said JOHN VENOUR )  
 DULHUNTY in the presence of:- )  
 Sgd. J.V. Dulhunty

Sgd. B.J. Flood

THE COMMON SEAL of TERUKIM )  
 PTY. LIMITED was hereunto )  
 affixed in the presence of:- )  
 Sgd. J.V. Dulhunty C.S.  
 Director

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Sgd. B.J. Flood  
 Secretary

THE COMMON SEAL of HALISBURY )  
 PTY. LIMITED was hereunto )  
 affixed in the presence of:- )  
 Sgd. J.V. Dulhunty C.S.  
 Director

Sgd. B J. Flood  
 Secretary



<u>Exhibits</u> "B" Agreement between Tacking Point Downs Pty. Ltd. and Other Persons and Companies - 4th April 1974 (cont'd)	THE COMMON SEAL of VENDUL MANAGEMENT PTY. LIMITED was hereunto affixed in the presence of:-  Sgd. B.J. Flood Secretary	) ) Sgd. ) J.V. Dulhunty C.S. ) Director	
	THE COMMON SEAL of VENDUL INTERNATIONAL PTY. LIMITED was hereunto affixed in the presence of:-  Sgd. B.J. Flood Secretary	) ) Sgd. ) J.V. Dulhunty C.S. ) Director	10
	THE COMMON SEAL of ROWINI HOLDINGS PTY. LIMITED was hereunto affixed in the presence of:-  Sgd. B.J. Flood Secretary	) ) Sgd. ) J.V. Dulhunty C.S. ) Director	
	THE COMMON SEAL of HUDSON & WALLACE TRADING PTY. LIMITED was hereunto affixed in the presence of:-  Sgd. B.J. Flood Secretary	) ) Sgd. ) J.V. Dulhunty C.S. ) Director	20
	SIGNED by the said BENEFICIAL FINANCE CORPORATION LIMITED by its Attorneys and who state that they have no notice of the revocation of Power of Attorney registered Number under the authority of which they have executed these presents in the presence of:	) ) ) ) ) ) ) ) ) )	30
"B" Variation Agreement between Tacking Point Downs Pty. Ltd. and other persons and companies (added to Exhibit "B") 2nd March 1976	<hr/> "B" Variation Agreement between Tacking Point Downs Pty. Limited and other persons and companies 2nd March 1976 <hr/>		
	<u>THIS DEED</u> made the 2nd day of March One thousand nine hundred and seventy-six <u>BETWEEN TACKING</u> <u>POINT DOWNS PTY. LIMITED</u> a company duly incorporated in the State of New South Wales and having its registered office at C/o J.V. Dulhunty, 8th floor, 139 Macquarie Street, Sydney		40

10 in the said State (hereinafter called "the Borrower") of the first part, JOHN VENOUR DULHUNTY of 10 Kara Crescent, Bayview in the said State, Company Director, TERUKIM PTY. LIMITED a company duly incorporated in the State of New South Wales and having its registered office at C/o J.V. Dulhunty, 8th floor, 139 Macquarie Street, Sydney in the said State and HALISBURY PTY. LIMITED a company duly incorporated in the Australian Capital Territory and having its registered office in New South Wales at C/o J.V. Dulhunty, 8th floor, 139 Macquarie Street, Sydney in the said State (hereinafter called "the Guarantors") of the second part, VENDUL MANAGEMENT PTY. LIMITED, VENDUL INTERNATIONAL PTY. LIMITED, ROWINI HOLDINGS PTY. LIMITED and HUDSON & WALLACE (TRADING) PTY. LIMITED all being companies incorporated in the State of New South Wales and having their registered offices at C/o J.V. Dulhunty, 8th floor, 139 Macquarie Street, Sydney in the said State (hereinafter called "the Sureties") of the third part AND BENEFICIAL FINANCE CORPORATION LIMITED a company duly registered and carrying on business in the State of New South Wales and duly registered under the Money-lenders and Infants Loans Act 1941 and having its registered office under that Act at 285 George Street, Sydney in the said State (hereinafter called "Beneficial") of the fourth part

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Variation Agreement between Tacking Point Downs Pty Ltd. and other persons and companies (added to Exhibit "B")  
2nd March 1976  
(cont'd)

W H E R E A S :-

- 40 A. By Deed dated the 4th day of April 1974 made between the parties hereto (hereinafter referred to as "the Principal Agreement") the parties entered into certain mutual covenants and agreements relating to the provision by Beneficial of a take-out guarantee to The Australia and New Zealand Banking Group Limited (hereinafter called "the Bank").
- 40 B. The terms of the Principal Agreement were varied by a Deed dated the 3rd day of February 1975 made between the parties hereto (hereinafter referred to as "the Amending Deed").
- 50 C. Beneficial has at the request of the Borrower, the Guarantors and the Sureties agreed to vary the terms of the said take-out guarantee given by Beneficial to the Bank so as to cover increased financial accommodation given by the Bank to the Borrower subject in all respects to the execution of this Deed.

NOW THIS DEED WITNESSETH that the parties hereto for themselves and their respective successors or

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"B"

Variation  
Agreement  
between Tacking  
Point Downs Pty.  
Ltd. and other  
persons and  
companies  
(added to  
Exhibit "B")  
2nd March 1976  
(cont'd)

personal representatives (as the case may be) and assigns hereby mutually covenant and agree as follows:-

1. BENEFICIAL at the request of all the other parties hereto agrees to provide to the Bank an amended take-out guarantee in the form of the draft letter from Beneficial to the Bank annexed hereto and signed by the parties for the purposes of identification.

2. THE commitment fee payable by the Borrower to Beneficial as provided for in Clause 3 of the Principal Agreement shall be varied in the following respects:-

- (a) A commitment fee of three-quarters of one per cent (0.75%) per quarter in advance shall be payable in respect of Beneficial's potential liability to the Bank under the amended take-out guarantee as from the date of provision of the amended take-out guarantee by Beneficial to the Bank in respect of:-
- (i) the Bank's liability as endorser under the Commercial Bill Non-Discount Acceptance Line of One million dollars (\$1,000,000.00);
- (ii) the overdraft facilities to be extended by the Bank to the Borrower; and
- (iii) all interest and other charges from time to time owing by the Borrower to the Bank
- (b) A commitment fee of one-half of one per cent (0.5%) per quarter in advance shall be payable in respect of Beneficial's potential liability to the Bank under the amended take-out guarantee in respect of the indemnity/guarantee of Two hundred and fifty thousand dollars (\$250,000.00) to be provided by the Bank to the Port Macquarie Municipal Council as from the date of establishment of the indemnity/guarantee.
- (c) The commitment fee provided for in paragraph (a) hereof shall be in lieu of the fee provided for in Clause 3 of the Principal Agreement and in the event of the amended fee falling due for payment other than on a quarter day under the Principal Agreement then an appropriate adjustment on a daily basis shall be made.

10 3. THE Principal Agreement is further varied by deleting from paragraph (a) of Clause 8 thereof the reference to the sum of Nine hundred thousand dollars (\$900,000.00) and inserting in lieu thereof a reference to the sum of Two hundred and fifty thousand dollars (\$250,000.00) it being agreed by the parties that the maximum liability of Beneficial by way of take-out guarantee to the Bank (following any increased accommodation granted by the Bank to the Borrower as contemplated by Clause 8 of the Principal Agreement) shall be One million seven hundred thousand dollars (\$1,700,000.00).

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Variation Agreement between Tacking Point Downs Pty. Ltd. and other persons and companies (added to Exhibit "B")  
2nd March 1976  
(cont'd)

20 4. BENEFICIAL agrees that upon the gazettal of an Interim Development Order permitting residential development of Stage 1 of the Borrower's Port Macquarie lands (being Portions 15 and 70 of the Parish of Macquarie) it will release the collateral securities referred to in paragraphs (c)(ii) (John's River Caravan Park), (d)(iv) (Sedger Road, Kenthurst), (e)(i) (Cairnes Road, Glenorie) and (e)(ii) Black's Road, Arcadia) of the Second Schedule to the Principal Agreement.

30 5. THE Borrower, the Guarantors and the Sureties acknowledge that their respective obligations under the Principal Agreement (as amended by the Amending Deed) and under the guarantees and securities provided or to be provided by them or any one or more of them to Beneficial in pursuance of the terms of the Principal Agreement shall extend to and include all moneys which may be paid by Beneficial to the Bank under the terms of the amended take-out guarantee and the commitment fees provided for in this Deed and any other moneys payable by the Borrower to Beneficial in accordance with the terms of this Deed.

40 6. IN all other respects the parties hereto confirm the terms of the Principal Agreement (as amended by the Amending Deed and this Deed) and of the securities referred to in the Principal Agreement as Beneficial's Securities (save to the extent that the obligations on the part of the mortgagors therein have been varied by this Deed) and the covenants agreements and obligations on their respective parts contained or implied in the aforesaid documents.

50 7. THE Borrower shall pay all legal costs and disbursements incurred by Beneficial in relation to the preparation execution and stamping of this Deed and the establishment of the amended take-out guarantee and the preparation and execution of the two Deeds between (inter alia) the Borrower,

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companies  
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Beneficial, the Bank and Port Macquarie  
Municipal Council relative to rezoning of the  
Borrower's land at Port Macquarie.

IN WITNESS whereof the parties hereto have  
hereunto set their hands and seals on the day and  
year first hereinbefore written.

THE COMMON SEAL of TACKING )  
POINT DOWNS PTY. LIMITED was ) Sgd.  
hereunto affixed in the ) J.V. Dulhunty C.S.  
presence of:- ) Director

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Sgd. B.J. Flood  
Secretary

SIGNED SEALED AND DELIVERED )  
by the said JOHN VENOUR ) Sgd.  
DULHUNTY in the presence of:- ) J.V. Dulhunty C.S.

Sgd. B.J. Flood

THE COMMON SEAL of TERUKIM )  
PTY. LIMITED was hereunto ) Sgd.  
affixed in the presence of:- ) J.V. Dulhunty C.S.  
Director

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Sgd. B.J. Flood  
Secretary

THE COMMON SEAL of HALISBURY )  
PTY. LIMITED was hereunto ) Sgd.  
affixed in the presence of:- ) J.V. Dulhunty C.S.  
Director

Sgd. B.J. Flood  
Secretary

THE COMMON SEAL of VENDUL )  
MANAGEMENT PTY. LIMITED was ) Sgd.  
hereunto affixed in the ) J.V. Dulhunty C.S.  
presence of:- ) Director

30

Sgd. B.J. Flood  
Secretary

THE COMMON SEAL of VENDUL )  
INTERNATIONAL PTY. LIMITED was ) Sgd.  
hereunto affixed in the ) J.V. Dulhunty C.S.  
presence of:- ) Director

Sgd. B.J. Flood  
Secretary

THE COMMON SEAL of ROWINI )  
HOLDINGS PTY. LIMITED was ) Sgd.  
hereunto affixed in the ) J.V. Dulhunty C.S.  
presence of:- ) Director

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Sgd. B.J. Flood  
Secretary

THE COMMON SEAL of HUDSON & )  
WALLACE (TRADING) PTY. ) Sgd.  
LIMITED was hereunto ) J.V. Dulhunty C.S.  
affixed in the presence of:- ) Director

Sgd. B.J. Flood  
Secretary

Exhibits  
"B"  
Variation  
Agreement  
between Tacking  
Point Downs Pty.  
Ltd. and other  
persons and  
companies  
(added to  
Exhibit "B")  
2nd March 1976  
(cont'd)

10 THE COMMON SEAL of BENEFICIAL )  
FINANCE CORPORATION LIMITED )  
was hereunto affixed in the )  
presence of:- ) Director  
Secretary

-----  
BENEFICIAL FINANCE CORPORATION LIMITED

TO: Australia & New Zealand Banking Group  
Limited.

re: Tacking Point Downs Pty. Limited and other  
related companies.

W H E R E A S :-

- 20 A. Australia & New Zealand Banking Group Limited  
(hereinafter called "the Bank") by an  
Agreement with Beneficial Finance Corporation  
Limited (hereinafter called "Beneficial")  
dated 4th April, 1974 (hereinafter referred  
to as "the original take-out letter") agreed  
to provide certain loans, commercial bills and  
other banking accommodations to Tacking Point  
Downs Pty. Limited and other related  
companies (hereinafter called "the Borrower")  
up to a maximum amount of \$1.1 Million.
- 30 B. By a further Agreement between the same parties  
dated 1st May 1974 the advance hereinbefore  
referred to was reduced from \$1.1 Million to  
\$1 Million (hereinafter called "the original  
advance").
- 40 C. In the said Agreement dated 4th April 1974  
Recital C erroneously refers to a first  
mortgage to the Bank in respect of the  
additional fifty six (56) acres of land referred  
to in the said Recital and the parties hereto  
acknowledge that this mortgage has always been  
a second mortgage ranking behind a first  
mortgage in favour of E.J. Cunning.
- D. Pursuant to the terms and conditions of the  
original take-out letter Beneficial agreed  
to pay out and discharge the Borrower's  
liability to the Bank in respect of the  
original advance.

Exhibits  
"B"  
Variation  
Agreement  
between Tacking  
Point Downs Pty.  
Ltd. and other  
persons and  
companies  
(added to  
Exhibit "B")  
2nd March 1976  
(cont'd)

- E. The Bank has provided or agreed to provide additional loans commercial bills and other banking accommodation to the Borrower up to a maximum amount (including the original advance) of \$1.45 Million (hereinafter called "the principal") (subject to Beneficial extending the terms of the original take-out letter to cover the said principal).
- F. The parties hereto have agreed to vary certain terms and conditions referred to in the Agreements dated 4th April 1974 and 1st May 1974 in the manner hereinafter set forth. 10

NOW IT IS HEREBY AGREED as follows:-

1. IN the event of the Borrower's liability to the Bank in respect of the principal not being totally discharged and satisfied on or before 31st March 1978 (hereinafter called "the expiration date") Beneficial will at the expiration of ninety (90) days notice in writing given to it by a duly authorised officer of the Bank, forthwith pay to the Bank the whole of the principal then owing together with all bank interest on the principal and all bank charges of and incidental thereto, owing to the Bank by the Borrower as at the date of payment, or otherwise make such arrangements to repay the Bank as are satisfactory to the Bank to fully discharge the liability of the Borrower to the Bank under the loan at the expiration of the said ninety (90) days notice PROVIDED HOWEVER that upon Beneficial complying with the terms of this letter of take-out, the Bank will at the expense of the Borrower transfer and assign its interest in the Bank's securities (as described in the original take-out letter and subject to paragraph 3 of the original take-out letter) to Beneficial in a manner and form satisfactory to Beneficial and its Solicitors AND PROVIDED FURTHER that the Bank shall not have hitherto and shall not pending the expiration date have done or omitted to do any act matter or thing (whether in the way of exercising or omitting to exercise any of the powers conferred on the Bank by the Bank's said securities or otherwise) as a result of which act or omission the value or the effectiveness of the Bank's securities shall have been in any way diminished or impaired (save in the manner contemplated by paragraph 3 of the original take-out letter). 20 30 40

2. SUBJECT to the proviso hereto contained Beneficial's liability hereunder is limited to the sum of \$1.45 Million which comprises:- 50

- (a) The Bank's liability as endorser under the Commercial Bill Non-Discount Acceptance Line of \$1 Million;

- (b) The Bank's liability under an indemnity/guarantee provided or to be provided by the Bank to the Port Macquarie Municipal Council on behalf of the Borrower in the sum of \$250,000.00; and
- (c) Overdraft facilities up to \$200,000.00 to be extended by the Bank to the Borrower to meet development expenses on the Borrower's Port Macquarie lands, all drawings on which must be countersigned by a nominee of Beneficial.

Exhibits

"B"  
Variation Agreement between Tacking Point Downs Pty. Ltd. and other persons and companies (added to Exhibit "B")  
2nd March 1976  
(cont'd)

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20  
PROVIDED HOWEVER that notwithstanding anything hereinbefore contained or contained in the original letter of take-out Beneficial shall in addition to repaying the principal, pay to the Bank interest on the said principal and all other charges normally made by the Bank up to the date of discharge of its securities including but not limited to the following, namely all holding charges, rates, land tax, take-out fees, endorsement fees and indemnity guarantee fees.

3. THE liability of Beneficial under paragraph 1 hereof includes and is not in addition to its liability under the original take-out letter, the terms of which shall continue to apply save as herein varied.

30  
4. BENEFICIAL'S liability hereunder is conditional upon the Bank procuring the due payment by the Borrower or itself paying firstly the arrears of the commitment fees totalling \$10,000.00 owing by the Borrower under the Agreement of 4th April 1974 between (inter alia) Beneficial and the Borrower such payment to be made not later than 4th April 1976 and secondly all future commitment fees payable by the Borrower to Beneficial under the terms of the said Agreement (being at the rate of 3% per annum payable quarterly in advance).

40  
5. BENEFICIAL hereby acknowledges that up to the date hereof there has been no breach by the Bank of any terms or conditions of the original take-out letter and that if there has been any such breach or breaches then such breach or breaches have been waived by Beneficial.

50  
6. THE Bank undertakes and agrees that if at any time after the date hereof the Bank becomes aware that the Borrower has defaulted in the due performance or observance of any covenant obligation or agreement on the part of the Borrower contained or implied in any one or more of the Bank's securities entitling the Bank to exercise its powers of entry into possession sale foreclosure or otherwise under the Bank's securities then and in



Exhibits  
"B"  
Variation  
Agreement  
between Tacking  
Point Downs Pty.  
Ltd. and other  
persons and  
companies  
(added to  
Exhibit "B")  
2nd March 1976  
(cont'd)

any such event the Bank shall forthwith give notice in writing to Beneficial specifying the default which has occurred and at any time thereafter Beneficial may in its absolute and uncontrolled discretion elect to pay to the Bank forthwith (notwithstanding the provisions of paragraph 1 hereof) the principal and all other moneys owing by the Borrower to the Bank (as hereinbefore specified) as at the date of payment whereupon the Bank will at the expense of the Borrower transfer and assign its interest in the Bank's securities to Beneficial in a manner and form satisfactory to Beneficial and its Solicitors.

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SIGNED for the purposes of identification: On the 2nd day of March, 1976.

Sgd. B.J. Flood  
.....  
For Tacking Point Downs Pty. Limited

Sgd. J.V. Dulhunty  
.....  
John Venour Dulhunty

Sgd. J.V. Dulhunty and B.J. Flood  
.....  
For Terukim Pty. Limited

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Sgd. J.V. Dulhunty and B.J. Flood  
.....  
For Halisbury Pty. Limited

Sgd. J.V. Dulhunty and B.J. Flood  
.....  
For Vendul Management Pty. Limited

Sgd. J.V. Dulhunty and B.J. Flood  
.....  
For Vendul International Pty. Limited

Sgd. J.V. Dulhunty and B.J. Flood  
.....  
For Rowini Holdings Pty. Limited

Sgd. J.V. Dulhunty and B.J. Flood  
.....  
For Hudson & Wallace (Trading) Pty. Limited

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.....  
For Beneficial Finance Corporation Limited

"C"(i) - Letter - Defendant to Plaintiff  
19th December 1977

Exhibits  
"C"(i)  
Letter -  
Defendant to  
Plaintiff

Australia and New Zealand Banking Group Limited  
New South Wales Administration  
20 Martin Place, Sydney  
P.O. Box 495,  
Sydney NSW 2001  
Telephone 231 0011

DMM: md

10 19th December, 1977.

Mr. F.J. Kelly,  
Regional Manager,  
Beneficial Finance Corporation Ltd.,  
Beneficial House,  
285 George Street,  
SYDNEY NSW 2000.

Dear Frank,

TACKING POINT DOWNS PTY LTD

20 It is regretted that we have not replied earlier  
to your request regarding the building of houses  
on the above estate. However, you will appreciate  
our reasons for this.

In relation to the house building, the Bank is not  
interested in providing any further finance, even  
though this would be covered by your letter of take  
out.

30 Additionally you had asked of the Bank's attitude  
to extension of your letter of take out, as amended.  
This has been the reason for our delay as this  
aspect has been given considerable thought. The  
Bank has decided it will call under the letter of  
take out on the expiry of it, on 31st March 1978.  
Mr. Dulhunty has today been informed of the Bank's  
decision.

I am on leave until 23rd January and it is  
suggested that after that date arrangements be made  
to discuss in detail, any aspects.

Yours sincerely,  
Sgd. D.M. Murphy

40 DENNIS M. MURPHY  
SENIOR MANAGER CORPORATE ACCOUNTS

RECEIVED  
DATE STAMPED 21 DEC 1977

Exhibits

"C"(11)  
Letter -  
Plaintiff to  
Defendant  
7th February  
1978

"C"(ii) - Letter - Plaintiff to  
Defendant - 7th February 1978

BENEFICIAL FINANCE CORPORATION LIMITED  
Beneficial House, 285-287 George Street,  
Sydney, New South Wales 2000.  
Telephone 29 5244 Code Address: BENFINANCE  
G.P.O. Box 2715

7th February, 1978  
FJK.EW

Mr. D.M. Murphy,  
Senior Manager Corporate Accounts,  
Australia & New Zealand Banking Group Limited,  
20 Martin Place,  
SYDNEY N.S.W. 2000.

10

Dear Sir,

Re: Tacking Point Downs Pty. Limited

We acknowledge receipt of your letter of the 19th  
December, 1977.

The terms of the letter and the circumstances  
leading to its despatch have caused us to  
critically examine our position. Accordingly, we  
must point out that there has occurred non-  
fulfilment with the condition contained in Clause  
4 of the Undertaking of 2 March 1976 and that  
accordingly, our liability under Clause 1 to "take-  
out" cannot and will not be accepted on our part.  
The non-fulfilment comprises at least the non-  
payment of the last commitment fee to fall due and  
payable under the terms of the relevant Agreement  
with the Borrower on 4 January, 1978.

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30

In addition to Clause 4, there has occurred non-  
fulfilment of the following further contractual  
conditions:

- (i) That contained in Clause 6 of the 2 March  
1976 Undertaking, relating to the giving to  
us of notice specifying defaults. You would  
doubtless be aware of all relevant defaults.  
No notice thereof has ever been given to us.
- (ii) That contained in Clause 2 of the letter of  
undertaking dated 4 April 1974, as preserved  
by Clause 3 of the 2 March 1976 Undertaking,  
relating to the making of further advances  
without our consent. Again, you would  
doubtless have full details of such advances.
- (iii) That contained in the second proviso to  
Clause 1 of the 2 March 1976 Undertaking

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relating to acts or omissions  
diminishing or impairing the value or  
effectiveness of the Bank's securities.

Exhibits  
"C" (ii)  
Letter -  
Plaintiff to  
Defendant  
7th February  
1978.  
(cont'd)

10 Additionally, contrary to Recital B contained  
in the letter of 4 April 1974, no floating  
debenture charge over the assets and undertakings  
of the Borrower then existed, nor was in fact  
obtained until 23 December 1975; both of the  
undertakings referred to in this letter were  
predicated, whether expressly or by implication,  
on the charge having been in existence on or before  
4 April 1974 and upon such charge being ultimately  
available for transfer contemporaneously with "take-  
out".

20 For the foregoing and any other grounds which may  
be presently available to us, we repeat that we  
must decline liability to "take-out" under Clause  
1 of the 2 March 1976 Undertaking. In case you  
dispute our entitlement to so decline liability,  
we have instructed our solicitors to prepare a  
Summons for declaratory relief so that any such  
dispute can be conveniently determined by the  
Supreme Court as early as possible. Could you  
please let us know your views on the matter  
within the next ten days.

Yours faithfully,  
Sgd. F.J. Kelly  
F.J. KELLY  
REGIONAL MANAGER.

30 c.c. Mr. D.E. Moore, Managing Director.  
c.c. Mr. T.M. Siegele, Operations Manager B.S.P.

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"C"(iii) - Letter Defendant to Plaintiff  
14th February 1978

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"C"(iii) -  
Letter  
Defendant to  
Plaintiff  
14th February  
1978.

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
New South Wales Administration  
20 Martin Place, Sydney  
P.O. Box 495, Sydney NSW 2001  
Telephone 231 0011

AEB:md

40 14th February, 1978                      date stamped RECEIVED  
17 FEB 1978

Mr. F.J. Kelly,  
Regional Manager,  
Beneficial Finance Corporation Limited,  
285-287 George Street,  
SYDNEY NSW 2000.

Exhibits

"C"(iii) -  
Letter -  
Defendant to  
Plaintiff  
14th February  
1978.  
(cont'd)

Dear Sir,

TACKING POINT DOWNS PTY LIMITED

We acknowledge receipt of your letter of the 7th instant indicating that your Company intends to deny liability to make payment to the Bank pursuant to the Letter of Take Out dated 4th April, 1974 and subsequent amendments to the same which were executed by your Company.

With respect to the various matters raised in your letter of the 7th instant as reasons why your Company considered it was not under liability to the Bank we reply as follows:

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1. With regard to your statement that the last commitment fee due on 4th January, 1978 has not been paid it is noted that you did not inform the Bank of this before your letter of the 7th instant, and further, that as your Company is required under account authority to countersign all cheques of Tacking Point Downs Pty Limited your Company had adequate means of seeing that payment was made at the correct time or of informing the Bank if it was not. Pursuant to Clause 4 of the amending Agreement of 2nd March 1976 we have endeavoured to arrange issue of a cheque to cover the amount of the Commitment Fee to 4/1/78 but our efforts have been thwarted by your refusal to allow issue of a cheque form from the book which is held by you and in terms of the Bank Authority we are aware that such cheques are to be counter-

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2. With regard to the giving to your Company under Clause 6 of the amending Agreement of 2nd March 1976 notice of defaults under the securities held by the Bank, we would enquire what defaults your Company alleges have occurred. The Bank, not having had notice of any defaults under the securities, has not been required to give any notice of defaults to your Company.

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3. With regard to the suggestion that the Bank has made further advances to Tacking Point Downs Pty Limited without your Company's consent, this is emphatically denied. Your Company has at all times been aware of increases granted and its representatives in fact have been involved with the interviews held with the Bank to arrange increases. Your Company's representative actually signed acknowledgement and confirmation of the last arrangement for increase contained in the Bank's letter to your Company of 10th August 1977.

50

4. With regard to the suggestion that the Bank has by its acts or omissions impaired the value or effectiveness of the Bank's securities, this is also emphatically denied. We would suggest that you specify such acts and omissions of the Bank as your Company alleges have occurred and have had the effect above mentioned.

Exhibits  
"C" (iii) -  
Letter -  
Defendant to  
Plaintiff  
14th February  
1978  
(cont'd)

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5. With regard to your Company's complaint that the floating debenture charge referred to in Recital B of the Letter of Take Out of 4th April, 1974 was not in fact obtained by the Bank until 23rd December 1975, it is pointed out, first, that the Letter of Take Out is addressed by your company to the Bank and executed by your Company and is not addressed to your Company or executed by the Bank; secondly, that the floating debenture charge was in fact obtained and is still subsisting and available for assignment to your Company on Take Out; thirdly, there is no evidence of any kind that your Company's position has been or will be prejudiced by the fact that the floating debenture charge was not in existence at 4th April, 1974.

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6. Finally, in relation to all the foregoing matters, we would call your Company's attention to Clause 5 of the amending Agreement of March 2nd 1976 which was executed by your Company which states that up to the date of that Agreement there had been no breach by the Bank of the original Letter of Take Out, of 4th April, 1974 and that if there had been any such breach then the breach had been waived by your Company.

40

The Bank considers that your Company is bound by the Letter of Take Out, as amended, and intends to enforce its rights against your Company. In these circumstances we see no merit in the application to Court for declaratory relief proposed by you.

Yours faithfully,

Sgd. A.E. Bown

A.E. BOWN  
SENIOR MANAGER CORPORATE ACCOUNTS

Exhibits

"C"(iv) -  
Letter -  
Tacking Point  
Downs Pty. Ltd.  
to Plaintiff  
17th February  
1978.

"C"(iv) - Letter - Tacking Point  
Downs Pty. Limited to Plaintiff  
17th February 1978

TACKING POINT DOWNS PTY. LIMITED

Telephone 241-3681  
P.O. Box 5180  
Sydney, 2001

8th Floor,  
139 Macquarie Street,  
Sydney, 2000.

February 17, 1978.

The Manager  
Beneficial Finance Corporation Limited,  
285 George Street,  
SYDNEY, N.S.W., 2000.

10

RECEIVED  
17 FEB. 1978.

Attention: Mr. F.J. Kelly

Dear Sir,

Enclosed is a cheque in the sum of \$14,402-82  
representing the guarantee fee due to your company  
in respect of the quarter ended 4th April 1978.

Kindly note that this cheque requires the  
signature of one of your representatives prior to  
your banking it.

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Yours faithfully,

TACKING POINT DOWNS PTY. LIMITED

Sgd. B.J. Flood

Encl.

"C"(v) -  
Letter -  
Plaintiff to  
Tacking Point  
Downs Pty. Ltd.  
21st February  
1978.

"C"(v) - Letter - Plaintiff to Tacking  
Point Downs Pty. Limited - 21st  
February 1978

21st February, 1978.  
FJK.EW

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The Secretary,  
Tacking Point Downs Pty. Limited,  
8th Floor,  
139 Macquarie Street,  
SYDNEY, N.S.W. 2000.

Dear Sir,

We refer to your letter of 17th February.

On 7th February we notified the Australian New

Zealand Banking Group Limited that this Company would withdraw the take-out facility by reason of breaches on the part of the Bank of the arrangements that had pre-existed the date of our letter. Inter alia, the non-payment to us of the commitment fee due on 4th January, 1978 was one of the matters of which this Company complained.

Exhibits  
"C"(v) -  
Letter -  
Plaintiff to  
Tacking Point  
Downs Pty. Ltd.  
21st February  
1978.  
(cont'd)

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In the circumstances we return herewith your cheque and would ask that you make arrangements with the Bank for fresh authorities not involving officers of this Company as a signatory to the No. 3 Account.

Yours faithfully,  
Sgd. F.J. Kelly  
F.J. KELLY  
REGIONAL MANAGER.  
Att.

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"C"(vi) - Letter Defendant to Plaintiff  
and enclosed cheque 7th March 1978

"C"(vi) -  
Letter  
Defendant to  
Plaintiff and  
enclosed  
cheque  
7th March 1978

ANZ BANK  
Australia and New Zealand Banking Group Limited,  
New South Wales Administration  
20 Martin Place, Sydney N.S.W.  
P.O. Box 495 Sydney NSW 2001 Telephone 231 0011  
7th March, 1978

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The Manager,  
Beneficial Finance Corporation Limited,  
Beneficial House,  
George Street,  
SYDNEY, N.S.W. 2000.

Dear Sir,  
Tacking Point Downs Pty. Ltd.

We enclose our Bank Cheque for \$14,402.82 covering Commitment fee for the period ended 4/4/78 in connection with your Letter of Take Out on account of the above company.

Yours faithfully,  
Sgd. A.E. Bown.

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A.E. Bown,  
Senior Manager  
Corporate Accounts.  
sv.



Exhibits

"C"(vi) -  
Letter  
Defendant to  
Plaintiff and  
enclosed cheque  
7th March 1978  
(cont'd)

ANZ BANK  
Australia and New Zealand Banking Group Limited  
Pitt & Hunter Streets, 012-003 7 MARCH 1978  
Sydney, NS.W.  
  
Pay BENEFICIAL FINANCE CORPORATION LIMITED or bearer  
The sum of FOURTEEN THOUSAND FOUR HUNDRED AND TWO  
DOLLARS AND EIGHTY TWO CENTS \$ 14,402.82  
For Australia and New Zealand Banking Group Limited

Sgd. ? Sgd. ?  
Manager Accountant

135858 012 003 95 01047

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"C"(vii)  
Letter  
Plaintiff to  
Defendant  
8th March 1978

"C"(vii) - Letter Plaintiff to Defendant  
8th March, 1978

8th March, 1978  
RJK.EW

Mr. A.E. Bown,  
Senior Manager,  
Corporate Accounts,  
A.N.Z. Bank,  
20 Martin Place,  
SYDNEY N.S.W. 2000.

20

Dear Mr. Bown,

re: Tacking Point Downs Pty. Limited

Your letter of the 7th March was delivered to our  
counter this morning.

You are referred to our letter of the 7th February,  
1978 and subsequent correspondence and to the  
proceedings between us listed for mention tomorrow.  
The purported tender is rejected and your cheque is  
returned herewith.

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Yours faithfully,

Sgd. F.J. Kelly  
F.J. KELLY  
REGIONAL MANAGER.

Encl.

"D"(i) - Certificate of Registration  
of Charge - 19th January, 1976

Exhibits

"D"(i) -  
Certificate of  
Registration  
of Charge  
19th January  
1976.

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CORPORATE AFFAIRS COMMISSION  
NEW SOUTH WALES

No. of Company  
158905

Certificate of Registration of Charge  
Companies Act, 1961 (Section 103 (2))

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This is to Certify that a MORTGAGE DEBENTURE dated the twenty-third day of December, 1975, created by TACKING POINT DOWNS PTY. LIMITED in favour of AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED to secure advances from time to time has this day been registered and numbered 27403 in the Register of Charges.

Given under the seal of the Corporate Affairs Commission at Sydney, this nineteenth day of January 1976.

Sgd. F.J.D. Ryan  
Commissioner.

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"D"(ii) - Floating Charge from Tacking  
Point Downs Pty. Limited in favour of  
Defendant - 23rd December, 1975

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"D"(ii) -  
Floating Charge  
from Tacking  
Point Downs  
Pty. Ltd. in  
favour of  
Defendant - 23rd  
December, 1975

STAMP DUTY \$ =06.00

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THIS MORTGAGE DEBENTURE is issued under the powers contained in its Memorandum and Articles of Association by Tacking Point Downs Pty. Limited a Company incorporated in the State of New South Wales and having its registered office at 8th Floor, 139 Macquarie Street, Sydney in the said State (hereinafter called "the Mortgagor") to AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (hereinafter called "the Bank") AND WITNESSES that WHEREAS the Bank has granted or agreed to grant to the Mortgagor or to third parties at the request of the Mortgagor but only during the pleasure of the Bank certain cash credit accommodation and for the purpose of securing such accommodation and all moneys hereinafter mentioned the Mortgagor has agreed to execute these presents NOW THEREFORE in pursuance and in consideration of the premises

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Exhibits

"D"(ii) -  
Floating Charge  
from Tacking  
Point Downs  
Pty. Ltd. in  
favour of  
Defendant -  
23rd December  
1975.  
(cont'd)

and in further consideration of the forbearance of the Bank from requiring immediate payment of certain moneys (if any) for which the Mortgagor or any third party aforesaid is now indebted and liable to the Bank the Mortgagor as beneficial owner DOTH HEREBY CHARGE ALL AND SINGULAR its undertaking and all its assets whatsoever and wheresoever both present and future including its uncalled capital for the time being and including all assets acquired after the date or dates upon which the floating security hereby created crystallizes (hereinafter referred to as "the mortgaged premises") with the payment to the Bank on demand in writing signed by any officer of the Bank or by the Solicitors of the Bank all and every sums and sum of money loans and advances heretofore lent or made by the Bank or by Australia and New Zealand Bank Limited or by The English Scottish and Australian Bank Limited or which may now or hereafter be lent or made by the Bank to or for the use or accommodation or at the request of the Mortgagor and for the time being remaining unpaid on any account or in any way whatsoever: AND ALSO all moneys which the Bank or Australia and New Zealand Bank Limited or The English Scottish and Australian Bank Limited has paid or become liable to pay or which the Bank shall pay or become liable to pay to for or on account of the Mortgagor either alone or jointly with any other or others and either by direct advances or by reason of accepting or paying or discounting any order draft cheque promissory note Bill of Exchange or other engagement or by entering into any bond indemnity or guarantee or otherwise incurring liabilities for or on behalf of the Mortgagor ALSO all moneys owing or to become owing by the Mortgagor in respect of any other loans credits or advances or in respect of leasing agreements or of any guarantee undertaking or obligation which has heretofore been given or incurred by the Mortgagor to the Bank or to Australia and New Zealand Bank Limited or to The English Scottish and Australian Bank Limited or which may hereafter be given or incurred by the Mortgagor to the Bank ALSO ALL moneys costs (as between Solicitor and own client) charges and expenses which the Bank shall pay or become liable to pay in or incidental to preparing completing stamping or registering these presents or to investigating or perfecting or defending the title to the mortgaged premises or exercising or attempting to exercise any right or remedy of the Bank hereunder or of any such demand as aforesaid or on account of or arising out of any default by the Mortgagor in duly performing or observing any of the covenants or agreements on the part of the Mortgagor contained or implied herein or in any other security over the mortgaged premises or any part thereof ALSO ALL moneys payable or to become payable for discounts postages commissions charges

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exchanges re-exchanges and other lawful and accustomed charges and expenses according to the usage and course of business of the Bank AND ALSO interest upon all such moneys as aforesaid at the rate or rates and in the manner from time to time usually charged by the Bank to its other customers on accounts of a similar nature or in the case of so much (if any) of the principal money as to which the Bank hereunder or in pursuance of any agreement between the Bank and the Mortgagor has the right at any time or from time to time to determine the rate or rates applicable thereto (irrespective of the rate or rates usually charged by the Bank to its other customers on any accounts of a similar nature) at the rate or rates from time to time applicable thereto which interest shall be considered as accruing from day to day and be payable on demand but until demanded shall be payable half-yearly on the usual half-yearly days for balancing the books of the Bank from time to time the first of such payments to be made on the first of such half-yearly days following the date hereof and any interest remaining unpaid on any such half-yearly day of payment may together with all customary charges and whether or not the relation of Banker and Customer may for the time being be existing be turned into principal and shall thenceforth be deemed part of the principal money intended to be hereby secured and carry interest at the rate or rates from time to time applicable to the account or respective accounts to which such unpaid interest shall be debited but such accrued and unpaid interest shall not by reason of such capitalisation be deemed to have been advanced by the Bank or to have been actually paid for any purpose whatsoever And it is declared that a certificate in writing signed by any officer of the Bank certifying to the rate or rates of interest from time to time or at any time charged by the Bank or applicable as aforesaid shall be conclusive evidence of the rate or rates therein certified to and payable hereunder and that a statement of the indebtedness on any account of the Mortgagor to the Bank signed in like manner shall be conclusive evidence against all parties interested hereunder of the amount of such indebtedness (all of which moneys liabilities and interest are hereinafter referred to as "the moneys hereby secured") AND the Mortgagor DOETH HEREBY COVENANT with the Bank as follows:-

1. The Mortgagor will on demand duly pay to the Bank the moneys hereby secured.

2. The Mortgagor will duly and punctually pay all rates taxes duties charges and assessments of

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every description now or hereafter charged or chargeable upon the mortgaged premises or any part thereof and will forthwith produce to the Bank the receipt for every such payment.

3. The Mortgagor will duly and punctually pay all rent and perform and observe all covenants and conditions on the part of the lessee contained or implied in any lease or underlease for the time being held by the Mortgagor and will forthwith produce to the Bank the receipt for every such payment.

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4. The Mortgagor will duly and punctually comply with and observe all statutes ordinances or other legislation now or hereafter in force and all ordinances regulations and by-laws as the case may be thereunder and all requirements and orders of any authority statutory or otherwise in all cases in which the non-compliance therewith or non-observance thereof would or might impose some charge or liability upon the mortgaged premises or any part thereof or prejudicially affect this security.

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5. The Mortgagor will keep in good repair working order and condition all buildings fixtures plant machinery and chattels affixed to or forming part of the mortgaged premises and will on being required by the Bank so to do forthwith amend every defect and want of repair therein.

6. The Mortgagor will insure and keep insured against loss or damage by fire and against such other risks as the Bank may require in the full insurable value in the name of the Bank with some insurance company to be approved of by the Bank such of the mortgaged premises as are of an insurable nature and will punctually pay all moneys necessary for effecting and keeping up such insurance and forthwith produce to the Bank every policy and receipt relating thereto.

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7. The Mortgagor will not without the consent in writing of the Bank first had and obtained employ any of the funds or other assets of the Mortgagor in the purchase of shares in any other company and will not without the like consent call up or receive in advance of calls any of the uncalled capital hereby charged and will not without such consent apply any of such capital when called up to any purpose other than in or towards payment of the moneys hereby secured.

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8. The Mortgagor has good right to charge the mortgaged premises in manner aforesaid free from encumbrances other than any securities already held by the Bank over the mortgaged premises or any part thereof.

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9. The Mortgagor and all persons in any way interested in the Mortgaged premises will at all times hereafter at the cost of the Mortgagor until sale hereunder or foreclosure and afterwards of the person requiring the same do all things and execute all instruments documents and other writings reasonably required for more perfectly assuring the mortgaged premises to the Bank or as the Bank may direct.

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10. If the Mortgagor makes default in duly performing or observing any covenant or agreement on the part of the Mortgagor herein contained or implied it shall be lawful for but not obligatory upon the Bank without prejudice to any other right power or remedy of the Bank herein (whether express or implied) to do all things and pay all moneys necessary or expedient in the opinion of the Bank to make good such default to the satisfaction of the Bank.

11. All moneys which the Bank may pay or expend under any power or authority herein contained or implied or in consequence of any default that may be made by the Mortgagor in the performance or observance of any covenant or condition of these presents and all costs (including costs as between Solicitor and own client) charges and expenses already or hereafter incurred by the Bank of or incidental to the preparation completion and registration of these presents or of any collateral security or for the purpose of giving effect to the security created by these presents or by any other security now or at any time hereafter held by the Bank for the moneys hereby secured or any part thereof shall be moneys hereby secured as aforesaid and shall from the time of payment of the said moneys respectively bear interest at such rate or rates as may from time to time be determined by the Bank (being a rate or rates not exceeding the highest of the rates for the time being charged on any other part of the principal money hereby secured) to accrue from day to day as aforesaid.

12. The Mortgagor will duly and punctually pay all principal interest and other moneys owing and secured under and by virtue of every security (if any) taking priority to these presents as and in the manner provided by such security and will duly and punctually observe and perform all other the covenants provisions conditions and agreements contained or implied in such security and that if default be made in the payment of such moneys or any of them or in the observance or performance of the said covenants provisions conditions and agreements or any or either of them it shall be lawful for but not obligatory

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upon the Bank (and without prejudice to any other rights powers or remedies of the Bank hereunder or by law) to pay such moneys or any part thereof as may be due and payable thereunder and to observe and perform the said covenants provisions conditions and agreements or any of them and all moneys paid or expenses incurred by the Bank under the power hereby conferred shall be moneys hereby secured and shall from time of payment of the said moneys respectively bear interest at the rate determined as aforesaid to accrue from day to day as aforesaid.

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13. The Mortgagor will forthwith on receipt thereof by itself or by any person on its behalf lodge or cause to be lodged with the Bank as security under these presents all mortgages liens or charges over any real or personal estate whatsoever which shall have been or shall be given to secure the payment of any moneys to the Mortgagor.

14. The Mortgagor will whenever requested by the Bank so to do execute in favour of the Bank for more perfectly securing the moneys hereby secured such legal mortgages transfers assignments or other securities over all or any part of the mortgaged premises in such forms and containing such powers (including but without limitation power of sale) and provisions as the Bank shall require

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15. The Mortgagor will once at least in every year or more frequently if so required by the Bank cause the books of the Mortgagor to be duly audited by an auditor to be approved of by the Bank and will immediately thereafter furnish to the Bank a copy of the balance sheet and trading and profit and loss accounts of the Mortgagor duly certified by such auditor and further the Mortgagor will at such other times as the Bank shall require furnish to the Bank true and correct financial statements accounts and reports showing the transactions and true financial position of the Mortgagor.

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AND IT IS HEREBY AGREED AND DECLARED as follows:-

16. The charge hereby created shall operate as a fixed charge as regards all uncalled capital good-will freehold and leasehold property fixtures engines machinery plant and other chattels (other than stock-in-trade) and all books of account vouchers and other documents relating in any way to the business transactions of the Mortgagor and all securities negotiable or otherwise and documents evidencing title to or right to possession of any property at any time deposited with or which under this security are required to be deposited with the Bank by the Mortgagor and the property mentioned in any such documents and shall operate as a floating security only as regards all other assets hereby

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charged but so that the Mortgagor shall not be at liberty to create any mortgage or charge in priority to or pari passu with this security or to make any assignment of its book debts or any of them except with the consent in writing of the Bank and so that the floating security hereby created shall ipso facto and without any act on the part of the Bank being necessary immediately become a fixed and specific charge upon the property and assets previously subject only to a floating security upon the moneys hereby secured becoming payable and the Bank may at any time by notice in writing to the Mortgagor signed by any officer of the Bank convert the floating charge hereby created into a specific charge as regards any assets forming part of the mortgaged premises which are specified in the notice and which in the reasonable opinion of an officer of the Bank may be in danger of being seized or sold under any sort of distress or execution levied or threatened or otherwise in jeopardy and may appoint a Receiver thereof in accordance with the succeeding provisions hereof.

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17. The moneys hereby secured shall at the option of the Bank (notwithstanding anything hereinbefore contained) immediately become due and payable and the security hereby created shall immediately become enforceable without the necessity for any demand or notice (and notwithstanding any delay or previous waiver of the provisions of this Clause by the Bank) upon the happening of any one or more of the following events:

- (a) if a petition is presented or an order is made or an effective resolution is passed for the winding up of the Mortgagor or a meeting is summoned or convened for the purpose of considering such a resolution;
- (b) if an encumbrancer takes possession of the mortgaged premises or any part thereof or threatens so to do or if a Receiver of the mortgaged premises or any part thereof is appointed or proposed;
- (c) if any execution or other process of any Court or Authority or any distress is issued out against or levied upon any of the mortgaged premises;
- (d) if the Mortgagor shall without the consent in writing of the Bank signed by any officer of the Bank first had and obtained create or purport or attempt to create any charge or mortgage ranking or which might by any means be made to rank on the mortgaged premises or any part thereof in priority to or pari passu with these presents;



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- (e) if the Mortgagor or any subsidiary of the Mortgagor shall stop payment or shall without the consent in writing of the Bank signed by any officer of the Bank cease or threaten to cease to carry on its business but a cessation of such business arising from a strike (sympathetic or otherwise) amongst any persons connected with such business or from any riot or fear thereof shall not be deemed a cessation until it has lasted two months; 10
- (f) if the Mortgagor enters into any arrangement or composition with its creditors or any of them or proposes so to do;
- (g) if the Mortgagor is placed under official management or a meeting is summoned or other step taken for the purpose of placing the Mortgagor under official management and appointing an Official Manager thereof;
- (h) if in the opinion of the Bank or any officer of the Bank the moneys hereby secured or any part thereof are applied for any purpose other than the purpose for which the same were advanced by the Bank or any works for which the same were advances shall not be carried out and performed in a manner satisfactory to the Bank or an officer of the Bank or shall not be carried out or performed with due expedition; 20
- ~~(i) if without the written consent of the Bank signed by any officer of the Bank the whole or any part of the banking business transacted by the Mortgagor with the Bank at the date hereof is subsequently transferred to another Banking Institution or Corporation;~~ 30
- (j) if default shall be made in payment as and when due of any moneys payable under any mortgage charge or encumbrance upon the mortgaged premises whether ranking in priority to pari passu with or subsequent to these presents; 40
- (k) if the Mortgagor shall fail to observe or perform any of the covenants on its part herein or in any collateral security contained;
- (l) if under the provisions of any Act or Ordinance or any other legislation for the time being in force in the Commonwealth of Australia or any State or Territory thereof an inspector is proposed or appointed to investigate the affairs of the Mortgagor; 50

- (m) if without the consent in writing of the Bank signed by any officer of the Bank first had and obtained the Mortgagor shall sell assign or transfer the whole or any part or parts of its undertaking or assets or attempts so to do otherwise than in the ordinary course of business of the Mortgagor;
- 10 (n) if the Mortgagor without the consent in writing of the Bank signed by any officer of the Bank first had and obtained passes a resolution determining that any portion of its share capital which has not been already called up shall not be capable of being called up except in the event and for the purposes of the Mortgagor being wound up;
- 20 (o) if the Mortgagor without the consent in writing of the Bank signed by any officer of the Bank first had and obtained reduces or attempts to reduce its capital;
- (p) if any lease or licence of any property or part thereof upon which the Mortgagor carries on business for the time being is determined by reason of any default on the part of the Mortgagor or if the Mortgagor shall commit any other breach in the performance or observance of any of the obligations thereby imposed upon it;
- 30 (q) if the Mortgagor without the consent of the Bank signed by any officer of the Bank first had and obtained makes any alterations in or amendments to the provisions of its Memorandum or Articles of Association which might in the reasonable opinion of the Bank detrimentally affect the interests of the Bank;
- 40 (r) if the Mortgagor is carrying on business at a loss and in the opinion of any officer of the Bank further prosecution by the Mortgagor of its business will endanger this security;
- (s) if the Mortgagor without the prior written consent of the Bank signed by any officer of the Bank offers for sale or sells factors alienates charges encumbers or parts with possession or disposes of all or any of the book debts of the Mortgagor or any rights of the Mortgagor in relation to all or any of the book debts of the Mortgagor.

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50 18. At any time after the moneys hereby secured become payable the Bank by notice in writing signed by any officer of the Bank may appoint any qualified

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person to be a Receiver of the mortgaged premises or any part thereof and may remove any Receiver and appoint another Receiver in his place and may fix the remuneration of any such Receiver and determine the conditions upon which he shall hold office PROVIDED ALWAYS that every such Receiver shall be the agent of the Mortgagor and the Mortgagor alone shall be responsible for his acts and defaults and such Receiver so appointed shall without any consent on the part of the Mortgagor have power:-

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- (a) to take possession of collect and get in the whole or any part of the mortgaged premises;
- (b) to take or grant or assign or surrender or accept surrenders of leases or sub-leases in the name of the Mortgagor or otherwise of the whole or any part of the mortgaged premises which leases or sub-leases may be from year to year or for any term of years or for any term less than a year at such rent and upon such terms and conditions as to such Receiver may seem expedient;
- (c) to carry on or concur in carrying on the business of the Mortgagor and to make and effect all repairs purchases and insurances and to do all acts which the Mortgagor might do in the ordinary conduct of its business for the protection or improvement of the mortgaged premises or any of them or for obtaining income or returns therefrom;
- (d) to borrow any moneys which in the opinion of the Receiver may be required for any of the purposes mentioned in this clause and in the name of the Mortgagor or otherwise to secure any moneys so borrowed by mortgage or charge over the mortgaged premises or any part thereof and so that such mortgage or charge may rank in priority to or pari passu with or after the charge hereby created;
- (e) without prejudice to the powers conferred by the preceding sub-paragraph to borrow moneys from the Bank for the purpose of carrying out any of the powers herein contained or conferred on the Receiver by law but so that unless otherwise agreed by the Bank any moneys so borrowed shall be deemed to have been borrowed by the Mortgagor on the security of the charge hereby created and shall carry interest accordingly and shall form part of the moneys hereby secured (but the provisions of this sub-paragraph shall be without prejudice to any greater priority which may be conferred by law in respect of the moneys so borrowed). The Bank shall not be bound to

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enquire as to the necessity for such borrowing and shall not be responsible for the application misapplication or non-application of the moneys so borrowed;

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(f) to sell or concur in selling all or any of the mortgaged premises either by public auction or by private contract or by tender or by way of hire purchase agreement and either for cash or on credit and upon such other terms and conditions as such Receiver may consider expedient and by deed or other instrument in the name and on behalf of the Mortgagor or otherwise to convey and assure the same to any purchaser;

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(g) to employ and appoint managers officers solicitors attorneys agents auctioneers workmen and servants for all or any of the purposes hereof at such salaries or remuneration as the Receiver shall think fit and to confer on or delegate to any such persons all or any of the powers authorities and discretions hereby conferred;

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(h) to make any arrangements or compromises which such Receiver shall think expedient in the interests of the Bank;

(i) to give receipts for all moneys and other assets which may come to the hands of such Receiver in exercise of any power hereby conferred and such receipts shall be sufficient discharges therefor and any person paying or handing over such moneys or other assets shall not be concerned to see to the application thereof;

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(j) to carry out and enforce specific performance of or otherwise obtain the benefit of all contracts entered into or held by the Mortgagor or entered into in exercise of the powers or authorities hereby conferred;

(k) to make debtors insolvent or bankrupt and to wind up companies and to do all things in connection with any insolvency bankruptcy or winding up which the Receiver shall think necessary for the recovery or protection of the mortgaged premises or any part thereof or for the security of the Bank;

(l) to take proceedings at law or in equity in the name of the Mortgagor or otherwise for all or any of the purposes aforesaid;

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(m) to do all things necessary to perform or observe any of the covenants on the part of the Mortgagor herein contained;

<p><u>Exhibits</u>  "D" (ii) -  Floating Charge  from Tacking  Point Downs  Pty. Ltd. in  favour of  Defendant  23rd December  1975.  (cont'd)</p>	<p>(n) To compel the execution by the Mortgagor or the Liquidator thereof of any contracts deeds instruments mortgages transfers assurances documents and things as may be considered by the Receiver to be desirable for the purpose of effectuating any sale disposition or mortgage or agreement made by such Receiver under the powers hereby or by law conferred;</p> <p>(o) to exercise all the powers of the Mortgagor and all the powers of the governing body of the Mortgagor;</p> <p>(p) to do all such other acts and things without limitation as such Receiver shall think expedient in the interests of the Bank;</p> <p>(q) to do all or any of the things or exercise all or any of the powers aforesaid in the name of the Mortgagor or otherwise</p> <p>19. The Mortgagor hereby for valuable consideration irrevocably appoints any such Receiver as its attorney for the purpose of enabling him in the name and on behalf of the Mortgagor to sign or sign seal and deliver all such conveyances transfers mortgages leases instruments notices agreements and other documents whatsoever and to take all such steps and proceedings and to do all such acts and things whatsoever as may in the opinion of such Receiver be necessary or expedient for carrying into effect completing or facilitating anything done or proposed to be done by such Receiver in exercise of any of the powers conferred on him under or by virtue of these presents.</p> <p>20. Notwithstanding a Receiver may or may not have been appointed as aforesaid it shall be lawful for the Bank at any time after default by the Mortgagor in the payment of any moneys hereby secured or in the observance or performance of any covenant or agreement on the part of the Mortgagor herein contained and without giving any notice to exercise all or any of the powers authorities and discretions conferred on a Receiver as aforesaid.</p> <p>21. All moneys received by any such Receiver or by the Bank under or by virtue of these presents shall be applied in manner following namely:-</p> <p>(a) in payment of all rents rates taxes and other outgoings having priority to the charge hereby created or which such Receiver or the Bank shall think fit to pay;</p> <p>(b) in keeping down all annual sums or other payments (if any) and the interest on all</p>	<p>10</p> <p>20</p> <p>30</p> <p>40</p> <p>50</p>
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principal sums (if any) having priority to the charge hereby created;

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10 (c) in payment of all costs charges expenses and outgoings properly incurred in or incidental to the exercise or performance or attempted exercise or performance of any of the powers or authorities hereby conferred such costs in the case of legal costs being charged as between Solicitor and own client;

(d) in payment of the remuneration of the Receiver;

(e) in payment to the Bank of the moneys hereby secured.

20 The surplus (if any) shall belong to the Mortgagor but such surplus shall not carry interest And the Receiver or the Bank shall be at liberty to pay the same to the credit of an account in the name of the Mortgagor in the books of the Bank and shall thereupon be under no further liability in respect thereof.

30 22. Neither the Bank nor any Receiver shall be answerable or accountable for any involuntary losses of any kind whatsoever which may happen in or about the exercise or execution of any of the powers or authorities herein contained and shall not by reason of the Bank or such Receiver entering into possession of the mortgaged premises or any part thereof be liable to account as mortgagee in possession or for anything except actual receipts or be liable for any loss upon realisation or for any default or omission for which a mortgagee in possession might be liable and every Receiver duly appointed under these presents shall be deemed as regards responsibility for loss damage or misconduct to be the agent of the Mortgagor which shall be solely responsible for his actions and defaults.

40 23. The Bank and every Receiver attorney manager agent or other persons appointed by the Bank hereunder shall be entitled to be indemnified out of the mortgaged premises in respect of all liabilities and expenses incurred by them it or him in the execution or purported execution of the powers authorities or discretions vested in them it or him pursuant to these presents including liabilities and expenses consequent on any mistake oversight error of judgment forgetfulness or want of prudence on the part of the Bank or any such  
50 appointee (unless the same shall amount to wilful or gross negligence) and against all actions proceedings costs claims and demands in respect of

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any matter or thing done or omitted in anywise relating to the mortgaged premises and the Bank may retain and pay out of any money in its hands arising from the provisions of these presents all sums necessary to effect such indemnity.

24. The Bank or any officer of the Bank shall be at liberty at any time to complete in favour of the Bank or any appointee of the Bank or any purchaser under the powers hereby given all instruments of whatever nature executed by or on behalf of the Mortgagor in blank and deposited with the Bank as collateral security to these presents.

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25. Upon the exercise of any power or authority herein contained or implied no person dealing with the Bank or any Receiver appointed as aforesaid or any attorney hereby appointed shall be bound to enquire whether any default has been made by the Mortgagor hereunder or whether any money remains owing on the security of these presents or otherwise as to the propriety or regularity of the exercise of such power or authority and notwithstanding any impropriety or irregularity therein such exercise shall as far as regards the safety and protection of such person be deemed to be valid and effectual and the remedy of the Mortgagor in respect of any impropriety or irregularity therein shall be in damages only.

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26. In the event of loss or damage by fire or otherwise the Bank alone shall have full power to make enforce and compromise every claim in respect of every insurance and to sue for recover receive and give discharges for all insurance moneys whether the policy be in the name of the Bank or the Mortgagor or both and whether the same shall or shall not cover other property as well as the mortgaged premises or part thereof And every such policy and the insurance moneys payable thereunder shall be held by the Bank as further security for the moneys hereby secured.

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27. In applying the purchase money to arise from any sale by the Bank or the Receiver hereunder towards satisfaction of the moneys hereby secured the Mortgagor shall be credited only with so much of the said money available for that purpose as shall be actually received in cash by the Bank such credit to date from the time of such receipt.

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28. A statement in writing signed by any officer of the Bank of the amount of the moneys hereby secured at the date mentioned in such statement shall be prima facie evidence that such amount is so due or owing or secured.

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29. The Bank may immediately or at any time

without notice to the Mortgagor blend or consolidate all or any of the Mortgagor's accounts current with the Bank so as to set off against any such accounts on which the Bank may be indebted to the Mortgagor any debt or part thereof owing by the Mortgagor to the Bank. Without prejudice to the generality of the foregoing if the Mortgagor has accounts current with the Bank in more than one State or Territory of the Commonwealth of Australia the Bank may blend or consolidate such accounts in the manner aforesaid in any one of such States or Territories as the Bank may in its absolute discretion think fit.

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30. It shall be lawful for any officer of the Bank or any person authorised by or on behalf of the Bank to enter upon the mortgaged premises at all reasonable times to inspect the state of repair and condition thereof and to inspect and take copies of or extracts from all books of account vouchers and other documents relating in any way to the business transactions of the Mortgagor.

31. Neither the taking of this security nor anything herein contained shall be held to merge discharge postpone or prejudice any other security now held or hereafter taken by the Bank for payment of any of the moneys hereby secured or affect any claim or demand which the Bank now has or may hereafter have against any other person whomsoever as surety or otherwise nor shall any other security now held or hereafter taken by the Bank abate or prejudice the powers and provisions herein contained and these presents shall be a continuing security notwithstanding any settlement of account intervening payment or other matter or thing whatsoever until a final discharge hereof shall have been given to the Mortgagor and that any specialty hereby created shall be deemed a collateral security and shall not operate as a merger of the remedy upon any Bill of Exchange or Promissory Note or other negotiable or other security or guarantee or on any other simple contract express or implied.

32. The Mortgagor shall stand possessed of all hire purchase credit sale or time payment contracts which the Mortgagor has entered into or may hereafter enter into and of all rights and powers therein contained and of all chattels thereby intended to be sold upon trust for the Bank.

33. Notwithstanding any judgment or order which the Bank may hereafter recover against the Mortgagor in respect of any of the moneys hereby secured or any part thereof the Bank shall hold such judgment



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or order collaterally with these presents as security for the due payment of the moneys for the time being owing under any such judgment or order (with interest thereon at the rate determined as aforesaid) and this security shall not merge in any such judgment or order.

34. This security may be enforced notwithstanding the acceptance of interest by the Bank after any default and notwithstanding any previous or other default and without the necessity of any notice to or of any further consent or concurrence on the part of the Mortgagor.

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35. The Mortgagor for valuable consideration hereby irrevocably appoints the Bank and any officer of the Bank and each and every of them jointly and severally to be the true and lawful attorneys and attorney of the Mortgagor (hereinafter called "the attorney") with full power and at the expense of the Mortgagor for and in the name of the Mortgagor and on behalf of the Mortgagor but for the sole use and benefit of the Bank from time to time to do and suffer all such acts and sign all such documents for the purpose of exercising the powers granted to the Bank as the attorney shall think proper as fully and effectually as the Mortgagor could do AND in particular and without prejudice to the generality of the foregoing provisions (which are not to be construed as being limited by what hereinafter follows) the attorney shall have power to do or suffer whatever he may think necessary for the observance and performance of the covenants of the Mortgagor herein contained and for giving the Bank a complete legal mortgage over the mortgaged premises or any part or parts thereof as security for the moneys hereby secured and to sign all certificates as to the correctness for the purpose of registration under any Acts of any instruments and to sue for recover and give effectual receipts and discharges for all moneys due or to become due by virtue of any insurance effected on the mortgaged premises or any part thereof and to compound or compromise any claim arising thereout and to sign seal deliver and execute all deeds instruments receipts and assurances for the purpose of effectuating such composition or compromise and to receive such moneys or any part thereof and to receive or recover all moneys payable to the Mortgagor by any person or persons under any contract of whatever nature and to do all acts deeds matters and things whatsoever (none excepted) and to sign seal deliver and execute all writings documents assurances deeds plans and instruments whatsoever (none excepted) for the purpose of exercising and carrying into effect the powers granted to the Bank or a Receiver appointed hereunder and to convey and transfer to

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a purchaser all or any of the Morgagor's freehold and leasehold lands and other assets which such purchaser shall have purchased from the Bank or the Receiver and to do all such acts deeds matters and things as are hereby covenanted to be done by the Mortgagor and to appoint a substitute or substitutes and such substitute or substitutes at pleasure to remove and another or others to appoint in his or their place or stead and to do all such further and others acts and things in and about the premises as the attorney or his substitute or substitutes in his or their discretion thinks proper as fully and effectually as the Mortgagor could do if acting therein the Mortgagor hereby ratifying and agreeing to ratify all and whatsoever the attorney his substitute or substitutes shall lawfully do or cause to be done in or about the premises by virtue hereof. This power of attorney being given for valuable consideration is hereby declared to be irrevocable. The attorney or his substitute or substitutes shall not be responsible for any loss which may happen in the exercise or attempted exercise of any of the aforesaid powers.

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36. And the Mortgagor so far as it has power so to do hereby authorises any officer of the Bank or any Receiver appointed hereunder in trust for the Bank jointly and severally at any time after the moneys hereby secured become payable to make calls on the members of the Mortgagor in respect of the uncalled capital hereby charged and the provisions contained in the Articles of Association of the Mortgagor in regard to calls shall mutatis mutandis apply to calls made under this security and this authority shall be exercisable to the exclusion of the powers of the Directors of the Mortgagor and shall be assignable.

AND IT IS ALSO HEREBY AGREED AND DECLARED as follows:-

37. Except where otherwise required by law any notice to be given to the Mortgagor hereunder shall be deemed to be duly given if the same be in writing and be left at or sent through the Post Office addressed to the Mortgagor at the registered office of the Mortgagor or be affixed to some part of any land hereby charged or some building thereon and any such mode of service shall in all respects be valid and effectual notwithstanding that the Mortgagor may be in liquidation or wound up and notwithstanding any other matter or event whatsoever.

38. Notwithstanding anything contained in any present or future Federal State or Territory law or regulation or other legislation whereby the Mortgagor might be entitled to claim or set up the postponement of the payment of any moneys hereby secured or the

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reduction of the rate of interest or of any rent made payable the Mortgagor HEREBY COVENANTS AND AGREES that the rights powers and remedies of the Bank hereunder whether express or implied shall be enforceable against the Mortgagor and that the provisions of any Act of Parliament Regulation Ordinance or Proclamation or other legislation for the time being in force in any of the States or Territories of the Commonwealth having the effect of affording a moratorium shall be and they are hereby expressly (so far as the same lawfully can or may be) excluded from and shall not apply to these presents.

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39. And except to the extent that such interpretation shall be excluded by or be repugnant to the context whenever the same is used herein the word "Mortgagor" shall be deemed to mean and include the Mortgagor and its assigns the word "Bank" shall be deemed to mean and include the Bank and its assigns the word "person" shall be deemed to include a corporation or company the word "Receiver" shall be deemed to include a Receiver and Manager and also joint Receivers or joint Receivers and Managers words importing the singular number or plural number shall be deemed to include the plural number and singular number respectively and the expression "officer of the Bank" shall include the following officers for the time being of the Bank namely the Managing Director of the Bank the Chief General Manager of the Bank any General Manager of the Bank any Assistant General Manager of the Bank any Attorney of the Bank the Manager of any Branch of the Bank and the Accountant of any Branch of the Bank.

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40. Insofar as it is lawful so to provide the powers conferred on a mortgagee by any present or future Act of Parliament Regulation or Ordinance or other legislation shall be in augmentation of the powers herein mentioned and shall be exercisable by the Bank immediately upon or at any time after any default by the Mortgagor hereunder without any notice or expiration of time under that Act Regulation or Ordinance or other legislation being necessary except where otherwise prescribed by law and in such case after notice for the shortest period that is legally permissible and any other provisions of such Act Regulation or Ordinance or other legislation shall be deemed to be negated or varied only so far as they are inconsistent with the terms and provisions herein expressed.

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41. The powers conferred by clauses 19 and 35 hereof shall extend to the execution of all instruments to give effect to any dealing with any land estate or interest under any real property Statute or Ordinance or other legislation or under the general law or otherwise.

10 42. By the use in this Deed of the words "as beneficial owner" the covenants implied by the relevant Acts or Ordinances in the case of a conveyance by a person who is expressed to convey as beneficial owner (hereinafter called "the implied covenants") shall be incorporated in and form part of this Deed insofar as they are applicable and insofar as the implied covenants or any of them are in any way inconsistent with limited or reduced in effect by the express covenants in that behalf contained in this Deed then the provisions of the implied covenants shall prevail.

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43. Notwithstanding anything hereinbefore contained this Deed does not create or purport to create any interest in land in the Territory of Papua and New Guinea.

20 44. That interest payable in pursuance of any of the provisions of this Debenture shall accrue and may be debited to the Mortgagor and the provisions herein contained as to moneys upon which interest is payable shall be continued notwithstanding the liquidation or winding up of the Mortgagor and notwithstanding any other matter or thing whatsoever until all moneys hereby secured have been fully paid and satisfied.

45. Insofar as any security given under this Deed constitutes a security by way of guarantee the following provisions shall apply:-

30 (a) the guarantee shall be a continuing guarantee and shall not be considered as wholly or partially satisfied or discharged by any moneys which may at any time or times hereafter be received or applied by the Bank to the credit of any account of the Mortgagor and shall be available as a guarantee for the whole of the sums of money secured hereby and for the time being remaining unpaid.

40 (b) the Bank shall be at liberty without discharging or in any way affecting the liability of the Mortgagor hereunder as a Guarantor or under any other security of any kind which the Bank now holds or may hereafter hold from the Mortgagor or from any other person whomsoever or whatsoever whether with or without the consent of or notice to the Mortgagor to grant to the Mortgagor any time or other indulgence and also to compound  
50 compromise or make any arrangement with the Mortgagor and/or to release wholly or partially the Mortgagor or any persons who are or may be liable to the Bank in respect

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of any moneys hereby secured or any part thereof and also to abandon or release wholly or partially or to vary renew or give up any judgment mortgage bond covenant guarantee bill of exchange promissory note or other security or right of any kind whatsoever which the Bank may now or hereafter hold for the payment of moneys hereby secured or any part thereof respectively and also to receive dividends in the winding up of the Mortgagor or in the estate of any other person whomsoever or whatsoever.

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(c) all compositions dividends and payments which may from time to time be received by the Bank and all moneys which the Bank may receive in respect of any security which the Bank may now or hereafter hold for the moneys hereby secured or any part thereof shall be taken and applied as payments in gross and shall as regards the Mortgagor go or be taken to reduce the moneys hereby secured only by the amount actually received by the Bank in cash after deducting the costs and expenses of or incidental to obtaining payment thereof and the Mortgagor as Guarantor will remain liable to the Bank for the balance of the moneys hereby secured which shall remain unpaid or due and owing to the Bank with interest thereon notwithstanding the discharge of the Mortgagor AND the Mortgagor as Guarantor undertakes not to prove in or against the estate of any other Mortgagor in liquidation or official management or in or against or under any assignment for the benefit of or composition or arrangement with the creditors of any Mortgagor or in or under any administration in equity or otherwise of the estate or assets of any Mortgagor in competition with the Bank or to seek in any way to deprive the Bank of or to hold the Bank accountable to any Mortgagor as Guarantor for any dividends or sums of money the Bank may receive or be entitled to in any such liquidation official management assignment composition arrangement or administration and in case of any such liquidation official management assignment composition arrangement or administration the Mortgagor as Guarantor authorises the Bank by any of the Officers of the Bank to prove against the estate of the Mortgagor for any sums of money which the Mortgagor as Guarantor shall have paid to the Bank in pursuance of this guarantee and all such dividends and moneys shall belong to the Bank and when received by the Bank shall be applied in or towards satisfaction of the moneys hereby secured AND the Bank shall be

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entitled to carry all payments made by or on behalf of the Mortgagor in pursuance of this guarantee to a suspense account and shall not be bound to give credit in account in reduction of the moneys recoverable from a Guarantor hereunder for the sum so paid until after the Bank shall have received one hundred cents in the dollar in respect of all other moneys besides the sum recoverable from a Guarantor under this guarantee for which the Mortgagor is now or may hereafter be indebted or liable to the Bank.

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46. As a separate and independent agreement and for the consideration aforesaid the Mortgagor as Guarantor agrees with the Bank that in case the whole or any part of the moneys hereby secured shall not be recoverable from a Guarantor as Guarantor under the guarantee contained in this Deed by reason of any legal limitation disability or incapacity on or of the Mortgagor or by reason of any failure of liability of the Mortgagor or any other fact or circumstance and whether known to the Bank or not the Mortgagor as Guarantor shall nevertheless hold the Bank fully indemnified at all times hereafter against all loss or damage which the Bank may suffer or incur by reason of such limitation disability incapacity failure fact or circumstance.

EXECUTED under the seal of the Mortgagor on the twenty third day of December One thousand nine hundred and seventy five

THE COMMON SEAL of TACKING  
POINT DOWNS PTY. LIMITED  
was hereunto affixed by order  
of the Board of Directors in  
the presence of:

L.S.

Sgd. B.J. Flood

Secretary

Director

"D" (iii) - Memorandum of Mortgage  
No. N461274 dated 31st May, 1973

\_\_\_\_\_  
New South Wales

"D"(iii) -  
Memorandum of  
Mortgage No.  
N461274  
31st May 1973.

MEMORANDUM OF MORTGAGE  
Real Property Act, 1900

(Must be in duplicate, one copy to be filed and the other retained by the Mortgagee).

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Form S.1/102

This form may be used for a Mortgage over any Freehold or Leasehold land under the Real Property Act 1900.

The Crown Grant or Certificate of Title must be presented herewith, in order that this Mortgage may be noted thereon.

/(a) Insert name(s) address(es) occupation(s) registered office of mortgagor in full.7

(a) Tacking Point Downs Pty. Limited whose registered office is at 115 Pitt Street Sydney in the State of New South Wales (hereinafter referred to as "the Mortgagor")

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being registered or entitled to be registered as the proprietor of an estate in fee simple (b)

/(b) If a less estate strike out "in fee simple" and interline the required alteration. If the Mortgage is over leasehold delete "an estate in fee simple" and insert "a leasehold estate" and have the alteration initialled.7

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in the land hereinafter described subject however to the following encumbrances liens and interests

/(c) A short note will suffice. If an encumbrance is not yet registered particulars sufficient for identification must be furnished.7

(c) Reservations and conditions if any contained in Crown Grant

in consideration of all or any loans advances credits or banking accommodation whether made created or given on the signing hereof or that may hereafter be made created or given in its discretion by AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED whose registered office in the State of New South Wales is at 2 Martin Place Sydney hereinafter referred to as "the BANK"

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to for or on account of the Mortgagor and/or to for or on account of (d)

/(d) Insert name(s) address(es) occupation(s) registered office of Customer in full. If the account is in the name of a firm insert "the firm of \_\_\_\_\_". If in a business name used by a sole trader insert "carrying on business under the name of \_\_\_\_\_" after the name and description of the Customer.7

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Tacking Point Downs Pty. Limited whose registered office is at 115 Pitt Street Sydney in the State

of New South Wales (hereinafter referred to as "the Customer") or at the request of either the Mortgagor or the Customer by any means whatsoever and/or of forbearance on the part of the Bank to immediately demand and sue for payment of any moneys now owing by the Mortgagor and/or the Customer to the Bank and/or for other valuable consideration moving from the Bank to the Morgagor and/or the Customer (as the Mortgagor doth hereby admit) AND for the purpose of securing to the Bank the payment in manner hereinafter mentioned of all the principal interest and other moneys herein covenanted or agreed to be paid to the Bank doth hereby mortgage to the Bank all the Mortgagor's estate and interest as such registered proprietor as aforesaid in ALL those lands comprised in the following schedule:-

Exhibits  
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 (cont'd)

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/(e) If part only of the land in a title is to be mortgaged add "and being Lot \_\_\_\_\_ Sec. \_\_\_\_\_ D.P. \_\_\_\_\_" or "being the residue of the land in certificate (or grant) registered Vol. \_\_\_\_\_ Fol. \_\_\_\_\_".

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<u>Reference to title</u>	<u>Whole or Part</u>	<u>Description of land if part only (e)</u>	<u>County</u>	<u>Parish</u>
<u>Volume Folio</u>	<u>Part</u>			
25	238	Whole ) No CIT Vol	Macquarie	Macquarie
175	44	Whole ) 13555	Macquarie	Macquarie
57	246	Whole ) Folio 7/0 65	Macquarie	Macquarie
3210	34	Whole ) Inclusive	Macquarie	Macquarie
12541	240	Whole )		

AND for the consideration aforesaid the Mortgagor hereby covenants and agrees with the Bank in manner following that is to say:-

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1. THAT the Mortgagor will on demand in writing pay to the Bank free from all deductions the amount or balance which shall for the time being be owing or unpaid by the Mortgagor and/or the Customer to the Bank (and that although the whole or some part of such amount or balance be then represented and/or secured by any mortgages bonds covenants guarantees bills of exchange promissory notes leasing agreements or other securities or agreements then current or under any letters of credit or other documents (whether or not similar to the above or any of them) issued by the Bank or Australia and New Zealand Bank Limited or The English Scottish and Australian Bank Limited to or for the benefit or at the request of the Mortgagor and/or the Customer either alone or

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jointly or in common with any other or others and whether or not default shall have been made by the Mortgagor and/or the Customer in respect thereof) for or in respect of all loans advances credits or banking accommodation heretofore made created or given by the Bank or Australia and New Zealand Bank Limited or The English Scottish and Australian Bank Limited or now or which may hereafter be made created or given by the Bank to for or on account or at the request of the Mortgagor and/or the Customer or in respect of any indebtedness from the Mortgagor and/or the Customer to the Bank on any account whether now existing or which may hereafter be opened or by any means whatsoever including all sums in which the Mortgagor and/or the Customer is or may hereafter become liable immediately or contingently to the Bank upon or in respect of any account or accounts in which the Mortgagor and/or the Customer is now or may hereafter be interested or concerned either alone or jointly or in common as aforesaid or in respect of any guarantee undertaking or obligation which has been given or incurred for or at the request of the Mortgagor and/or the Customer by the Bank or Australia and New Zealand Bank Limited or The English Scottish and Australian Bank Limited or by the Mortgagor and/or the Customer to the Bank or Australia and New Zealand Bank Limited or The English Scottish and Australian Bank Limited or which may hereafter be given or incurred for or at the request of the Mortgagor and/or the Customer by the Bank or by the Mortgagor and/or the Customer to the Bank either alone or jointly or in common as aforesaid or in respect of any bills or bill of exchange promissory notes or note heretofore purchased discounted or paid by the Bank or Australia and New Zealand Bank Limited or The English Scottish and Australian Bank Limited or hereafter purchased discounted or paid by the Bank for or at the request of the Mortgagor and/or the Customer either alone or jointly or in common as aforesaid or in respect of any bills or bill of exchange or promissory notes or note bearing the Mortgagor's and/or the Customer's name or the name of any partnership or firm of which the Mortgagor and/or the Customer may be a member or members and which are or is now or may hereafter be held by the Bank and whether such bills of exchange and promissory notes as aforesaid or any of them shall have arrived at maturity or not And for interest commission stamp and other duties postages and other lawful and accustomed charges in respect of the said loans advances credits accommodation indebtedness guarantee undertaking or obligation or any of them and for any other money principal or interest now due or owing under or secured by or hereafter to become due or owing under or secured by this Mortgage and including also all costs expenses and outgoings incurred by the Bank in

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consequence of default in payment of any moneys intended to be hereby secured or the breach of any covenant condition or stipulation herein contained or implied and all other moneys which the Mortgagor and/or the Customer may now or hereafter be liable to pay to the Bank (including all moneys which by law or under any provision hereof the Bank may be entitled to pay on account of the Mortgagor and/or the Customer or to charge to any account which the Mortgagor and/or the Customer may have with the Bank) under any covenant or provision herein or in any collateral security contained or implied.

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2. THAT so long as any principal money shall be owing or unpaid under or by virtue of this security the Mortgagor will pay interest thereon as follows namely at the rate or rates and in the manner from time to time usually charged by the Bank to its other customers on accounts of a similar nature or in the case of so much (if any) of the principal money as to which the Bank hereunder or in pursuance of any agreement between the Bank and the Mortgagor and/or the Customer has the right at any time or from time to time to determine the rate or rates applicable thereto (irrespective of the rate or rates usually charged by the Bank to its other customers on any accounts of a similar nature) at the rate or rates from time to time applicable thereto which interest shall be considered as accruing from day to day and be payable upon demand but until demanded shall be payable half yearly on the usual half yearly days for balancing the books of the Bank from time to time the first payments to be made on the first of such half yearly days following the date of these presents and any interest remaining unpaid on any such half yearly day of payment may together with all customary charges and whether or not the relation of Banker and Customer may for the time being be existing be turned into principal and shall thenceforth be deemed part of the principal money intended to be hereby secured and carry interest at the rate or rates from time to time applicable to the account or respective accounts to which such unpaid interest shall be debited but such accrued and unpaid interest shall not by reason of such capitalisation be deemed to have been advanced by the Bank or to have been actually paid for any purpose whatsoever And it is declared that a certificate in writing signed by any of the Officers of the Bank certifying to the rate or rates of interest from time to time or at any time charged by the Bank or applicable as aforesaid shall be conclusive evidence of the rate or rates therein certified to and payable hereunder and that a Statement of the indebtedness on any account of the Mortgagor and/or the Customer to

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the Bank signed in like manner shall be conclusive evidence against all parties interested hereunder of the amount of such indebtedness.

Conditions where Surety

3. THAT if the Mortgagor shall be surety for the Customer then -

(a) Without in any way limiting any of the other provisions of this Mortgage this Mortgage shall be security to the Bank for

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(i) the whole of the amount or balance referred to in Clause 1 hereof whether or not the Customer shall be legally liable to pay the same to the Bank and whether or not demand shall have been made on the Customer in respect thereof;

(ii) all sums of money which the Bank may after the date of any demand made hereunder or of the Mortgagor determining this security as to future transactions as hereinafter provided pay to or for the Customer in respect of cheques drafts bills or other negotiable or other instruments drawn before such demand or determination on any account in which the Customer may be interested or concerned either alone or jointly or in common as aforesaid or in respect of any other obligations incurred by the Bank or Australia and New Zealand Bank Limited or The English Scottish and Australian Bank Limited with or on behalf of or on account of the Customer either alone or jointly or in common as aforesaid prior to such demand or determination And Also for all sums of money received by the Bank or Australia and New Zealand Bank Limited or The English Scottish and Australian Bank Limited for credit of any account in which the Customer may be interested or concerned either alone or jointly or in common as aforesaid and for which the Bank may be obliged to account or may in its discretion account to any official receiver trustee liquidator official manager or other person in the administration or winding up of the

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estate or affairs of the Customer  
in any liquidation bankruptcy or  
official management of the Customer  
or under any assignment for the  
benefit of or arrangement or  
compromise with creditors of the  
Customer or otherwise Together with  
interest on all such sums of money at  
such rate or rates as may from time to  
time be determined by the Bank being  
a rate or rates not exceeding the  
highest of the rates for the time being  
charged on any other part of the  
principal money hereby secured or in  
the event of no other principal money  
being hereby secured then at such rate  
as may from time to time be charged by  
the Bank on accounts of a similar nature  
to the account to which such sums of  
money are debited.

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- (b) No assurance security or payment which may  
be avoided under any statutory provision or  
enactment (whether relating to bankruptcy the  
winding up or official management of  
Companies or any other matter whatsoever) and  
no release settlement discharge or arrangement  
which may have been given or made on the faith  
of any such assurance security or payment shall  
prejudice or affect the Bank's right to recover  
from the Mortgagor to the full extent of his  
liability under this Mortgage as if such  
assurance security payment release settlement  
discharge or arrangement (as the case may be)  
had never been granted given or made and any  
such release settlement discharge or  
arrangement shall as between the Bank and the  
Mortgagor be deemed to have been given or made  
upon the express condition that it shall become  
and be wholly void and of no effect if the  
assurance security or payment on the faith of  
which it was made or given shall at any time  
thereafter be avoided under any statutory  
provision or enactment (whether relating to  
bankruptcy the winding up or official  
management of Companies or any other matter  
whatsoever) to the intent and so that the Bank  
shall become and be entitled at any time after  
such avoidance to exercise all or any of the  
rights in this Mortgage expressly conferred  
upon the Bank and/or all or any other rights  
which by virtue and as a consequence of this  
Mortgage the Bank would have been entitled to  
exercise but for such release settlement  
discharge or arrangement And Further that  
notwithstanding anything herein or (so far as

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the same can lawfully be excluded) in any rule of law or equity or any statutory provision to the contrary and without prejudice to any other right which the Bank may have to retain this Mortgage the Bank shall be at liberty at its absolute discretion to retain this Mortgage for a period of seven months after the repayment of all the principal interest and other moneys hereby secured or the granting or giving of any assurance or security by the Customer to the Bank notwithstanding any release settlement discharge or arrangement given or made by the Bank on or as a consequence of such repayment or of the granting or giving of any such assurance or security and if at any time within the period of six months after such repayment or the granting or giving of any such assurance or security either a bankruptcy petition shall be presented against or filed by the Customer or a petition shall be presented for an Order for the winding up of the Customer (being a Company) or the Customer (being a Company) shall commence to be wound up voluntarily or shall be placed under official management the Bank shall be at liberty and notwithstanding as before mentioned to continue to retain this Mortgage for and during such further period as the Bank in its absolute discretion shall determine And the Mortgagor agrees that this Mortgage shall be deemed to have been and to have remained held by the Bank as and by way of security for the payment to the Bank of the principal interest and other moneys secured hereby in the event of and upon or after any avoidance of any assurance security or payment under any statutory provision or enactment (whether relating to bankruptcy the winding up or official management of Companies or any other matter whatsoever).

- (c) All compositions dividends and payments which the Bank may receive in respect of any moneys in or for which the Customer is now or may hereafter be indebted or liable to the Bank on any account whatsoever (other than any moneys paid in cash by the Mortgagor hereunder) and all moneys which the Bank may receive in respect of any other security which the Bank may now or hereafter hold for the principal interest and other moneys hereby secured or any part thereof shall be taken and applied as payments in gross and shall as regards the Mortgagor go or be taken to reduce the liability of the Mortgagor hereunder only by the amount actually received

by the Bank in cash after deducting the costs and expenses of or incidental to obtaining payment thereof and all moneys paid by the Mortgagor or received by the Bank on account of the Mortgagor in pursuance of this Mortgage may (at the option of the Bank) be carried to a suspense account and the Bank shall not be bound to give credit in account in reduction of the moneys secured hereby until the Bank shall have been paid one hundred cents in the dollar in respect of all the principal interest and other moneys secured hereby And the Mortgagor shall not nor will prove in or against the estate of the Customer in bankruptcy insolvency liquidation or official management or in or under any assignment for the benefit of or composition or arrangement with the creditors of the Customer or in or under any administration in equity or otherwise of the estate or assets of the Customer in competition with the Bank or seek in any way to deprive the Bank of or hold the Bank accountable to the Mortgagor for any dividends or sums of money the Bank may receive or be entitled to in any such bankruptcy insolvency liquidation official management assignment composition arrangement or administration And the Bank shall be entitled to prove against the estate of the Customer for any moneys received by the Bank from the Mortgagor in pursuance of this Mortgage.

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(d) This mortgage shall be a security for all loans advances credits and banking accommodation together with interest thereon made created or given by any Branch of the Bank at which any account in which the Customer may be interested or concerned either alone or jointly or in common as aforesaid shall for the time being be kept to or for the Customer after the death lunacy mental incapacity or bankruptcy of the Mortgagor or any one or more of them (if more than one) and before notice in writing of such death lunacy mental incapacity or bankruptcy signed by one or more of the personal representatives of the deceased or the Public Trustee or Official Receiver shall have been received by the Manager for the time being of such Branch.

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(e) If the Mortgagor shall not be in default under any of the provisions of this Mortgage and the Bank shall not at the time of the service of the notice of determination be under any obligation to make any further payments or advances to for or on account of the Customer the Mortgagor may determine this Mortgage as to future transactions at any time by service of notice in writing of such determination signed by the Mortgagor or all of them (if more than one) upon the Manager for the time being at every Branch of the Bank at which any account hereby secured is then kept and upon payment to the Bank of the whole of the moneys hereby secured.

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Notwithstanding anything in this Clause contained the Mortgagor shall be considered principal debtor to the Bank for the moneys intended to be hereby secured.

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4. THAT the giving by the Bank of any time or any other indulgence to or the entering into any arrangement or negotiation with or the taking of any bill of exchange or promissory note or other security from or accepting any composition from or any dividend in or upon the estate of or releasing wholly or partially or in any manner dealing with the Customer or any other person now or at any time hereafter liable to the Bank for or in respect of the principal interest and other moneys secured hereby or any part thereof or the abandoning or releasing wholly or partially or exchanging varying giving up or in any way dealing with any security whatsoever which the Bank now holds or which the Bank may hereafter hold in respect of the principal interest and other moneys hereby secured or any part thereof shall not in anywise discharge the Mortgagor from any liability under the covenants herein contained or implied or otherwise prejudice this Mortgage and the Mortgagor hereby waives all defences (whether or not of the aforesaid description) of a surety.

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5. THAT the Mortgagor will insure all buildings fences fixtures and other improvements which shall for the time being be erected on the said land and which shall be of a nature or kind capable of being so insured against fire in their full value and

10 against such other risks as the Bank may from  
time to time require in the name of the Bank and  
the Bank alone shall have the power to settle  
compromise and recover any claim against any  
Insurance Company PROVIDED THAT for the purpose of  
construing this Clause the words "and such other  
risks as the Mortgagee or his executors  
administrators or assigns may from time to time  
require" shall be deemed to be inserted after the  
words "against loss or damage by fire" in the form  
of words set out and numbered two in the first  
column of part one of the fourth Schedule of the  
Conveyancing Act, 1919 and the word "nominated" shall  
be deemed to be substituted for the words  
"approved of" in such Schedule and the words "fences  
fixtures and other improvements" shall be deemed to  
be inserted after the word "buildings" twice  
appearing in such Schedule and the words "either of  
the principal money hereby secured or" shall be  
20 deemed to be deleted from such Schedule.

Exhibits  
"D"(iii) -  
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(cont'd)

30 6. THAT the Mortgagor will at all times during  
the continuance of this security promptly and duly  
pay or cause to be paid all taxes rates assessments  
impositions and outgoings whatsoever now or at any  
time hereafter payable or chargeable in respect of  
the mortgaged property or any part thereof AND all  
principal interest and other moneys payable under  
any mortgage or encumbrance noted hereon as an  
encumbrance and will perform and observe all  
Mortgagor's covenants conditions and agreements  
contained or implied in any such mortgage or  
encumbrance AND also will at the expense of the  
Mortgagor comply with all Acts Statutes and  
Ordinances regulations and requirements now or  
hereafter in force in the State of New South Wales  
(hereinafter referred to as "the said State")  
affecting the mortgaged property and all regulations  
requirements by-laws and orders heretofore or which  
may hereafter be made by any Public Municipal or other  
Authorities or Bodies in respect of the mortgaged  
40 property and now or at any time hereafter in force in  
the said State And that upon any breach or non-  
observance of this Covenant the Bank shall be at  
liberty (but without any obligation so to do) at any  
time and from time to time to make and do all or any  
of such payments acts and things as aforesaid on  
behalf of the Mortgagor.

50 7. THAT the Mortgagor has or is entitled to an  
absolute and indefeasible title to all and every part  
of the mortgaged property subject only to the  
encumbrances notified hereon and that no other person



Exhibits

"D"(iii) -  
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has any right title estate or interest in the mortgaged property or any part thereof as purchaser nor is any part of the mortgaged property subject to any right subsisting under any adverse possession of such mortgaged property or to any easements or to any rights or claims whatsoever excepting only such easements rights or claims (if any) as are expressly contained in the Crown Grant(s) and/or Certificate(s) of Title and/or Lease(s) of the mortgaged property or are notified as aforesaid.

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8. THAT the Mortgagor and every person having or claiming any estate right title or interest in or to the mortgaged property or any part thereof (otherwise than by virtue of some encumbrance notified hereon) will at all times hereafter at the request of the Bank and until foreclosure or sale at the cost of the Mortgagor and afterwards at the cost of the person or persons requiring the same execute every such document deed instrument or assurance and do every such thing for further or more effectually securing the rights or interests of the Bank to the mortgaged property or any part thereof pursuant to these presents as shall by the Bank be from time to time required AND the Mortgagor authorises the Bank or any of the Officers of the Bank for and on behalf of the Mortgagor to sign or execute every such document deed instrument and assurance and do every such thing so as to perfect or attempt to perfect the security intended to be hereby given and also for and on behalf of the Mortgagor to comply with all or any requisitions of the Registrar-General.

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9. THAT nothing herein contained or implied shall discharge abate or prejudice any other security now held or which may hereafter be held or taken by the Bank or any other right or remedy which the Bank now has or may hereafter have for payment of the principal interest and other moneys hereby secured or any part thereof or waive extinguish prejudice or affect any claim or demand which the Bank now has or may hereafter have against the Mortgagor and/or the Customer or any other person whomsoever or whatsoever as surety for or party to any bill of exchange or promissory note or other negotiable or other security or guarantee or otherwise nor shall any other security abate or prejudice this Mortgage or any of the powers and provisions herein contained or implied nor shall the Mortgagor and/or the Customer having given or hereafter giving any bill of exchange promissory

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note or other negotiable or other security or  
guarantee to the Bank operate as a payment of  
the principal interest and other moneys hereby  
secured or any part thereof until the same  
shall have been actually paid in cash And that  
this Mortgage and the covenant for payment herein  
contained shall be a collateral security only  
and shall not operate as a merger of the remedy  
upon any negotiable or other security or  
guarantee or simple contract as aforesaid And  
notwithstanding any judgment or order being  
obtained in respect of the principal interest and  
other moneys hereby secured or any part thereof  
the Mortgagor will pay to the Bank interest at  
the rate or rates and calculated in the manner  
and with the rests aforesaid on the amount of the  
principal money for the time being remaining  
unpaid under this Mortgage.

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"D"(iii) -  
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10. THAT until finally discharged this Mortgage  
shall be and remain a continuing security for the  
due payment of all the principal interest and  
other moneys hereby secured and for the time being  
remaining unpaid irrespective of any sums which  
may from time to time be paid to the credit of any  
account of the Mortgagor and/or the Customer with  
the Bank and that notwithstanding the account of  
the Mortgagor and/or the Customer may at any time  
appear to be in credit and notwithstanding any  
settlement of account or any other matter or thing  
whatsoever And the Bank shall be at liberty  
without any notice to or consent of the Mortgagor  
to apply in or towards satisfaction of any of the  
moneys hereby secured all or any moneys which may  
from time to time be paid in or may be standing to  
the credit of any current account of the Mortgagor  
and/or the Customer with the Bank And Also that  
nothing herein contained or implied shall render it  
in any way obligatory upon the Bank to make any  
further advances or give any further credits or  
banking accommodation and this whether any agreed  
limit of overdraft has or has not been reached.

11. THAT if default shall be made by the Mortgagor  
in payment of the principal interest and other  
moneys hereby secured or any part thereof upon  
demand as aforesaid or in the performance or  
observance of any of the covenants conditions or  
agreements herein contained or implied and on the  
part of the Mortgagor to be performed or observed  
it shall be lawful for but not obligatory upon the  
Bank or any of the Officers of the Bank immediately  
thereupon or at any time or times thereafter and  
notwithstanding any previous neglect or waiver of

Exhibits  
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any right to sooner exercise any of the powers herein mentioned or any act of abandonment or waiver whatsoever by the Bank and notwithstanding any acceptance by the Bank of any money or interest or any negotiations between or on behalf of the Customer and/or the Mortgagor and the Bank after the happening of any such default as aforesaid and notwithstanding the currency of any promissory note or bill of exchange or any other negotiable or other security or guarantee that now is or may at any time hereafter be held by the Bank on account of any part of the moneys hereby secured all of which promissory notes bills of exchange and other negotiable or other securities and guarantees shall immediately on the happening of any such default as aforesaid and for the purpose of these presents be considered to become immediately due and payable and notwithstanding any other matter or thing whatsoever and without the necessity of any further consent or concurrence on the part of the Mortgagor and without the necessity of any notice being given to the Mortgagor to enter upon and take possession of the mortgaged property or any part or parts thereof in the name of the whole and into receipt of the rents and profits thereof and to manage the mortgaged property or any part thereof with power to erect make remove or alter any fences buildings or other improvements or additions whatsoever upon the mortgaged property and with liberty at any time to abandon such possession and also to sell or otherwise dispose of any produce of the mortgaged property and to do all such acts and purchase all such things as may be necessary for the efficient working of the mortgaged property or for deriving or obtaining an income or return therefrom and at the risk of the Mortgagor to carry on any business for the time being carried on thereon or any other business which the Bank may think proper and for all such purposes to employ such managers overseers workmen servants or agents and to expend such money as the Bank may think fit and from time to time either with or without entering into such possession or after abandoning such possession to let or demise the same or any part thereof either with or without an option of renewal to any person for any term at such rent with such powers and subject to such covenants and conditions as the Bank shall think fit and either with or without taking any fine or premium and either for the purpose of occupation building agriculture grazing mining or for any other purpose whatsoever and either together with or separately from any other property comprised in any other security for the time being held by the Bank from the Mortgagor or otherwise for all or any part of the same moneys as are intended to be hereby secured And further the Bank shall be at liberty in case any other property than that comprised in these presents shall be included in any such lease

to apportion the costs and expenses of such lease and the rent between the properties leased And to accept surrenders of any leases or tenancies now existing or which may hereafter be created of such mortgaged property or any part thereof and also to determine such leases and tenancies or any of them and to compromise with or make any concessions or arrangements with the lessees or tenants or occupiers thereof or with the holders of any encumbrances liens or charges whatsoever over the mortgaged property or any part thereof or with any caveator or person claiming any charge or interest over or in respect of the mortgaged property or any part thereof or over or in respect of any rents or profits or income derived therefrom in all cases as the Bank may from time to time think fit and so as to bind the Mortgagor and all persons claiming through or under the Mortgagor AND that the powers hereby conferred upon the Bank shall be in addition to or enlargement of the powers conferred upon Mortgagees by any Act of Parliament now or at any time hereafter in force in the said State and affecting the mortgaged property or any part thereof AND ALSO that during the continuance of this security none of the restrictions imposed upon Mortgagees under or by virtue of any such Act as aforesaid shall apply to these presents and the Mortgagor shall not be entitled to exercise any powers of leasing or of accepting surrenders of leases which are or may be conferred by any such Act as aforesaid And that any Receiver appointed under Section 109 of the Conveyancing Act, 1919 shall in addition to the powers conferred by such Act have power in his own name but as the Agent of the Mortgagor to manage the mortgaged property and in the course of such management from time to time to grant any such leases or tenancies or to accept surrenders of any such leases or tenancies as aforesaid and that for any purpose within the powers of the Receiver the Bank may at his request advance to him such moneys as the Bank thinks fit and all moneys so advanced shall be deemed cash advanced at the request of the Mortgagor and shall form part of the principal money hereby secured and bear interest at such rate or rates as may from time to time be determined by the Bank being a rate or rates not exceeding the highest of the rates for the time being charged on any other part of the principal money hereby secured.

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12. THAT for the purpose of giving full effect to this Mortgage the Mortgagor doth hereby irrevocably during the continuance of this security appoint the Bank and each of the Officers of the Bank jointly and each of them severally the

Exhibits

"D"(iii) -  
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Attorneys and Attorney of the Mortgagor for and on behalf of the Mortgagor and without the Bank being liable as Mortgagee in possession to enter into and execute all such documents deeds instruments assurances agreements and leases and to do all such acts matters deeds and things as such Attorneys or Attorney may deem expedient for carrying out all or any of the powers or authorities herein contained or conferred upon the Bank and also to demand sue for recover and receive all or any rents or sums of money from time to time owing to the Mortgagor in respect of the mortgaged property under any present or future tenancy and to accept surrenders and make concessions to or compromise with tenants upon terms or gratuitously and otherwise with respect to such tenancies and lands to have all the powers of an absolute owner And the Mortgagor hereby ratifies and agrees to ratify all and whatsoever the said Attorneys or Attorney shall lawfully do or cause to be done in or about the premises under or by virtue of these presents.

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13. THAT the Mortgagor will from time to time and at all times during the continuance of this security at the sole expense in all things of the Mortgagor keep the mortgaged property free from noxious weeds rabbits and other noxious animals pests or vermin and comply with the law for the time being in force relating to such matters and for any of such purposes will erect or maintain such fencing and do such other acts and things as shall be required by the Bank and if any fence shall be erected by the owner or occupier of the adjoining land then will pay the Mortgagor's share and proportion of the expense of erecting and maintaining the same and also will farm cultivate and manage in a proper and husbandmanlike manner and preserve and maintain in a good and efficient state of improvement and cultivation the mortgaged property or such part (if any) as is or has been usually cultivated or which may be brought into cultivation or is of a nature or kind capable of or suitable for cultivation and also will well and sufficiently to the satisfaction of the Bank repair and keep both in tenantable and also in good and substantial repair all fences buildings and other improvements now erected or made and which may hereafter be erected or made on the mortgaged property and will keep all drains and sewers in good repair order and condition And that the Mortgagor will not without the prior consent in writing of the Bank make or suffer or permit to be made any structural alteration to any buildings or other improvements now or hereafter to

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be on the mortgaged property And will not  
without the like consent remove or attempt to  
remove such buildings or other improvements or  
any part thereof or any fixtures or fittings  
from the mortgaged property And will permit the  
Bank and the Officers agents and servants of the  
Bank at all times to enter upon the mortgaged  
property and all buildings and improvements  
thereon to inspect the state and condition  
thereof and the report of the person so inspecting  
the same shall be conclusive evidence of any  
default or otherwise under this covenant or otherwise  
under this Mortgage And also that the Bank or any  
of the Officers of the Bank or the agents servants  
or workmen of the Bank may (but without any  
obligation so to do) enter upon the mortgaged  
property (without the Bank thereby becoming liable  
as Mortgagee in possession) and at the expense of  
the Mortgagor make good any breaches of this or  
any other covenant on the part of the Mortgagor  
herein contained or implied and at such expense do  
and execute all such works repairs acts and things  
and incur and pay such costs charges and expenses  
as the Bank may deem requisite.

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14. THAT if the whole or any part of the principal  
money shall be advanced or lent or agreed to be  
advanced or lent to enable the Mortgagor and/or  
the Customer to erect construct or complete any  
buildings and/or improvements on the mortgaged  
property the Mortgagor and/or the Customer shall  
duly erect construct or complete the same or cause  
the same to be erected constructed or completed  
upon the mortgaged property within such period (if  
any) as the Bank shall stipulate and in a good and  
workmanlike manner to the satisfaction in all  
respects of the Bank and of the Architect or servant  
of the Bank (if any) nominated by the Bank for the  
purposes of this Clause And that in default of the  
Mortgagor and/or the Customer so doing (as to which  
default a certificate under the hand of any of the  
Officers of the Bank shall be conclusive evidence)  
or if the said power of sale shall become exercisable  
it shall be lawful for but not obligatory upon the  
Bank at any time thereafter to enter upon the  
mortgaged property and to erect construct and  
complete the said buildings and/or improvements or  
such of them as the Bank may think fit with any and  
such variations or omissions or additions as the  
Bank shall think proper (with power to vary the  
original design) and for that purpose to use any  
material including any material on the mortgaged  
property and to engage and employ upon such terms  
and conditions as the Bank shall think fit such  
contractors workmen agents or servants and to enter

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into such contracts or agreements as the Bank shall consider necessary or proper PROVIDED ALWAYS that the Bank shall not by reason of any approval given satisfaction expressed by the Bank or by any officer architect or servant of the Bank or by reason of the exercise of any of the powers conferred by this clause or otherwise howsoever be under any responsibility in respect of the proper erection construction or completion of the said buildings and/or improvements or in any way liable or responsible to the Mortgagor or any other person for any defects therein of any nature whatsoever or howsoever arising AND PROVIDED FURTHER that the Bank shall not by reason of the exercise of any of the powers conferred by this clause be deemed to be a mortgagee in possession.

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15. THAT one day is hereby fixed as the period of time for which the default mentioned in Section 57 of the Real Property Act, 1900 must be continued previously to the service of the notice in the said Section mentioned And one day is also fixed as the period for which default must continue after the service of the demand as hereinbefore provided or of the said notice before the power of sale given by Section 58 of the said Act can be exercised AND THAT it shall be lawful for the Bank at any time thereafter without any further notice or demand from time to time to sell the mortgaged property or any parts thereof and/or the estate and interest which the Bank can dispose of therein either together or in parcels and either by public auction or by private treaty contract or by tender and either at one or several times in one lot or in such separate lots as the Bank may think fit and at such prices in such way and manner and upon and subject to such terms and conditions in all respects as to the Bank shall seem expedient including conditions for obtaining barring or allowing compensation for any errors in the description of the property or other matters in any contract or particulars of sale and that on any such sale any time may be allowed for the payment of the whole or any part of the purchase money either with or without interest in the meantime and if with interest then at any rate or rates and either with or without security as the Bank may think fit and also with power to buy in or rescind or vary any Contract for Sale and to resell without being answerable for any loss occasioned thereby and to otherwise exercise all or any of the rights powers and remedies of a Mortgagee under or by virtue of the Conveyancing Act, 1919 Real Property Act, 1900 and/or other Act or Acts now or at any time hereafter in force in the said State as the Bank shall think proper.

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10 16. THAT the said power of sale may be exer-  
cised notwithstanding any previous neglect or  
waiver of any right to make any sale under the  
said power or any act of abandonment or waiver  
whatsoever by the Bank and notwithstanding any  
acceptance by the Bank of any money or interest  
or any negotiations between or on behalf of the  
Customer and/or the Mortgagor and the Bank  
subsequently to the service of any such demand  
and before the power of sale is exercised and  
notwithstanding the currency of any promissory  
note or bill of exchange or any other negotiable  
or other security or guarantee that now is or  
may at any time hereafter be held by the Bank on  
account of any part of the moneys hereby secured  
all of which promissory notes bills of exchange  
and other negotiable or other securities and  
20 guarantees shall immediately on default being  
made by the Mortgagor in payment of the principal  
interest and other moneys hereby secured or any  
part thereof upon demand as aforesaid or in the  
performance or observance of any of the covenants  
conditions or agreements herein contained or  
implied and on the part of the Mortgagor to be  
performed or observed and for the purposes of  
these presents be considered to become immediately  
due and payable and notwithstanding any other  
30 matter or thing whatsoever and that any such sale  
may be made either in conjunction with or  
separately from any other property real or personal  
over which the Bank may have any mortgage or other  
security for the payment of the principal interest  
and other moneys hereby secured or any part thereof  
by one Contract and at one price or in any other  
manner as the Bank may think fit AND further the  
Bank shall be at liberty in case any other property  
than that comprised in these presents shall be  
40 included in any such sale to apportion the costs  
and expenses of sale and the purchase moneys between  
the properties sold.

50 17. THAT upon any such sale it shall be lawful for  
the Bank at the sole discretion of the Bank from time  
to time to reserve land for roads and to grant any  
rights or easements of carriage or other way or  
passage or drainage or any other easements or rights  
and to impose building or other restrictive covenants  
over upon or in respect of the mortgaged property or  
any part thereof and/or acquire easements or rights  
of any description at the cost of the Mortgagor as  
the Bank may think fit and also at the like cost  
apply for and proceed to obtain any amendment of any



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title relating to the mortgaged property or any part thereof and/or make or cause to be made a subdivision or resubdivision of the mortgaged property or any part or parts thereof and make or cause to be made all such surveys plans and applications and execute and do all such instruments acts and things and register such Plan or Plans of Subdivision of the mortgaged property or any part or parts thereof under Section 196 of the Conveyancing Act, 1919 or the Conveyancing (Strata Titles) Act, 1961 as may be necessary or expedient for that purpose. 10

18. AND it is hereby declared and agreed that the covenants implied against Mortgagors by virtue of any Act now or at any time hereafter in force in the said State shall be implied by these presents save and except so far as the same are hereby altered modified or negatived and that all covenants rights and remedies implied in favour of or given to Mortgagees by virtue of any Act now or at any time hereafter in force in the said State shall be implied and given by these presents save and except so far as the same are hereby altered modified or negatived And Further that the Bank shall not be under any obligation to exercise any of the powers or rights hereby or by any such Act or Acts conferred on it and the Bank shall not nor shall any of the Officers of the Bank or any agent or servant of the Bank be answerable or accountable for any loss which may happen in the exercise or execution or attempted exercise or execution or through the non-exercise of any of the powers or rights conferred by this Mortgage or any Act or Acts now or hereafter in force in the said State or in doing anything hereby or by any such Act or Acts as aforesaid authorised or directed to be done nor shall the Bank or any of the Officers of the Bank or any agent or servant of the Bank be liable as Mortgagee in possession. 20 30

19. THAT every receipt which shall be given by the Bank or its agent for any rent or purchase money or interest on any lease or sale or for any other money payable hereunder shall be an effectual and complete discharge to the person paying the same And no person whether a purchaser or otherwise shall be entitled to enquire into the propriety or regularity of any sale or any other act deed or thing which may be made executed done or performed or purported so to be under any of the powers by this Mortgage or by law conferred upon the Bank nor shall any such person dealing with the Bank with respect to the mortgaged property or any part thereof 40 50

be concerned or bound to enquire whether the moneys hereby secured or any part thereof have been paid by means of any other security or whether any money is in fact owing hereunder or whether any default has been made hereunder and no such person shall be affected by notice express or constructive that all moneys hereby secured have been actually paid And all such sales acts deeds and things shall be valid and effectual notwithstanding any impropriety or irregularity And further that the moneys to arise from the collection of rents and profits of the mortgaged property or from any such sale as aforesaid or otherwise coming into its hands hereunder shall subject to the rights of any prior encumbrance be applied by the Bank in the first place in or towards defraying the costs charges and expenses of or connected with the said lease or sale and the getting in of such moneys and in the next place in or towards payment of the principal interest and other moneys hereby secured (whether or not represented by any bills of exchange or promissory notes or other negotiable or other securities or guarantees and whether then actually due or current) and subject thereto any surplus (but without interest) shall be paid upon application therefor to the Mortgagor or other the persons entitled thereto according to their rights and interests respectively as appearing by the Register Book.

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20. THAT in applying the purchase money to arise from any sales by the Bank hereunder towards satisfaction of the principal interest and other moneys hereby secured the Bank shall be accountable for or chargeable with so much only of the said purchase money available for that purpose as it shall actually receive in cash and from the time of such receipt notwithstanding that it may have transferred the property sold to the purchaser and taken a mortgage from him to secure so much of the said purchase money as shall not have been then actually paid or may have sold the mortgaged property or any part thereof to a purchaser on terms without transferring it to such purchaser and that the Mortgagor shall remain liable for the moneys hereby secured beyond the amount of the moneys actually received as aforesaid.

21. THAT the Mortgagor will on demand as aforesaid pay to the Bank the balance which shall be due to the Bank after any sale shall be effected under the powers herein contained or implied in the event of the proceeds of such sale not being sufficient to pay and satisfy

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to the Bank the whole of the principal interest  
and other moneys hereby secured.

22. THAT it shall be lawful for the Bank at any  
time after the said power of sale shall have arisen  
to surrender to the Crown all or any part of the  
mortgaged property and to exchange with the Crown 10  
or with any person or corporation all or any part of  
the same for other lands of any tenure either with  
or without giving or receiving any cash for the  
purpose of equalising the exchange and to exercise  
and obtain the benefit of all or any rights powers  
or privileges which the holder mortgagee or owner  
of any land of similar tenure to the mortgaged  
property might exercise and obtain the benefit of  
and otherwise to deal with the mortgaged property  
or any part thereof in the same manner as the 20  
Mortgagor could do if these presents had not been  
executed and the lands so acquired shall thereupon  
be held by the Bank on account of the Mortgagor as  
further collateral security for the principal  
interest and other moneys hereby secured.

23. THAT the Mortgagor will not during the  
continuance of this security without the previous  
consent in writing of the Bank signed by any of the  
Officers of the Bank sell or agree to sell or  
otherwise dispose of or subdivide or give any lien 30  
charge or mortgage over or lease the mortgaged  
property or any part thereof or give any lien charge  
bill of sale or mortgage over any crop growing or  
to be grown or over any live stock sheep or chattels  
being on the mortgaged property or any part thereof

24. THAT the Mortgagor shall not without the  
previous written consent of the Bank during the  
continuance of this security apply for or obtain  
from the Crown or any Statutory Authority any  
moneys or material or otherwise do or suffer anything 40  
whereby any charge liability or encumbrance shall or  
might be imposed upon the mortgaged property or any  
part thereof in priority to or in derogation of this  
security.

25. THAT the several documents of title to the  
mortgaged property shall at all times during the  
continuance of this security remain in the custody  
of the Bank but subject to the right of any prior  
mortgagee or encumbrancee (if any) to hold the same

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during the currency of any prior mortgage or encumbrance.

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31st May 1973  
(cont'd)

10 26. THAT this Mortgage shall not be discharged or affected by the death lunacy mental incapacity or bankruptcy of the Customer or any one or more of them (if more than one) or any principal debtor or by the death lunacy mental incapacity or bankruptcy of the Mortgagor or any one or more of them (if more than one) or by any change which may take place in the persons or person now or hereafter comprising any partnership or Firm for the time being constituting the Customer or the Mortgagor and notwithstanding the incorporation of such partnership or Firm and notwithstanding also (if the Customer or the Mortgagor is a company) any reconstruction or other change in the constitution of such company or its amalgamation with or its absorption of or by any other company or by any change which may take place in the constitution of the Bank or by any other circumstance or event but shall continue to be operative until actually discharged by the Bank And that in the event of there being more than one Mortgagor the Bank may give such release discharge or indulgence to any one or more of them as the Bank may think fit and such release discharge or indulgence shall not discharge or affect in any way the rights and remedies of the Bank under these presents or otherwise against the other or others of them.

40 27. THAT the Bank shall not in any event or in any circumstances be concerned to enquire into the power of the Customer (being a Company) or its Officer or Officers or other person or persons purporting to act on its behalf and no objection shall be taken by the Mortgagor with regard to the liability of the Customer to the Bank or with regard to the liability of the Mortgagor to the Bank on the ground of the borrowing or other act in respect of which any demand or claim of the Bank may be made having been outside or in excess of the powers of the Customer or of any such Officer or other person as aforesaid or having been in any way irregular defective or informal and that this security and the liability of the Mortgagor hereunder shall extend to all advances made or to be made by the Bank as aforesaid and to all other moneys or accommodation made available to the Customer or any such person or persons as aforesaid notwithstanding that the Bank

Exhibits

"D" (iii) -  
Memorandum of  
Mortgage No.  
N461274  
31st May 1973  
(cont'd)

may have no legal right or claim to recover from the Customer all or any of such advances moneys or accommodation.

28. THAT all costs charges expenses and outgoings which may be incurred by the Bank in or about the preparation completion stamping and registration and the discharge or partial discharge of this Mortgage and all securities collateral herewith or in or about any consent to any transfer or other dealing with the mortgaged property or any part thereof or in or about any survey valuation or report of or concerning the mortgaged property or any part thereof pursuant to or for the purpose of giving effect to this Mortgage or any security collateral herewith or in consequence of any default which may be made in the payment of any moneys intended to be hereby secured or in the performance or observance of any covenant or agreement on the part of the Mortgagor and/or the Customer expressed or implied in this Mortgage or any security or securities collateral herewith or which may be incurred in or about or in relation to the ascertainment exercise or enforcement or attempted ascertainment exercise or enforcement of any of the powers rights or remedies conferred on the Bank hereunder or by any such collateral security or securities as aforesaid or by any Act or Acts now or at any time hereafter in force in the said State shall from the time of payment of the same sums respectively be treated as if they were new advances by the Bank to the Mortgagor and/or the Customer under this Mortgage and bear interest at such rate or rates as may from time to time be determined by the Bank being a rate or rates not exceeding the highest of the rates for the time being charged on any other part of the principal money hereby secured and the same sums and all interest thereon shall be a charge upon the mortgaged property and shall be considered as principal money secured with such interest by this Mortgage and may be placed by the Bank to the debit of any account of the Mortgagor secured hereby and all costs chargeable under this or any other provision of this mortgage (including costs of and incidental to any proceedings in any Court) shall be computed as between solicitor and own client.

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29. THAT any demand or notice required to be given to the Mortgagor under or by virtue of these presents may be signed by any of the Officers of the Bank or by the Solicitors of the Bank or by any servant or agent of the Bank expressly or impliedly authorised

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to sign the same or whose authority so to do may be subsequently ratified by the Bank and may be served upon the Mortgagor by being delivered personally to the Mortgagor or any one or more of them (if more than one) or by leaving the same upon the mortgaged property or by posting the same in a registered letter at any Public Post Office addressed to the Mortgagor or any one or more of them (if more than one) at his or their address or the address of any of them above appearing at his or their place of abode or business or the place of abode or business of any of them last recorded in the books of the Bank or addressed to other the then registered proprietor of the mortgaged property at his address appearing in the Register Book and the production of the receipt of the Post Office for such registered letter shall be conclusive proof of the service of any demand or notice so sent at the time when the same ought to be delivered in due course of post and although such letter may be returned through the Post Office undelivered and every such demand or notice shall be sufficient and bind the person or persons entitled to any right equity of redemption or benefit in or to the mortgaged property or any part thereof if so served left or posted as aforesaid.

Exhibits  
"D" (iii) -  
Memorandum of  
Mortgage No.  
N461274  
31st May 1973  
(cont'd)

30. THAT if or in so far as the mortgaged property is leasehold the Lease or Leases under which it is held are now valid and subsisting and that the Mortgagor has not done committed or suffered any act or thing whereby or in consequence whereof the said Lease or any of them (if more than one) may be or become void or voidable And that the rent fees and/or instalments of purchase money and interest and all other moneys (if any) payable under all the covenants and conditions contained in the said Lease or Leases and on the part of the lessee or the purchaser to be paid observed or performed have been paid observed and performed up to the day of the date of this Mortgage And that the Mortgagor now has power to mortgage the same And also that the Mortgagor will at all times during the continuance of this security pay the rent fees or instalments of purchase money and interest and other moneys payable under the said Lease or Leases and every renewal or extension thereof on the first day on which the same shall be payable and will within seven days after each day on which the same shall become due deliver to the Bank the receipt for the same and will observe and perform all and every the covenants and conditions in the said Lease or Leases and every renewal or extension thereof contained and on the part of the lessee or the purchaser to be observed and performed and will keep the Bank

Exhibits

"D" (iii) -  
Memorandum of  
Mortgage No.  
N461274  
31st May 1973  
(cont'd)

indemnified against all actions suits proceedings costs damages claims and demands which may be incurred or sustained by reason of the non-payment of the said rent fees or instalments and purchase money and interest and other moneys or any part thereof or by the breach or non-observance or non-performance of the said covenants and conditions or any of them And that upon any breach or non-observance of this covenant the Bank shall be at liberty (but without any obligation so to do) at any time and from time to time to make and do all or any of such payments acts and things as aforesaid on behalf of the Mortgagor

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31. THAT if at the date on which any new Lease of the mortgaged property or any part thereof is capable of being granted to or acquired by the Mortgagor pursuant to the provisions of any Lease or Leases of the mortgaged property or any part thereof there are any moneys secured hereby then the Mortgagor will if required by the Bank forthwith at his own expense apply for and endeavour to obtain such new Lease And whenever any new Lease has been granted to or acquired by the Mortgagor he will when requested by the Bank execute at his own cost and expense a Mortgage in favour of the Bank over such Lease to further secure the moneys hereby secured And such Mortgage shall be in the usual printed form of Mortgage then used by the Bank in respect of lands of a similar tenure.

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32. THAT the Mortgagor will at his own cost at any time or times during the continuance of this security when required by the Bank so to do execute and give to the Bank by way of collateral security for any part of the principal money hereby secured a preferable lien or preferable liens over the then next ensuing crop or crops to be harvested from the mortgaged property every such lien to contain a power to sell and agreement to insure and such other provisions and be in such form as the Bank shall think fit.

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33. THAT the powers hereby conferred on the Bank shall be in addition to any powers conferred on Mortgagees by the Conveyancing Act, 1919 and the provisions of such Act regulating the exercise of the powers thereby conferred shall be deemed to be varied or extended as the case may require in the manner and to the extent provided by these presents And in particular sub-sections 3, 5, 6, 7 and 8 of Section 106 of the said Act shall not nor shall any of the conditions and

restrictions of the Bank's power of leasing contained in such section apply to any lease granted by the Bank under the powers of leasing conferred on it by the said Act or by this instrument And Also that the Mortgagor shall not be entitled to exercise the statutory power of leasing or of accepting Surrenders of Leases conferred by such section without the previous written consent of the Bank.

Exhibits  
"D" (iii) -  
Memorandum of  
Mortgage No.  
N461274  
31st May 1973  
(cont'd)

- 10 34. THAT in the event of the mortgaged property or any part thereof being a unit on any registered plan under the Conveyancing (Strata Titles) Act, 1961:
- 20 (a) The Mortgagor will duly and punctually comply with and observe the by-laws of the Body Corporate from time to time in force and will duly and punctually pay all amounts which may be demanded from time to time by the Body Corporate pursuant to the provisions of section 15(2) of the Conveyancing (Strata Titles) Act, 1961 and will if requested by the Bank so to do hand to the Bank every receipt relating thereto And that upon any breach or non-observance of this covenant the Bank shall be at liberty (but without any obligation so to do) at any time and from time to time to make and do all or any of such acts things and payments as aforesaid on behalf of the Mortgagor.
- 30 (b) The Mortgagor will give to the Bank written notice of each meeting of the Body Corporate forthwith upon being notified of such meeting.
- 40 (c) The Mortgagor doth hereby irrevocably during the continuance of this security appoint the Bank and each of the Officers of the Bank severally to be the Attorney of the Mortgagor to attend and vote on his behalf or to appoint by a proper instrument of proxy any person to attend and vote on his behalf at any meeting of the Body Corporate in the same manner in all respects as the Mortgagor himself could do if he were personally present and voting And the Mortgagor doth further covenant and agree with the Bank that if any of the said Attorneys or any proxy appointed by any such Attorney or by the Mortgagor at the request of the Bank or of any Officer of the Bank is present at any such meeting the Mortgagor shall not exercise his right to vote (if any) but such right shall be exercised on his behalf by such Attorney or proxy PROVIDED THAT nothing herein contained shall render it obligatory upon
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Exhibits

"D" (iii) -  
Memorandum of  
Mortgage No.  
N461274  
31st May 1973  
(cont'd)

any of the said Attorneys or proxies to attend or vote at any such meeting and the Mortgagor declares that the Bank shall not be answerable or accountable to the Mortgagor by reason of any exercise or failure to exercise such power of voting or attend any meeting And the Mortgagor further agrees that he will from time to time whenever requested by the Bank execute an instrument of proxy in proper form in relation to any such meeting of the Body Corporate in favour of such person or persons as the Bank may nominate and deliver the same to the Bank or as the Bank shall direct.

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(d) The Mortgagor will not without the prior consent in writing of the Bank or any of the Officers of the Bank concur or agree to any dealing with the common property or any part thereof or vote in favour of any resolution of the Body Corporate in respect of any matter which pursuant to the provisions of the Conveyancing (Strata Titles) Act, 1961 requires to be passed by a unanimous resolution or which adds to amends or repeals all or any of the by-laws in the Second Schedule to the Conveyancing (Strata Titles) Act, 1961 or any addition or amendment to such by-laws nor will the Mortgagor without such consent lodge or join in lodging with the Registrar for approval any plan of redevelopment or make or join in making or vote in favour of any resolution of the Body Corporate authorising the Body Corporate to make or join in making any application to the Registrar or the Court under the provisions of the Conveyancing (Strata Titles) Act, 1961.

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(e) The Mortgagor will effect and during the continuance of this security maintain in force a policy of insurance in respect of destruction of or damage to the mortgaged property pursuant to Section 17 of the Conveyancing (Strata Titles) Act, 1961 in some public insurance office to be nominated by the Bank to the amount of the liability of the Mortgagor hereunder and will deposit with the Bank the policy of such insurance and at least seven days before each premium is payable the receipt for such premium And in the event of any breach or non-observance of this covenant the Bank shall be at liberty to effect such insurance and continue the same for such period as it may in its absolute discretion think fit.

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(f) Each of the expressions used in this covenant which is defined by the Conveyancing (Strata

Titles) Act, 1961 shall have the same meaning as is assigned thereto respectively by that Act.

Exhibits  
"D" (iii) -  
Memorandum of  
Mortgage No.  
N461274  
31st May 1973  
(cont'd)

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35. THAT the Mortgagor will not without the previous written consent of the Bank change or permit to be changed any existing lawful non-conforming use of the mortgaged property or any part thereof under any Town Planning legislation ordinances or by-laws or similar legislation applicable thereto nor shall the Mortgagor without the prior written consent of the Bank apply for or consent to any application to re-zone or change the use of the mortgaged property or any part thereof under any Town Planning legislation ordinances or by-laws or similar legislation applicable thereto.

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36. THAT in case the Mortgagor shall receive notice of any intended resumption of the mortgaged property or any part thereof the Mortgagor will forthwith notify the Bank thereof and will furnish the Bank with a copy of such notice and will without delay upon the request of the Bank and after having first obtained the Bank's written approval to the amount and particulars thereof lodge a claim for compensation with the proper authority and proceed to obtain a prompt decision on such claim and will not reduce or compromise such claim without the consent in writing of the Bank first had and obtained And that the Mortgagor will not lodge any such claim for compensation without first obtaining the written approval of the Bank to the amount and particulars of such claim which approval shall not be unreasonably withheld

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37. THAT the provisions of every Act of Parliament proclamation rule and regulation (whether in each case Federal or State) now existing or which may hereafter be enacted or come into force whereby or in consequence whereof the date or dates whereon any principal interest or other moneys hereby secured ought to be paid shall or may be posted or stayed or the time for payment of such moneys or any of them shall or may be extended or enlarged or suspended or the amount of such moneys reduced or cancelled or the exercise by the Bank of any of the powers rights or remedies hereunder curtailed or precluded either absolutely or otherwise are hereby expressly (so far as the same lawfully can or may be) excluded from and shall not apply to those presents or the recovery of all or any of the moneys hereby secured.

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38. THAT the directions and notes written or

Exhibits  
"D" (iii) -  
Memorandum of  
Mortgage No.  
N461274  
31st May 1973  
(cont'd)

printed in the margin of these presents shall in nowise limit restrict or prejudice the rights powers and remedies conferred upon the Bank in the body of these presents or by any Statute Act or Ordinance now or at any time hereafter in force.

39. IT IS HEREBY AGREED AND DECLARED that:-

- (a) Where in this Mortgage the context requires or admits the plural number includes the singular number and vice versa and the masculine gender includes the feminine gender and also the neuter gender, the word "person" includes a Company and "Company" includes a Corporation ; and any reference to the death or personal representatives of a person shall refer also to the liquidation or appointment of an official manager or liquidator or official manager of a Company where the sense requires; 10
- (b) The expression "the Mortgagor" used herein includes if this Mortgage is given by one person that person his executors administrators and transferees and if this Mortgage is given by more persons than one those persons jointly and every two or more of them jointly and each of them severally and their respective executors administrators and transferees and if a Company is a Mortgagor includes that Company its successors and transferees; 20
- (c) If this Mortgage is given by more than one Mortgagor the covenants and agreements on the part of the Mortgagor herein contained or implied shall bind the Mortgagors jointly and every two or more of them jointly and each of them severally; 30
- (d) The expression "the Customer" used herein includes when the Customer is a person such person his executors administrators and transferees and when the Customer consists of more persons than one such persons jointly and every two or more of them jointly and each of them severally and their respective executors administrators and transferees and when the Customer is a partnership or firm includes such partnership or firm and not only the persons constituting the partnership or firm at the date of this security but also all and every persons and person who for the time being and from time to time shall be members of such partnership or firm and their respective executors administrators and transferees and all successors in business 40 50

of such partnership or firm and when the Customer is a company includes such company as constituted from time to time and its transferees and all successors in business of such company;

Exhibits  
"D" (iii) -  
Memorandum of  
Mortgage No.  
N461274  
31st May 1973  
(cont'd)

(e) The expression "the Bank" includes the successors and transferees of the Bank;

10 (f) The expression "the Officers of the Bank" shall include the following Officers for the time being of the Bank namely the Managing Director of the Bank the Chief General Manager of the Bank any General Manager of the Bank any Assistant General Manager of the Bank any Attorney of the Bank the Manager of any Branch of the Bank and the Accountant of any Branch of the Bank;

20 (g) Without in any way limiting any of the provisions of this Mortgage this Mortgage shall be a security for all moneys in which (if there be one Mortgagor only) the Mortgagor and (if there be more Mortgagors than one) the Mortgagors or any or either of them or any two or more of them and (if there be one Customer only) the Customer and (if there be more Customers than one) the Customers or any or either of them or any two or more of them shall be indebted or liable immediately or contingently to the Bank either alone or jointly or in common with any other or others on any account or by any means whatsoever;

30 (h) All references to Statutes shall refer also to Statutes amending modifying or re-enacting the Statutes referred to;

(i) In the event of the Mortgagor and the Customer being identical then notwithstanding anything herein this Mortgage shall not in any way be prejudiced by reason of the Mortgagor being sometimes called "the Customer".

Dated at Sydney this 31st day of May 1973.

40 SIGNED SEALED and DELIVERED in )  
my presence by the Mortgagor )  
who is personally known to me ) L.S.  
(f) ) Mortgagor  
Signature of Witness )  
Name of Witness )  
Qualification of Witness )

Exhibits

"D" (iii) -  
Memorandum of  
Mortgage No.  
N461274  
31st May 1973  
(cont'd)

SIGNED SEALED and DELIVERED in )  
my presence by the Mortgagor )  
who is personally known to me )  
(f) )  
Signature of Witness )  
Name of Witness )  
Qualification of Witness )

L.S.  
Mortgagor

SIGNED SEALED and DELIVERED in )  
my presence by the Mortgagor )  
who is personally known to me )  
(f) )  
Signature of Witness )  
Name of Witness )  
Qualification of Witness )

L.S.  
Mortgagor

10

The Common Seal of Tacking )  
Point Downs Pty. Limited was )  
hereunto affixed in compliance )  
with the Company's Memorandum )  
and Articles of Association and )  
with the consent of the Board )  
of Directors in the presence )  
of: )

C.S.

20

Sgd. ?  
Director

Sgd. ?  
Secretary

SIGNED in my presence for and )  
on behalf of AUSTRALIA AND NEW )  
ZEALAND BANKING GROUP LIMITED )  
by ELLIS MANNING CARTNER who )  
is personally known to me )  
Sgd. K.R. Gale )  
Signature of Witness )  
KEVIN ROY GALE )  
Name of Witness )  
68 Pitt St., Sydney )  
Address of Witness )

Accepted and )  
certified correct )  
for the purposes of )  
the Real Property )  
Act, 1900. )

30

For and on behalf of )  
AUSTRALIA AND NEW )  
ZEALAND BANKING GROUP )  
LIMITED )  
Sgd. E.M. Carter )  
Assistant Manager )

[-(f) Further proof of execution will not normally )  
be required if signed or acknowledged before )  
any of the following persons, not being a )  
party to the dealing, to whom the mortgagor is )  
known: )

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Where executed in New South Wales - bank )  
manager, barrister, clerk of petty sessions, )  
commissioned officer in the Defence Force of )  
the Commonwealth of Australia, commissioner )  
for taking affidavits, headmaster of a school, )  
judge, justice of the peace, magistrate, )  
mayor or other chief officer of any local )  
government corporation, medical practitioner, )

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member of parliament of the Commonwealth or of a State, member of the police force of the Commonwealth or of a State or a Territory, minister of religion, notary public, postmaster, solicitor, town or shire clerk or other executive officer administering local government;

Exhibits  
"D" (iii) -  
Memorandum of  
Mortgage No.  
N461274  
31st May 1973  
(cont'd)

10

Where executed in any part of the Commonwealth of Australia or its Territories or in any part of the British Commonwealth - any of the persons referred to above, and in addition, an Australian or British Consular Officer exercising his functions in the part, Governor, Government Resident, Chief Secretary or Registrar of Titles of the part:

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Where executed in foreign country - an Australian or British Consular Officer exercising his functions in that country, commissioned officer in the Defence Force of the Commonwealth of Australia, commissioner for taking affidavits, judge, justice of the peace, magistrate, mayor or other chief officer of any local government corporation, officer in charge of a police station, notary public, town or shire clerk or other executive officer administering local government.

Repeat attestation for additional parties if required.

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NOTE. - When the Mortgagor is a Company care should be taken to see that the attestation clause is correctly filled in in accordance with the Company's Article of Association.

DEPARTMENTAL USE ONLY  
MORTGAGE

TO BE COMPLETED BY LODGING PARTY

Lodged by: Australia and New Zealand Banking Group Limited  
Address: N.S.W. Administration Branch Securities Dept. 365 George Street, Sydney.  
Phone No.: 20275

40

Documents lodged herewith

Checked REGISTERED  
26.9.1973  
Passed  
Signed J. Watson  
Registrar General

- 1. CH 15 (4)
- 2. ....
- 3. ....
- 4. ....
- 5. ....

Received Receiving  
Documents ..... Clerk

The within mortgage is partly discharged.

50

Sgd.  
REGISTRAR GENERAL

Exhibits

"D"(iii) -  
Memorandum of  
Mortgage No.  
N461274  
31st May 1973  
(cont'd)

AUTHORITY FOR USE OF INSTRUMENT OF TITLE (g)

Authority is hereby given for the use of (insert  
reference to certificates, grants or dealings)  
lodged in connection with (insert number of plan  
or dealing) for the registration of this dealing  
and for delivery to \_\_\_\_\_  
(BLOCK LETTERS)

\_\_\_\_\_  
Signature

\_\_\_\_\_  
(Name (BLOCK LETTERS))

[(g) Unless the instrument of title has been  
lodged by the person lodging the dealing,  
or its use has been authorised previously,  
the authority must be furnished by the  
person otherwise entitled to delivery of  
the certificate of title, grants &c.]

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MEMORANDUM AS TO NON-REVOCATION OF POWER OF ATTORNEY

(To be signed at the time of executing the within  
dealing)

The undersigned states that he has no notice of the  
revocation of the Power of Attorney registered  
No.

20

Miscellaneous Register under the authority of  
which he has just executed the within dealing.  
Signed at \_\_\_\_\_  
the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ .

\_\_\_\_\_  
Signature of attorney

\_\_\_\_\_  
Signature of witness

CERTIFICATE OF J.P. &c., TAKING DECLARATION OF  
ATTESTING WITNESS (h)

I certify that \_\_\_\_\_, the  
attesting witness to this dealing, appeared  
before me at \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_  
and declared that he personally knew \_\_\_\_\_  
\_\_\_\_\_ the person signing the  
same, and whose signature thereto he has attested,  
and that the name purporting to be such signature  
of the said \_\_\_\_\_ is his own  
handwriting and that he was of sound mind and  
freely and voluntarily signed the same.

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\_\_\_\_\_  
Signature

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\_\_\_\_\_  
Name (BLOCK LETTERS)

\_\_\_\_\_  
Qualification

(h) Not required where dealing attested in accordance  
with note (f); in other cases to be signed by one  
of the persons referred to in note (f).

CORPORATE ACCOUNTS DEPARTMENT 20 MARTIN PLACE, SYDNEY.

"E" - Plaintiff's Interrogatories  
No. 10A(e), (f) & (g) and Defendant's  
answers - 21st August, 1978

Exhibits

"E"  
Plaintiff's  
Interrogatories  
No. 10A(e),(f)  
& (g) and  
Defendant's  
answers  
21st August 1978

10A. Further as to Mortgage Debenture Registered  
No. 27403:

- 10 (e) As to Clause 15 thereof, did the defendant  
between the date of creation of the said  
Mortgage Debenture No. 27403 and 23rd  
February, 1978, receive from Tacking Point  
a copy of any balance sheet and trading  
and profit and loss accounts? If so, when  
were the same received, and for what accounting  
period did they relate and was it certified by  
an auditor? If more than one such document  
was received, answer as to each document and  
each occasion (as the case may be).
- (f) Did the Defendant ever approve of any auditor  
for the purposes of the said Clause 15 and if  
so, who was so approved and when?
- 20 (g) Did the defendant ever require Tacking Point  
to furnish any balance sheet and trading and  
profit and loss accounts and if so, how and  
when and with what result?

Defendant's answers

- 30 (e) Yes. Certified balance sheet and accounts for  
the period 1/9/73 to 31/8/74 was received on  
3rd September, 1976.
- (f) The Bank did not approve of any auditor of  
advance on his appointment neither did it  
disapprove of his appointment subsequently.
- (g) Periodic requests were made to the Bank for  
up to date information; the latest balance  
sheet received however was for the period  
1/9/73 to 31/8/74.

"F" - Plaintiff's Interrogatories No.  
11, 12 & 13 27th July 1978 and Defendant's  
Answers, 21st August, 1978

"F"  
Plaintiff's  
Interrogatories  
No. 11, 12 &  
13 27th July  
1978 and  
Defendant's  
Answers  
21st August  
1978

11.A. As to Memorandum of Mortgage Registered No.  
N461274:

- 40 (a) Did the defendant provide loans, advances,  
credits or banking accommodation to Tacking  
Point upon the signing thereof on 31st May,



Exhibits

"F"

Plaintiff's  
Interrogatories  
No. 11, 12 &  
13 27th July  
1978 and  
Defendant's  
Answers  
21st August  
1978  
(contd.)

1973, and thereafter up to the date of expiration of the period of ninety days from the giving of the notice in writing dated 3rd April, 1978 from the defendant to the plaintiff? If so, when were each of such loans, advances, credits and banking accommodation created or given (as the case may be), what was the amount of each of such loans, advances, credits or other accommodation, and upon what terms as to repayment thereof and payment of interest were the same so created or given?

- 10
- (b) Did the defendant at any time throughout the period referred to in (a) above make any demand upon Tacking Point to pay any principal money for the time being owing or unpaid under or by virtue of the said Mortgage and if so, when, in what manner and for what sum? If more than one demand was so made, answer as to each demand. 20
- (c) Was the demand satisfied, and if so, when and in what manner?
- (d) If the demand was not satisfied, did the defendant notify the plaintiff of that fact, and if so, how and when?
- (e) Did the defendant at any time throughout the period of time referred to in (a) above make any agreement with Tacking Point of the nature referred to in Clause 2 of the said Mortgage, and if so, when and in what manner was any such agreement made and what were its terms? If more than one agreement was made, answer as to each agreement. 30
- (f) What were the usual half yearly days for balancing the books of the defendant from time to time throughout the period of time referred to in (a) above?
- (g) Did Tacking Point pay the interest due to the defendant on any of the half yearly days referred to in Clause 2 of the said Mortgage occurring during the period of time referred to in (a) above, and if so, specify the amount so paid, the date and manner of payment, and when the amount so paid actually fell due? if more than one such payment was made, answer as to each payment. 40
- (h) Did the defendant at any time during the period of time referred to in (a) above make demand upon Tacking Point for payment of interest, and if so, when and in what manner and with what result? If more than one demand was so made, answer as to each demand. 50

- (i) Was the demand satisfied, and if so, when and in what manner?
- (j) If the demand was not satisfied, did the defendant notify the plaintiff of that fact, and if so, how and when?
- (k) Did Tacking Point throughout the period of time referred to in (a) above duly pay or cause to be paid:

Exhibits  
 "F"  
 Plaintiff's  
 Interrogatories  
 No. 11, 12 &  
 13 27th July  
 1978 and  
 Defendant's  
 Answers  
 21st August 1978  
 (cont'd)

10

- (i) All land tax assessed in respect of the security the subject of the Mortgage?
- (ii) All Council rates assessed in respect of the security the subject of the Mortgage?

(l) If the answer to (k) be NO:

- (i) What assessments were not so paid?
- (ii) What action was taken by the defendant in respect of any such non-payment?

20

(m) Was there any mortgage or encumbrance noted thereon as an encumbrance and if so, did Tacking Point duly pay or cause to be paid all principal, interest and other moneys payable thereunder?

(n) If the answer to (m) be NO:

- (i) What principal, interest or other moneys were not so paid?
- (ii) What action was taken by the defendant in respect of any such non-payment?

30

11B.(a) Loans were not granted upon the execution of the Mortgage. Thereafter the following facilities were approved:

<u>Date</u>	<u>Limit</u>	<u>Facility</u>
4/4/74	\$1,000,000	Commercial Bill.

Repayment from sale of blocks in Port Macquarie Sub-Division.

Interest to be provided by Tacking Point.

2/3/76	\$200,000	Overdraft No. 3 account.
	\$250,000	Indemnities Guarantees.
	\$1,000,000	Commercial Bill.

40

Repayment from sale of blocks in Port Macquarie Sub-division.

Exhibits

"F"

Plaintiff's  
Interrogatories  
No. 11, 12 &  
13 27th July  
1978 and  
Defendant's  
Answers  
21st August 1978  
(cont'd)

Interest to be debited to a separate account styled No. 2 account.

Beneficial were responsible for interest following extension and variation to letter of Take Out dated 2/3/76.

From this stage Beneficial signed all cheques drawn on No. 3 account. 23/12/76 Facilities varied to:

Overdraft No. 3 Account	\$400,000 *	
Indemnities Guarantees	\$210,000 *	10
Commercial Bill	\$1,000,000	

\* Aggregate of both not to exceed \$446,000 at any one time. Repayment arrangement and interest payments remained unaltered.

25/3/77 Facilities varied to:

Overdraft No. 3 Account	\$495,000 *
Indemnities Guarantees	\$221,000 *
Commercial Bill	\$1,000,000

\* Aggregate of both not to exceed \$566,000 at any one time. Repayment arrangement and interest payments remained unaltered. 20

29/7/77 Facilities varied to:

Overdraft No. 3 Account	\$549,000 *
Indemnities Guarantees	\$ 71,000 *
Commercial Bill	\$1,000,000

\* Aggregate of both not to exceed \$600,000 at any one time. Repayment arrangement and interest payments remained unaltered.

8/12/77 Facilities varied to:

Overdraft \$600,000 following release of Indemnities Guarantees.	30
Commercial Bill \$1,000,000.	

19/6/78 Commercial Bill matured and was paid to a Special Account styled "Tacking Point Downs Pty. Ltd." - Retired Commercial Bills. Thus overdraft facilities varied to:

No. 3 Account	\$600,000
Special Account	<u>\$1,000,000</u>
	<u>\$1,600,000</u>

Sale and settlement of blocks of land in Port Macquarie sub-division has seen facilities reduced to: 40

No. 3 account                   \$515,465  
Special Account               \$1,000,000  
  \$1,515,465

Exhibits  
"F"  
Plaintiff's  
Interrogatories  
No. 11, 12 &  
13 27th July  
1978 and  
Defendant's  
Answers  
21st August 1978  
(cont'd).

- (b) No.  
(c) Not applicable.  
(d) Not applicable.  
(e) No.  
(f) Days nominated by the Bank and being towards the end of March and September each year.

10 (g) Yes. Interest was paid as follows:

<u>Due Date</u>	<u>Date Paid</u>	<u>Amount</u>	<u>Manner of Payment</u>
		\$	
29/3/76	29/3/76	1,576.30	Debited to No. 2 Account
29/9/76	29/9/76	4,258.70	Debited to No. 2 Account
*29/9/76	29/9/76	5,912.30	Debited to No. 2 Account
20 30/3/77	30/3/77	8,506.30	Debited to No. 2 Account
**30/3/77	30/3/77	8,533.80	Debited to No. 3 Account
29/9/77	29/9/77	38,779.50	Debited to No. 2 Account
30/3/78	30/3/78	57,734.90	Debited to No. 2 Account

30 \* Interest was incorrectly debited to No. 3 account on 29/9/76 and on 8/11/76 adjusting entries were passed to transfer amount to No. 2 Account.

\*\* Interest was incorrectly debited to No. 3 account. Transfer to No. 2 Account has not been made.

- (h) No.  
(i) Not applicable.  
(j) Not applicable.  
(k) (i) as far as the Bank is aware assessment has not issued.  
40 (ii) as far as the Bank is aware Council Rates have been paid.  
(l) Not applicable.

Exhibits

"F"

Plaintiff's  
Interrogatories  
No. 11,12 &  
13 27th July  
1978 and  
Defendant's  
Answers  
21st August 1978  
(cont'd)

- (m) There is no mortgage. The only encumbrance is Crown Grant on which no sum is owing.
- (n) Not applicable.
- 12A. As to Mortgage No. Q261385 from Hudson and Wallace (Trading) Pty. Limited:
- (a) Did the defendant provide loans, advances, credits or banking accommodation to Tacking Point upon the signing thereof on 31st May 1973, and thereafter up to the date of expiration of the period of ninety days from the giving of the notice in writing dated 3rd April, 1978, from the defendant to the plaintiff? If so, when were each of such loans, advances, credits and banking accommodation created or given (as the case may be), what was the amount of each of such loans, advances, credits or other accommodation, and upon what terms as to repayment thereof and payment of interest were the same so created or given? 10
- (b) Did the defendant at any time throughout the period referred to in (a) above make any demand upon Tacking Point to pay any principal money for the time being owing or unpaid under or by virtue of the said Mortgage, and if so, when, in what manner and for what sum? If more than one demand was so made, answer as to each demand.
- (c) Was the demand satisfied and if so, when and in what manner? 30
- (d) If the demand was not satisfied, did the defendant notify the plaintiff of that fact, and if so, how and when?
- (e) Did the defendant at any time throughout the period of time referred to in (a) above make any agreement with Tacking Point of the nature referred to in Clause 2 of the said Mortgage, and if so, when and in what manner was any such agreement made and what were its terms? If more than one agreement was made, answer as to each agreement. 40
- (f) What were the usual half yearly days for balancing the books of the defendant from time to time throughout the period of time referred to in (a) above?
- (g) Did Tacking Point pay the interest due to the Defendant on any of the half yearly days referred to in Clause 2 of the said Mortgage occurring during the period of time referred

to in (a) above, and if so, specify the amount so paid, the date and manner of payment, and when the amount so paid actually fell due? If more than one such payment was made, answer as to each payment.

Exhibits  
"F"  
Plaintiff's  
Interrogatories  
No. 11, 12 &  
13 27th July  
1978 and  
Defendant's  
Answers  
21st August 1978  
(cont'd)

10 (h) Did the defendant at any time during the period of time referred to in (a) above make demand upon Tacking Point for payment of interest, and if so, when and in what manner and with what result? If more than one demand was so made, answer as to each demand.

(i) Was the demand satisfied, and if so, when and in what manner?

(j) If the demand was not satisfied, did the defendant notify the plaintiff of that fact, and if so, how and when?

20 (k) Did Tacking Point throughout the period of time referred to in (a) above duly pay or cause to be paid:

(i) All land tax assessed in respect of the security the subject of the Mortgage?

(ii) All Council rates assessed in respect of the security the subject of the Mortgage?

(l) If the answer to (k) be NO:

(i) What assessments were not so paid?

(ii) What action was taken by the defendant in respect of any such non-payment?

(m) Was there any mortgage or encumbrance noted thereon as an encumbrance and if so, did Tacking Point duly pay or cause to be paid all principal, interest and other moneys payable thereunder?

(n) If the answer to (m) be NO:

(i) What principal, interest or other moneys were not so paid.

(ii) What action was taken by the defendant in respect of any such non-payment?

40 12B.(a) Loans were not granted on signing of mortgage. Thereafter the following facilities were approved:

<u>Exhibits</u>	<u>Date</u>	<u>Limit</u>	<u>Facility</u>	
"F" Plaintiff's Interrogatories No. 11, 12 & 13 27th July 1978 and Defendant's Answers 21st August 1978 (cont'd)	4/4/74	\$1,000,000	Commercial Bill	
			Repayment from sale of blocks in Port Macquarie sub-division.	
			Interest to be provided by Tacking Point.	
	2/3/76	\$200,000	Overdraft No. 3 Account.	
		\$250,000	Indemnities Guarantees.	
		\$1,000,000	Commercial Bill.	
			Repayment from sale of blocks in Port Macquarie sub-division.	10
			Interest to be debited to a separate account styled No. 2 Account.	
			Beneficial were responsible for interest following extension and variation to letter of Take Out dated 2/3/76.	
			From this stage Beneficial signed all cheques drawn on No. 3 Account.	
			23/12/76 Facilities varied to:	
			Overdraft No. 3 Account       \$400,000 *	
			Indemnities Guarantees       \$210,000 *	20
			Commercial Bill               \$1,000,000	
			* Aggregate of both not to exceed \$446,000 at any one time. Repayment arrangement and interest payments remained unaltered.	
			25/3/77 Facilities varied to:	
			Overdraft No. 3 Account       \$495,000 *	
			Indemnities Guarantees       \$221,000 *	
			Commercial Bill               \$1,000,000	
			*Aggregate of both not to exceed \$566,000 at any one time. Repayment arrangement and interest payments remained unaltered.	30
			29/7/77 Facilities varied to:	
			Overdraft No. 3 Account       \$549,000 *	
			Indemnities Guarantees       \$ 71,000 *	
			Commercial Bill               \$1,000,000	
			*Aggregate of both not to exceed \$600,000 at any one time. Repayment arrangement and interest payments remained unaltered.	
			8/12/77 Facilities varied to:	

Overdraft \$600,000 following release of Indemnities Guarantees.  
Commercial Bill \$1,000,000.

Exhibits

"F"  
Plaintiff's Interrogatories No. 11, 12 & 13 27th July 1978 and Defendant's Answers 21st August 1978 (cont'd)

19/6/78 Commercial Bill matured and was paid to a Special Account styled "Tacking Point Downs Pty. Ltd." - Retired Commercial Bills.

Thus overdraft facilities varied to:

No. 3 Account \$600,000  
Special Account \$1,000,000  
\$1,600,000

10

Sale and settlement of blocks of land in Port Macquarie sub-division has seen facilities reduced to:

No. 3 Account \$515,465  
Special Account \$1,000,000  
\$1,515,465

- (b) No.
- (c) Not applicable.
- (d) Not applicable.
- (e) No.
- (f) Days nominated by the Bank and being towards the end of March and September each year.
- (g) Yes. Interest was paid as follows:

20

<u>Due Date</u>	<u>Date Paid</u>	<u>Amount</u>	<u>Manner of Payment</u>
29/3/76	29/3/76	1,576.30	Debited to No. 2 Account
29/9/76	29/9/76	4,258.70	Debited to No. 2 Account
*29/9/76	29/9/76	5,912.30	Debited to No. 2 Account
30/3/77	30/3/77	8,506.30	Debited to No. 2 Account
**30/3/77	30/3/77	8,533.80	Debited to No. 3 Account
29/9/77	29/9/77	38,779.50	Debited to No. 2 Account
30/3/78	30/3/78	57,734.90	Debited to No. 2 Account

30

40

\* Interest was incorrectly debited to No. 3 Account on 29/9/76 and on 8/11/76 adjusting entries



Exhibits

"F"

Plaintiff's  
Interrogatories  
No. 11, 12 &  
13 27th July  
1978 and  
Defendant's  
Answers  
21st August 1978  
(cont'd)

were passed to transfer amount to No. 2  
Account.

\*\* Interest was incorrectly debited to No.  
3 Account. Transfer to No. 2 Account has  
not been made.

- (h) No.
- (i) Not applicable.
- (j) Not applicable.
- (k) (i) as far as the Bank is aware assessment  
has not been issued. 10
- (ii) as far as the Bank is aware Council  
Rates have been paid.

(l) Not applicable.

(m) Right of Way G204096.  
Mortgage No. P229004 to Edward John CUNNING.  
Mortgage No. P301370 to Beneficial Finance  
Corporation Limited.  
As far as the Bank is aware all moneys due  
were paid.

(n) Not applicable. 20

13A. As to Mortgage No. Q309133 from Hudson and  
Wallace (Trading) Pty. Limited:

(a) Did the Defendant provide loans, advances,  
credits or banking accommodation to Tacking  
Point upon the signing thereof on 31st May,  
1973, and thereafter up to the date of  
expiration of the period of ninety days from  
the giving of the notice in writing dated 3rd  
April, 1978, from the defendant to the  
Plaintiff? If so, when were each of such  
loans, advances, credits and banking  
accommodation created or given (as the case  
may be), what was the amount of each of such  
loans, advances, credits or other accommodation,  
and upon what terms as to repayment thereof  
and payment of interest were the same so  
created or given? 30

(b) Did the defendant at any time throughout the  
period referred to in (a) above make any  
demand upon Tacking Point to pay any  
principal money for the time being owing or  
unpaid under or by virtue of the said  
Mortgage, and if so, when, in what manner  
and for what sum? If more than one demand  
was so made, answer as to each demand. 40

- |    |     |  |  |
|----|-----|--|--|
|    | (c) | Was the demand satisfied, and if so, when and in what manner?  | <u>Exhibits</u>  |
|    | (d) | If the demand was not satisfied, did the defendant notify the plaintiff of that fact, and if so, how and when?   | "F"  |
|    | (e) | Did the defendant at any time throughout the period of time referred to in (a) above make any agreement with Tacking Point of the nature referred to in Clause 2 of the said Mortgage, and if so, when and in what manner was any such agreement made and what were its terms? If more than one agreement was made, answer as to each agreement.   | Plaintiff's Interrogatories No. 11, 12 & 13 27th July 1978 and Defendant's Answers 21st August 1978 (cont'd) |
| 10 |     |  |  |
|    | (f) | What were the usual half yearly days for balancing the books of the defendant from time to time throughout the period of time referred to in (a) above?  |  |
| 20 |     |  |  |
|    | (g) | Did Tacking Point pay the interest due to the defendant on any of the half yearly days referred to in Clause 2 of the said Mortgage occurring during the period of time referred to in (a) above, and if so, specify the amount so paid, the date and manner of payment, and when the amount so paid actually fell due? If more than one such payment was made, answer as to each payment. |  |
| 30 |     |  |  |
|    | (h) | Did the defendant at any time during the period of time referred to in (a) above make demand upon Tacking Point for payment of interest, and if so, when and in what manner and with what result? If more than one demand was so made, answer as to each demand.   |  |
|    | (i) | Was the demand satisfied, and if so, when and in what manner?  |  |
|    | (j) | If the demand was not satisfied, did the defendant notify the plaintiff of that fact, and if so, how and when?   |  |
| 40 |     |  |  |
|    | (k) | Did Tacking Point throughout the period of time referred to in (a) above duly pay or cause to be paid:   |  |
|    |     | (i) All land tax assessed in respect of the security the subject of the Mortgage?  |  |
|    |     | (ii) All Council rates assessed in respect of the security the subject of the Mortgage?  |  |

Exhibits

"F"  
Plaintiff's  
Interrogatories  
No. 11, 12 &  
13 27th July  
1978 and  
Defendant's  
Answers  
21st August  
1978  
(cont'd)

- (l) If the answer to (k) be NO:
  - (i) What assessments were not so paid?
  - (ii) What action was taken by the defendant in respect of any such non-payment?
- (m) Was there any mortgage or encumbrance noted thereon as an encumbrance, and if so, did Tacking Point duly pay or cause to be paid all principal, interest and other moneys payable thereunder?
- (n) If the answer to (m) be NO: 10
  - (i) What principal, interest or other moneys were not so paid?
  - (ii) What action was taken by the defendant in respect of any such non-payment?

13B.(a) Loans were not granted on signing of mortgage. Thereafter the following facilities were approved:

<u>Date</u>	<u>Limit</u>	<u>Facility</u>
4/4/74	\$1,000,000	Commercial Bill

Repayment from sale of blocks in Port Macquarie Sub-Division. 20

Interest to be provided by Tacking Point.

2/3/76	\$200,000	Overdraft No. 3 Account
	\$250,000	Indemnities Guarantees
	\$1,000,000	Commercial Bill

Repayment from sale of blocks in Port Macquarie Sub-Division.

Interest to be debited to a separate account styled No. 2 Account.

Beneficial were responsible for interest following extension and variation to letter of Take Out dated 2/3/76. 30

From this stage Beneficial signed all cheques drawn on No. 3 Account.

23/12/76 Facilities varied to:

Overdraft No. 3 Account	\$400,000 *
Indemnities Guarantees	\$210,000 *
Commercial Bill	\$1,000,000

\*Aggregate of both not to exceed \$446,000 at any one time. Repayment arrangement and interest payments remained unaltered.

Exhibits

"F"  
Plaintiff's  
Interrogatories  
No. 11, 12 &  
13 27th July  
1978 and  
Defendant's  
Answers  
21st August 1978  
(cont'd)

25/3/77 Facilities varied to:

Overdraft No. 3 Account \$495,000 \*  
Indemnities Guarantees \$221,000 \*  
Commercial Bill \$1,000,000

\*Aggregate of both not to exceed \$566,000 at any one time. Repayment arrangement and interest payments remained unaltered.

29/7/77 Facilities varied to:

Overdraft No. 3 Account \$549,000 \*  
Indemnities Guarantees \$ 71,000 \*  
Commercial Bill \$1,000,000

\*Aggregate of both not to exceed \$600,000 at any one time.

Repayment arrangement and interest payments remained unaltered.

8/12/77 Facilities varied to:

Overdraft \$600,000 following release of Indemnities Guarantees.

Commercial Bill \$1,000,000.

19/6/78 Commercial Bill matured and was paid to a Special Account styled "Tacking Point Downs Pty. Ltd. " - Retired Commercial Bills. Thus overdraft facilities varied to:

No. 3 Account \$ 600,000  
Special Account \$1,000,000  
\$1,600,000

Sale and settlement of blocks of land in Port Macquarie Sub-Division has seen facilities reduced to:

No. 3 Account \$ 515,465  
Special Account \$1,000,000  
\$1,515,465

- (b) No.
- (c) Not applicable.

Exhibits  
 "F"  
 Plaintiff's  
 Interrogatories  
 No. 11, 12 &  
 13 27th July  
 1978 and  
 Defendant's  
 Answers  
 21st August  
 1978  
 (cont'd)

- (d) Not applicable.  
 (e) No.  
 (f) Days nominated by the Bank and being towards the end of March and September each year.  
 (g) Yes. Interest was paid as follows:

<u>Due Date</u>	<u>Date Paid</u>	<u>Amount</u>	<u>Manner of Payment</u>	
29/3/76	29/3/76	1,576.30	Debited to No. 2 Account	
29/9/76	29/9/76	4,258.70	Debited to No. 2 Account	10
*29/9/76	29/9/76	5,912.30	Debited to No. 2 Account	
30/3/77	30/3/77	8,506.30	Debited to No. 2 Account	
**30/3/77	30/3/77	8,533.80	Debited to No. 3 Account	
29/9/77	29/9/77	38,779.50	Debited to No. 2 Account	
30/3/78	30/3/78	57,734.90	Debited to No. 2 Account	20

\* Interest was incorrectly debited to No. 3 Account on 29/9/76 and on 8/11/76 adjusting entries were passed to transfer amount to No. 2 Account.

\*\* Interest was incorrectly debited to No. 3 Account. Transfer to No. 2 Account has not been made.

- (h) No.  
 (i) Not applicable. 30  
 (j) Not applicable.  
 (k) (i) as far as the Bank is aware assessment has not issued.  
 (ii) as far as the Bank is aware Council Rates have been paid.  
 (l) Not applicable.  
 (m) Reservations and Conditions contained in Crown Grant.  
 Mortgage No. P589934 to Edward John CUNNING.  
 Mortgage No. P850678 to Beneficial Finance Corporation Limited. 40  
 As far as the Bank is aware all moneys due were paid.  
 (n) Not applicable.

"I" - Schedule of dates on which  
commitment fees payable - Undated

Exhibits  
"I"  
Schedule of  
dates on which  
commitment fees  
payable  
Undated

TACKING POINT DOWNS

Original agreement dated 4/4/74

Commitment Fee 4% p.a.  
Payable quarterly from 4/4/74

From 4/4/76 Agreement extended for 2 years and  
fee reduced to 3% p.a.

Listed under is a schedule of payments received.

10	<u>Due date of Payment</u>	<u>Amount Due</u>	<u>Amount Paid</u>	<u>Date Received</u>	<u>Paid BY</u>
	4/4/74		\$ 8,300	5/4/74	
	4/7/74		8,300	5/7/74	
	4/10/74		9,577.77	9/10/74	
	4/1/75		10,000	8/1/75	
	4/4/75		10,000	5/2/75	
	4/7/75		10,000	4/7/75	
	4/10/75		10,000	10/10/75	
20	4/1/76				
	4/4/76				
	4/7/76		19,000		
			9,493.98	2/7/76	} T.P.D. No. 3 A/c
	4/10/76		9,342.42	5/10/76	
	4/1/77		10,164.83	5/1/77	
	4/4/77		11,326.93	4/4/77	
	4/7/77				
	4/10/77		26,236.45	7/10/77	
	4/1/78				

30 BENFIN AA 21111  
BENFIN AA 29503

KELLY  
RE TACKING POINT DOWNS

40	<u>AMTS RECEIVED</u>	<u>DATE</u>	<u>AMOUNT CREDITED</u>
	8,300.00	5/4/74	S/INCOME-BOND FEES
	8,300.00	5/7/74	SUNDRY INCOME
	9,577.77	9/10/74	"
	10,000.00	8/1/75	"
	10,000.00	2/5/75	"
	10,000.00	4/7/75	"
	10,000.00	10/10/75	"
	28,493.98	21/7/65	"
	9,342.42	12/10/76	TACKING POINT DOWNS SUSPENSE
	11,326.93	7/4/77	"
	26,236.45	7/10/77	"

Exhibits

"I"  
Schedule of  
dates on which  
commitment fees  
payable  
Undated  
(cont'd)

AMOUNT OF \$28,493.98 MADE UP OF 3 PAYMENTS -  
1. \$10,000 OWING AS AT JANUARY 76  
2. \$9,000 FOR APRIL 76 BEING AN ARBITRARY  
AMOUNT AS THE EXACT FIGURE HAD NOT BEEN  
CALCULATED  
3. \$9,493.98 BEING AMOUNT DUE IN JULY  
THIS EXPLANATION TAKEN FROM MEMO S.23/7/76 AJP  
SIEGELE 4.45 17/1/78  
DATE AGAINST 28,493.98 SHD READ 21/7/76

BENFIN AA21111

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IN THE PRIVY COUNCIL

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O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES  
COMMON LAW DIVISION COMMERCIAL LIST  
IN PROCEEDINGS NO. 10162 of 1978

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B E T W E E N :

AUSTRALIA AND NEW ZEALAND BANKING  
GROUP LIMITED

Appellant  
(Defendant)

-v-

BENEFICIAL FINANCE CORPORATION  
LIMITED

Respondent  
(Plaintiff)

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RECORD OF PROCEEDINGS

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Allen & Overy,  
9 Cheapside,  
London EC2V 6AD.

Solicitors for the  
Appellant

Simmons & Simmons  
14 Dominion St.,  
London EC2M 2RJ.

Solicitors for the  
Respondent