



ST. HELENA

GOVERNMENT OF SAINT HELENA

REVISED ST HELENA GOVERNMENT GUARANTEE TO THE  
BANK OF ST HELENA – HOTEL DEVELOPMENT

*laid on the table - 18 May 2016.*



# GUARANTEE

THIS DEED is dated [...]2016

## PARTIES

- (1): BANK OF ST HELENA LTD of Market Street, Jamestown, St Helena Island, STHL 1ZZ. ("the Bank")
- (2): ST HELENA GOVERNMENT of The Castle, Grand Parade, Jamestown, St Helena STHL 1ZZ. Fax number: +290 22598 ("the Guarantor")

## BACKGROUND

- (A) The Lender has agreed to provide new banking facilities to the Customer.
- (B) The Guarantor has agreed to enter into this Guarantee and indemnity for the purpose of providing credit support to the Lender for the Customer's liabilities from time to time outstanding to the Lender.

### Definitions:

1.1 "Business Day" means a day (other than a Saturday or a Sunday) on which banks are open for business in St Helena.

"Customer" means St Helena Hotel Development Ltd a company incorporated and registered in St Helena with company number 112 whose registered office is at 1,2,3 Main Street, Jamestown, St Helena STHL1ZZ;

"Dissolution" means, in respect of any person, the bankruptcy, insolvency, winding-up, dissolution, administration or liquidation of that person, and any equivalent or analogous procedure by whatsoever name known and in whatsoever jurisdiction.

### "Liabilities" means:

- (i) all moneys and liabilities (whether actual or contingent) which are now or shall at any time hereafter be due within ten years and six months from the date of this Guarantee, owing or payable or expressed to be due, owing or payable to the Bank from or by the Customer (whether alone or with any other person, whether as principal or surety, and whether upon any banking account or otherwise) in any manner whatsoever under or pursuant to any and all transactions and agreements entered or to be entered into by and between the Bank and the Customer (including, without limitation, all amounts required by the Bank from the Customer by way of margin and amounts owing by the Customer to the Bank pursuant to the Bank's Terms of Business, as in force from time to time); and
- (ii) all legal and other costs, charges and expenses which the Bank may incur in enforcing or obtaining, or attempting to enforce or obtain, payment of any moneys and liabilities referred to in paragraph (i) above.

If there are two or more parties comprised within or constituting the Guarantor then references to "the Guarantor" in this Guarantee include all of such parties and each of them and all deposits, transfers, charges, agreements and undertakings herein shall be deemed given and made jointly and severally by them. References to the Guarantor shall include any individual, partnership and corporate body and any unincorporated association.

References to "**subsidiary**" and "**holding company**" herein bear the respective meanings ascribed thereto in the Companies Ordinance 2004 (SH).

References in this Guarantee to the plural shall include the singular and *vice versa* and references to any gender shall include all genders.

References in this Guarantee to ordinances or secondary legislation are to those ordinances and secondary legislation as amended and in force from time to time.

Unless the context requires otherwise, references in this Guarantee to Clauses and Schedules are references to clauses of, and schedules to, this Guarantee.

## **2. Guarantee**

2.1 In consideration of the Lender making or continuing loans to, giving credit or granting banking facilities, accommodation or time to the Customer as the Lender in its absolute discretion sees fit, the Guarantor irrevocably and unconditionally:-

- (i) as principal obligor Guarantees to the Bank the prompt performance by the Customer of all of the Liabilities;
- (ii) as principal obligor and as a separate and independent obligation and liability from its obligations and liabilities under clause 2.1(i) agrees to indemnify and keep indemnified the Lender in full and on demand from and against all and any losses, costs, claims, liabilities, damages, demands and expenses suffered or incurred by the Lender arising out of, or in connection with, the Liabilities not being recoverable for any reason or any failure of the Borrower to perform or discharge any of its obligations or liabilities in respect of the Liabilities; and
- (iii) indemnifies the Bank on demand against any loss or liability suffered by it if any of the Liabilities is or becomes unenforceable, invalid or illegal.

2.2 This Guarantee is limited in amount to £1,000,000 (one million pounds sterling) plus all interest and all costs charges and expenses which the Bank may incur in enforcing or obtaining, or attempting to enforce or obtain, payment of any monies due under this Guarantee.

## **3. Bank Protections**

3.1 This Guarantee is and shall at all times be a continuing security and shall cover the ultimate balance from time to time owing to the Bank by the Customer in respect of the Liabilities.

3.2 The liability of the Guarantor under this Guarantee shall not be reduced, discharged or otherwise adversely affected by:

- (i) any intermediate payment, settlement of account or discharge in whole or in part of the liabilities ;
- (ii) any variation, extension, discharge, compromise, dealing with, exchange or renewal of any right or remedy which the Bank may now or after the date of this Guarantee have from or against any of the Customer and any other person in connection with the Liabilities;
- (iii) any act or omission by the Bank or any other person in taking up, perfecting or enforcing any security, indemnity, or Guarantee from or against the Customer or any other person;
- (iv) any termination, amendment, variation, novation, replacement or supplement of or to any of the Liabilities including without limitation any change in the purpose of, any increase in or extension of the Liabilities and any addition of new Liabilities;
- (v) any grant of time, indulgence, waiver or concession to the Customer or any other person;

- (vi) any insolvency, bankruptcy, liquidation, administration, winding up, incapacity, limitation, disability, the discharge by operation of law, or any change in the constitution, name or style of the Customer, Bank, or any other person;
  - (vii) any invalidity, illegality, unenforceability, irregularity or frustration of any actual or purported obligation of, or security held from, the Customer or any other person in connection with the Liabilities;
  - (viii) any claim or enforcement of payment from the Customer or any other person; or
  - (ix) any act or omission which would not have discharged or affected the liability of the Guarantor had it been a principal debtor instead of a guarantor, or indemnifier or by anything done or omitted by any person which but for this provision might operate to exonerate or discharge the Guarantor or otherwise reduce or extinguish its liability under this Guarantee.
- 3.3 The Bank shall not be obliged, before taking steps to enforce any of its rights and remedies under this Guarantee, to:
- 3.3.1 take any action or obtain judgment in any court against the Customer or any other person;
  - 3.3.2 make or file any claim in a bankruptcy, liquidation, administration or insolvency of the Customer or any other person; or
  - 3.3.3 make demand, enforce or seek to enforce any claim, right or remedy against the Customer or any other person.

#### **4. Payments**

- 4.1 All sums payable by the Guarantor under this Guarantee shall be paid in full to the Bank in Pounds Sterling in which the Liabilities are payable:
- (a) without any set-off, condition or counterclaim whatsoever; and
  - (b) free and clear of any deductions or withholdings whatsoever except as may be required by law or regulation which is binding on the Guarantor.
- 4.2 If any deduction or withholding is required by any law or regulation to be made by the Guarantor, the amount of the payment due from the Guarantor shall be increased to an amount which (after making any deduction or withholding) leaves an amount equal to the payment which would have been due if no deduction or withholding had been required.
- 4.3 The Guarantor shall promptly deliver or procure delivery to the Bank of all receipts issued to it evidencing each deduction or withholding which it has made.
- 4.4 The Guarantor shall not and may not direct the application by the Bank of any sums received by the Bank from the Guarantor under any of the terms of this Guarantee.

#### **5. Continuing obligations**

The obligations of the Guarantor under this Guarantee shall be continuing obligations and accordingly shall remain in operation until all of the Liabilities have been paid off or satisfied in full and are in addition to and not in substitution for any other Guarantee or indemnity or any security which the Bank may at any time hold for the performance of the Liabilities or any of them and may be enforced without first having recourse to any such Guarantee, indemnity or security and without taking any steps or proceedings against the Customer.

#### **6. Interest**

- 6.1 The Guarantor shall pay interest to the Bank after as well as before judgment at the annual rate which is at a floating rate per annum, of 12 month GBP LIBOR (London Inter-Bank Offered Rate) plus a

margin of 3% on all sums demanded under this Guarantee from the date of demand by the Bank or, if earlier, the date on which the relevant damages, losses, costs or expenses arose in respect of which the demand has been made, until, but excluding, the date of actual payment.

6.2 Interest under clause 6.1 shall accrue on a day-to-day basis calculated by the Bank on such terms as the Bank may from time to time determine and shall be compounded on the last business day of each month.

7. **No right of subrogation**

If any moneys become payable by the Guarantor under this Guarantee, the Guarantor shall not, so long as the same remain unpaid, without the prior written consent of the Bank:-

- (i) in respect of any amounts paid under this Guarantee seek to enforce repayment by subrogation or otherwise or to exercise any other rights or legal remedies of any kind which may accrue howsoever to the Guarantor in respect of the amounts so paid;
- (ii) claim payment of any other moneys for the time being due to the Guarantor by the Customer on any account whatsoever or exercise any other right or remedy which the Guarantor has in respect thereof; or
- (iii) in the event of Dissolution or other analogous proceedings in respect of the Customer, prove in competition with the Bank in respect of any moneys owing to the Guarantor by the Customer on any account whatsoever, but will give to the Bank the benefit of any such proof and of all moneys to be received in respect thereof until all of the Liabilities shall have been satisfied in full.

8. **Guarantor not to take security**

- (A) The Guarantor represents and warrants to the Bank that it has not taken or received any security from the Customer or any other surety for or in respect of the Guarantor's obligations under this Guarantee.
- (B) The Guarantor shall not take or receive any security from the Customer or any other surety for or in respect of the Guarantor's obligations under this Guarantee.
- (C) If at any time the Guarantor has the benefit of any such security in breach of this Clause 8, it shall hold such security on trust for the Bank and shall, upon request by the Bank, transfer or assign such security to the Bank as security for the Guarantor's obligations under this Guarantee.

9. **Bankruptcy or insolvency of principal debtor**

Any settlement or discharge between the Bank on the one hand and the Guarantor on the other hand shall be conditional upon no security or payment to or for the account of the Bank by the Customer (or any other person) in respect of the Liabilities being avoided or reduced by virtue of any law relating to Dissolution for the time being and from time to time in force and the Bank shall be entitled to recover the value or amount of any such security or payment from the Guarantor subsequently as if such settlement or discharge had not occurred.

10. **Reinstatement**

If at any time any payment in respect of the Liabilities is rescinded or must be otherwise restored or returned on the Dissolution of the Customer, the Guarantor's obligations under this Guarantee with respect to such payment shall be reinstated as though such payment had been due but not made at such time, provided that the obligations of the Guarantor under this Clause 9 shall, as regards each payment made to the Bank which is rescinded or must otherwise be restored or returned, be contingent upon such payment being reimbursed to the Customer or other persons entitled thereto through the Customer.

11. **Suspense account**

Until all of the Liabilities have been paid and performed in full and after any claim has been made against the Guarantor under this Guarantee, the Bank may hold in a suspense account any moneys received from the Guarantor or on account of the Guarantor's liability under this Guarantee. Any moneys standing to the credit of any such suspense account shall be applied against the Liabilities on the date that all of the Liabilities will, as a result of such application, be paid and repaid in full.

12. **Set-off**

Nothing expressed or implied in this Guarantee shall be regarded as in any way negating or affecting any right which the Bank may have to apply any credit balance to which the Guarantor is entitled on any account of the Guarantor with the Bank in or towards satisfaction of any sum due from the Guarantor hereunder. For this purpose, the Bank is authorised to purchase with the moneys standing to the credit of any such account such amount in such currency as may be necessary to effect such application. The Bank shall not be obliged to exercise any right conferred or acknowledged by this Clause 11.

13. **Currency Indemnity; no set-off or withholding by Guarantor**

13.1 (A) **Payments to be made in same currency**

All payments to be made under this Guarantee shall be made in Pounds Sterling.

(B) **Currency indemnity**

If, under any applicable law, whether pursuant to a judgment being made or registered against the Guarantor or the Dissolution of the Guarantor or for any other reason, any payment under or in connection with this Guarantee is made or falls to be satisfied in a currency (the "**other currency**") other than the currency in which the relevant payment is expressed to be due (the "**required currency**"), then, to the extent that the payment (when converted into the required currency at the rate of exchange on the date of payment or, if it is not practicable for the Bank to purchase the required currency with the other currency on the date of payment, at the rate of exchange as soon afterwards as it is practicable for the Bank to do so or, in the case of a Dissolution, at the rate of exchange on the latest date permitted by applicable law for the determination of liabilities in such Dissolution) actually received by the Bank falls short of the amount expressed to be due or payable under this Guarantee, the Guarantor shall, as a separate and independent obligation under this Guarantee, indemnify and hold the Bank harmless against the amount of such shortfall. Any excess amount resulting from the above shall be refunded to the Guarantor, provided that all amounts owing from the Guarantor to the Bank under this Guarantee have been paid in full. For the purpose of this Clause 13, "**rate of exchange**" means the rate at which the Bank is able on the relevant date to purchase the required currency with the other currency and shall take into account any premium and other costs of exchange.

13.2 All the Bank's costs and expenses incurred in or in connection with the preservation or enforcement of any of the Bank's rights under this Guarantee shall be reimbursed to the Bank by the Guarantor on demand, on a full indemnity basis.

13.3 All payments to be made under this Guarantee shall be made in full and without any set-off, counterclaim, restriction or condition and free and clear of and without deduction for taxes, levies, imposts, duties, charges, fees or withholdings of any nature whatsoever now or hereafter imposed by any governmental, fiscal or other authority (save only any such deductions as may be required by law). If the Guarantor shall at any time be compelled by law to deduct or withhold any amount from any payment to be made hereunder the Guarantor will concurrently pay to the Bank such additional amount as will result in receipt by the Bank of the full amount which would have been received if such deduction or withholding had not been made. The Guarantor shall use reasonable endeavours to obtain from the applicable authorities as soon as possible after making any payment to any such authority (to the extent that the same is issued by such authority) a receipt or other appropriate evidence issued by such authority evidencing the payment to have been made.

**14. Representations and Warranties**

(A) The Guarantor represents and warrants to the Bank that:-

- (i) the Guarantor has power to enter into and perform this Guarantee and has taken all necessary steps under section 112 of the St Helena, Ascension and Tristan da Cunha Constitution Order 2009 to authorise the execution, delivery and performance of this Guarantee;
- (ii) the Guarantor's obligations under this Guarantee are legal, valid and binding upon it and enforceable in accordance with their terms;
- (iii) the execution, delivery and performance of this Guarantee would not contravene any law or regulation to which the Guarantor is subject or any provision of the Guarantor's memorandum and articles of association (or equivalent in the jurisdiction of the Guarantor's incorporation) and all governmental or other consents requisite for such execution, delivery and performance are in full force and effect;
- (iv) the execution, delivery and performance of this Guarantee will not violate any law or regulation or ordinance applicable to it or of any mortgage, contract or other undertaking to which it is a party or which is binding on it;
- (v) no steps have been taken by the Guarantor or the Customer, nor have any legal proceedings been started or, so far as the Guarantor is aware, threatened for the Dissolution of the Guarantor or the Customer or for the appointment of a receiver, administration, administrative receiver, trustee, liquidator or similar officer of the Guarantor or the Customer or its or their respective assets; and
- (vi) its obligations under this Guarantee constitute its unsecured and unsubordinated obligations ranking (subject to the preference of certain obligations in Dissolution proceedings in respect of it by operation of applicable law) *pari passu* with all its other unsecured and unsubordinated obligations, including those payable to or at the direction of any applicable governmental authority or agency.

**15. Remedies and Waivers**

(A) Delay

No delay or omission on the part of the Bank in exercising any right, power or remedy provided by law or under this Guarantee shall impair such right, power or remedy or operate as a waiver thereof or of any other right, power or remedy.

(B) Single or partial exercise

The single or partial exercise by the Bank of any right, power or remedy provided by law or under this Guarantee shall not preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

(C) Remedies to be cumulative

The rights, powers and remedies provided in this Guarantee are cumulative and are in addition to this, and not exclusive of, any rights, powers and remedies provided by law.

(D) Amendments

No amendment of this Guarantee shall be effective unless it is in writing and signed by, or on behalf of, each party (or its authorised signatory).



(E) Waivers

A waiver of any right or remedy under this Guarantee or by law, or any consent given under this Guarantee, is only effective if given in writing and signed by the waiving or consenting party and shall not be deemed a waiver of any other breach or default. It only applies in the circumstances for which it is given and shall not prevent the party giving it from subsequently relying on the relevant provision.

**16. Evidence of amounts and certificates**

Any certificate, determination or notification by the Lender as to a rate or any amount payable under this Guarantee is (in the absence of manifest error) conclusive evidence of the matter to which it relates and shall contain reasonable details of the basis of determination.

**17. Invalidity**

If at any time any provision of this Guarantee is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, neither:-

(A) the legality, validity or enforceability in that jurisdiction of any other provision of this Guarantee; nor

(B) the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this Guarantee,

shall be affected or impaired.

**18. Notices**

18.1 Any notice or other communication requiring to be served on the Guarantor may be served where applicable on any of the Guarantor's officers personally, by fax or by post in writing addressed to the Guarantor at the Guarantor's address or fax number on the first page of this Guarantee or at the Guarantor's registered office address from time to time or at such other address or fax number as may be notified from time to time by the Guarantor to the Bank.

18.2 Any such notice or other communication sent by post shall be deemed to have been served on the Guarantor at 10 a.m. GMT on the third St Helena business day next following the date of posting. In proving such service by post it shall be sufficient to show that the letter containing the notice or other communication was properly addressed and posted and such proof of service shall be effective notwithstanding that the letter was in fact not delivered or was returned undelivered. Any notice sent by fax will be deemed to have been served when the sending party's machine records that a complete transmission has been made.

**19. Governing law and jurisdiction**

19.1 This Guarantee is governed by, and shall be construed in accordance with, the laws of St Helena.

19.2 The parties to this Guarantee irrevocably agree for the exclusive benefit of the Bank that the courts of St Helena are to have jurisdiction to settle any disputes which may arise out of or in connection with this Guarantee and that accordingly any proceeding, suit or action arising out of or in connection with this Guarantee ("**Proceedings**") may be brought in such courts. Nothing contained in this Clause 19 shall limit the Bank's right to take Proceedings against the Guarantor in any other court of competent jurisdiction, nor shall the taking of Proceedings in one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction, whether concurrently or not, to the extent permitted by the law of such other jurisdiction.

19.3 The Guarantor agrees that the process by which any Proceedings are begun may be served on it by being delivered in connection with any Proceedings in St Helena to its agent for service of process specified in the Schedule at the address specified in the Schedule, or its other principal office for the time being in St Helena. If no such person is specified in the Schedule or if the appointment of the person specified in the Schedule ceases to be effective, the Bank shall be entitled to appoint a person in

St Helena as such agent of the Guarantor by notice to the Guarantor. Nothing contained in this Clause 17 shall affect the right to serve process in any other manner permitted by law.

**20. Privity of Contract**

A person who is not a party to this Guarantee has no right to enforce any of its terms.

**IN WITNESS whereof the Guarantor has executed and delivered this Guarantee as a deed (or caused the same to be so executed and delivered as a deed) the day and year first above written**

SIGNED AND DELIVERED as a deed )  
by St Helena Government, )  
acting by J. Angelo Berbotto )  
Attorney General being a person who )  
in accordance with the laws of St Helena )  
is acting under the authority of St Helena Government )

## THE SCHEDULE

**1. Agent for Service of Process**

Name: Attorney General of St Helena

Address: The Castle, Grand Parade, Jamestown, St Helena STHL 1ZZ

