

# LupinBay Limited T/A Emilie Jasper Studios – Terms & Conditions of Trade

**1. Definitions**

1.1 "Contract" means the terms and conditions contained herein, together with any Quotation, order, invoice or other document or amendments expressed to be supplemental to this Contract.

1.2 "Photographer" shall mean LupinBay Limited T/A Emilie Jasper Studios, its successors and assigns or any person acting on behalf of and with the authority of LupinBay Limited T/A Emilie Jasper Studios.

1.3 "Client" means the person/s, entities or any person acting on behalf of and with the authority of the Client requesting the Photographer to provide the Services and Photographic Works as specified in any quotation or order.

1.4 (a) if there is more than one Client, is a reference to each Client jointly and severally; and (b) if the Client is a partnership, it shall bind each partner jointly and severally; and (c) if the Client is a part of a Trust, shall be bound in their capacity as a trustee; and (d) includes the Client's executors, administrators, successors and permitted assigns.

1.5 "Services and Photographic Works" means the Services provided at the time of the scheduled shoot "Session" and then followed by the supply of photographic prints, artwork, transparencies, negatives and digital images created by the Photographer.

1.6 "Prohibited Content" means any content that contains, or could reasonably be considered to contain, representations, likely, or could reasonably be considered to be, misleading or deceptive, likely to mislead or deceive or otherwise unlawful.

1.7 "Fee" means the Fee payable (plus any Goods and Services Tax (GST) where applicable) for the Services as agreed between the Photographer and the Client in accordance with clause 5 of this Contract.

**2. Acceptance**

2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for, or accepts Services provided by the Photographer.

2.2 In the event of any inconsistency between the terms and conditions of this Contract and any other prior document or schedule that the parties have entered into, the terms of this Contract shall prevail.

2.3 Any amendment to the terms and conditions contained in this Contract may only be amended in writing by the consent of both parties.

2.4 The Photographer reserves the right not to supply any Services, or refuse the acceptance of any instructions, at any time for any reason (including where such, in the Photographer's opinion, or may be considered, to be in breach of the Contract, or is otherwise inappropriate), and the Photographer shall not be liable to the Client for any such action.

2.5 Any advice, recommendation, information, assistance or service provided by the Photographer in relation to Services or Photographic Works is given in good faith, is based on the information and knowledge and experience that is accepted without liability on the part of the Photographer and it shall be the responsibility of the Client to confirm the accuracy and reliability of the same in light of the use to which the Client makes or intends to make of the Services or Photographic Works.

2.6 The Client agrees to keep confidential any information in relation to the other party which is not in the public domain (including, but not limited to, trade secrets, processes, any Client's pet information pertaining to pedigree or breeding programme, accounts, marketing, designs, databases and all other information held in any form).

2.7 The Client acknowledges and accepts that the Photographer reserves the right to record any telephone conversations and/or sessions for training purposes. Furthermore, the Photographer agrees disclosure of this action will be advised to the Client prior to any recordings taking place.

2.8 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 22B of the Contract and Commercial Law Act 2017 or any other applicable provisions of that Act or any Regulations referred to in that Act.

**3. Errors and Omissions**

3.1 The Client acknowledges and accepts that the Photographer shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):

(a) resulting from an inadvertent mistake made by the Photographer in the formation and/or administration of this Contract; and/or

(b) contained in any literature (hard copy and/or electronic) supplied by the Photographer in respect of the Services.

3.2 In the event such an error and/or omission occurs in accordance with clause 3.1, and is not attributable to the negligence and/or willful misconduct of the Photographer, the Client shall not be entitled to treat this Contract as repudiated nor render it invalid.

**4. Change in Control**

4.1 The Client shall give the Photographer not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address, email contact phone or fax number, change of trustees or business practice). The Client shall be liable for any loss incurred by the Photographer as a result of the Client's failure to comply with this clause.

**5. Fee and Payment**

5.1 At the Photographer's sole discretion the Fee shall be either:

(a) as indicated on any invoice provided by the Photographer to the Client; or

(b) the Fee as at the date of delivery of the Services according to the Photographer's current price list; or

(c) the Photographer's quoted Fee (subject to clause 5.3) which will be valid for the period stated in the quotation or otherwise for a period of thirty (30) days.

5.2 Notwithstanding clause 5.1, in consideration for the Photographic Works to be provided by the Photographer the Client shall pay the Photographer the Fee as follows:

(a) a Session Fee as defined in the quotation and payable by the due date, therein. This confirms and holds the Session time, and enables the Photographer to schedule and allocate the required resources, and covers part of the cost of the session and viewing of the photographs;

(b) the Client accepts that the Session is not confirmed nor guaranteed until:

(i) this Contract is completed and signed by the Client and the Photographer; and

(ii) payment for the session Fee as noted in 5.1 is paid in full; and

(c) changes to the Session date must be made in writing and will result in the following:

(i) **Reschedule:** If the Client fails to pay the Fee to the Photographer for up to one (1) month from the original Session date, after which time the Session will be considered as cancelled; or

(ii) **Cancellation:** Session Fee will be held by the Photographer as a credit for a future Session for up to three (3) months from the date of cancellation of one (1) reschedule date will apply after which the Client will forfeit the Session Fee.

5.3 The Photographer reserves the right to change the Fee if a variation to the Photographer's quotation is requested. Variations will be charged for on the basis of the Photographer's quotation, and will be detailed in writing, and shown as variations on the Photographer's invoice. The Client shall be required to respond to any variation submitted by the Photographer within ten (10) working days. Failure to do so will entitle the Photographer to add the cost of the variation to the Fee. Payment for all variations must be made in full at the time of payment.

5.4 At the Photographer's sole discretion a deposit may be required which shall become immediately due and payable at the time of placing an order.

5.5 Time for payment for the Services being of the essence, the Fee will be payable by the Client on the date specified by the Photographer, which may be:

(a) on or before delivery of the Services or Photographic Works; or

(b) by way of instalments/progress payments in accordance with the Photographer's payment schedule which may be either:

(i) a deposit of fifty percent (50%) at the time of placing an order; and

(ii) balance of fifty percent (50%) at the time of pickup or at the time of delivery; or

(iii) five (5) instalments equal to twenty percent (20%) each of the Contract Fee, with the final instalment due at time of placing the order.

(c) payment for approved Clients shall be due twenty (20) days following the end of the month or by payment on or before the date specified in the Contract;

(d) the dates specified on any invoice or other form as being the date for payment; or

(e) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by the Photographer.

5.6 Where the Client's Work order is not made and payment for the Services or Photographic Works is to be made over an agreed period of time then the Client acknowledges and agrees that this Contract shall be deemed to be a purchase by instalment and not a lay-by Contract and no cancellation of the Client's order will be accepted once placed. For clarity the Client upon entering into this Contract shall be liable for the full manufactured Fee (as agreed between the Photographer and the Client) of the custom made Photographic Works once the manufacture of those items has commenced.

5.7 Payment may be made by cash, cheque, electronic/on-line banking, debit or credit card (a surcharge fee may apply), or by any other method as agreed to between the Client and the Photographer.

5.8 The Photographer may in its discretion allocate any payment received from the Client towards any invoice that the Photographer determines and may do so at the time of receipt or at any time afterwards. On any default by the Client the Photographer may re-allocate any payments previously received and allocated in the absence of any payment allocation by the Client. The Photographer's payment will be deemed to be allocated in such manner as preserves the maximum value of the Photographer's Purchase Money Security Interest (as defined in the PPSA) in the Services or Photographic Works.

5.9 The Client shall not be entitled to a refund or deduction from the Fee, any sums owed or claimed to be owed to the Client by the Photographer nor to withhold payment of any invoice because part of that invoice is in dispute.

5.10 Where the Services or Photographic Works are provided in a commercial sense of business to business then the Client agrees to pay GST and unless otherwise stated all consumer supply of Services or Photographic Works shall include GST Fee. Where GST does apply the Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Fee. In addition, the Client must pay any other taxes and duties that may be applicable in addition to the Fee except where they are expressly included in the Fee.

**6. Provision of Services or Photographic Works**

6.1 At the Photographer's sole discretion delivery of the Services or Photographic Works shall take place within:

(a) the Services or Photographic Works are supplied to the Client at the Photographer's address; or

(b) the Services or Photographic Works are supplied to the Client at the Client's nominated address.

6.2 Delivery of the Services or Photographic Works to a third party nominated by the Client is deemed to be delivery to the Client for the purposes of this Contract.

6.3 Any time specified by the Photographer for delivery of the Services or Photographic Works is an estimate of the time of delivery and is not a guarantee. The Client agrees to accept delivery by the Client as a result of delivery being late. However both parties agree that they shall make every endeavour to enable the Services to be supplied at the time and place as was arranged between both parties. In the event that the Photographer is unable to supply the Services or Photographic Works to the Client on the date specified in the Contract then the Client shall be entitled to charge a reasonable fee for re-supplying the Services or Photographic Works at a later time and date.

**7. Risk**

7.1 Risk

7.2 Risk

7.3 Risk

7.4 Risk

7.5 Risk

7.6 Risk

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7.12 Risk

7.13 Risk

**Title**

8.1 The Photographer and the Client agree that where it is intended that the ownership of Photographic Works to pass to the Client that ownership shall pass until:

(a) the Client has paid the Photographer all amounts owing for the Services or Photographic Works; and

(b) the Client has met all other obligations due by the Client to the Photographer in respect of this Contract.

8.2 Receipt by the Photographer of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then the Photographer's ownership or rights in respect of the Photographic Works shall remain with the Photographer.

8.3 It is further agreed that subject to clause 13.10:

(a) the Client is to be a bailee of the Photographic Works and must return the Photographic Works to the Photographer immediately upon request by the Photographer;

(b) the Client holds the benefit of the Client's insurance of the Photographic Works on trust for the Photographer and must pay to the Photographer the proceeds of any insurance in the event of the Photographic Works being lost, damaged or destroyed;

(c) the Client must not sell, dispose, or otherwise part with possession of the Photographic Works. If the Client sells, disposes or parts with possession of the Photographic Works the Client shall be liable to the Photographer for the full amount of the loss or damage and must pay to the Photographer and must pay to the Photographer on demand;

(d) the Client should not convert or process the Photographic Works or intermix them with other goods, but if the Client does so then the Client holds the resulting product on trust for the Photographer and must pay to the Photographer the proceeds of any insurance in the event of the Photographic Works being lost, damaged or destroyed;

(e) the Client shall not charge or grant an encumbrance over the Photographic Works nor grant nor otherwise give away any interest in the Photographic Works while they remain the property of the Photographer;

(f) the Client irrevocably authorises the Photographer to enter any premises where the Photographer believes the Photographic Works are kept and recover possession of the Photographic Works.

**Personal Property Securities Act 1999 ("PPSA")**

9.1 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that:

(a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and

(b) a security interest is taken in all Photographic Works and/or collateral (account) – being a monetary obligation of the Client to the Photographer for Services and/or Photographic Works – that have previously been supplied and that will be supplied in the future by the Photographer to the Client.

9.2 The Client undertakes that:

(a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which the Photographer may reasonably require to register a financing statement or financing change statement on the Personal Property Register;

(b) indemnify, and upon demand reimburse, the Photographer for all expenses incurred in securing a financing statement or financing change statement on the Personal Property Register's Register or releasing any Photographic Works charged thereby;

(c) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Photographic Works and/or collateral (account) in favour of a third party without the prior written consent of the Photographer.

9.3 The Photographer and the Client agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.

9.4 The Client waives its rights as a debtor under sections 116, 120(1), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.

9.5 Unless otherwise agreed to in writing by the Photographer, the Client waives its right to require a verification statement in accordance with section 148 of the PPSA.

9.6 The Client shall unconditionally ratify any actions taken by the Photographer under clauses 9.1 to 9.5.

**Security and Charge**

10.1 The Client agrees to the Photographer agreeing to supply Services or Photographic Works, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including this Contract) and the payment of any money.

10.2 The Client indemnifies the Photographer from and against all the Photographer's costs and disbursements including legal costs of a solicitor and own client basis incurred in exercising the Photographer's rights under this clause.

10.3 The Client irrevocably appoints the Photographer and each director of the Photographer as the Client's true and lawful attorneys to perform all necessary acts to give effect to the provisions of this clause 10 including, but not limited to, signing any document on the Client's behalf.

**Defective Photographic Works**

11.1 The Client shall inspect the Photographic Works on delivery and shall within three (3) days of delivery notify the Photographer of any alleged defect, shortage in quantity, errors, omissions or failure to comply with the description or quote. The Client shall afford the Photographer an opportunity to inspect the Photographic Works within a reasonable time following delivery if the Client believes the Photographic Works are defective in any way. If the Client fails to comply with these provisions, the Services shall be conclusively presumed to be in accordance with the terms and conditions and free from any defect or damage.

11.2 The Client shall warrant that the Photographic Works are free from any defect in writing that the Client is entitled to reject, the Photographer's liability is limited to either (at the Photographer's discretion) replacing the Photographic Works or rectifying the Photographic Works provided that the Client has complied with the provisions of clause 11.1.

11.3 The Client shall warrant that the Photographic Works are free from any defect in writing that the Client is entitled to reject, the Photographer's liability is limited to either (at the Photographer's discretion) replacing the Photographic Works or rectifying the Photographic Works provided that the Client has complied with the provisions of clause 11.1.

11.4 The Client shall warrant that the Photographic Works are free from any defect in writing that the Client is entitled to reject, the Photographer's liability is limited to either (at the Photographer's discretion) replacing the Photographic Works or rectifying the Photographic Works provided that the Client has complied with the provisions of clause 11.1.

**Consumer Guarantees Act 1993**

12.1 If the Client is acquiring Services or Photographic Works for the purposes of a trade or business, the Client acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of Services or Photographic Works by the Photographer to the Client.

**Intellectual Property and Licence to Use**

13.1 The copyright in all Photographic Works resulting from the session or order remains the property of the Photographer.

13.2 All copyright that arises out of the performance of the Photographer's obligations under this Contract shall arise not by commission but shall be the creation of the Photographer. The Photographer shall remain the first owner of the Photographic Works and the Client shall be deemed to have used the Photographic Works under a licence to use the Photographic Works. The Client shall have the right to seek further licences for reuse of a copyright at the Photographer's normal Fees at the time of the request.

13.3 The Client warrants that all designs, specifications or instructions given to the Photographer will not cause the Photographer to infringe any patent, registered design, trademark in the execution of the Client's order and the Client agrees to indemnify the Photographer against

any action taken by a third party against the Photographer in respect of any such infringement.

13.5 The Photographer does not accept commissions to create Photographic Works. The Photographer and the Client have agreed by these standard terms to override section 21(3) of the Copyright Act 1994.

13.6 The Client agrees to grant the Photographer a non-exclusive licence to use those parts of the Photographic Works selected by the Photographer and presented to the Client, however this licence does not include the right to copy, reproduce or publish the Photographic Works or any part of the Photographic Works.

13.7 The Client may license any or all of the Photographic Works from the Photographer's selection.

13.8 The Client acknowledges that the purpose of the creation of the Photographic Works includes the right of the Photographer to:

(a) select the Photographic Works into photographic competitions or awards and for their use in any material published in connection with promoting those competitions or awards; and

(b) advertise or otherwise promote the Photographer's Works; and

(c) submit the Photographic Works for display at art galleries or other premises; and

(d) use the Photographic Works for any other purpose within the Photographer's business activities as well as before any court.

13.9 This licence to use, and the right to use, the Photographic Works comes into effect from the date of full payment of the Services, except where the Photographer gives express written permission.

13.10 In the circumstances, shall either party enforce any rights extended to the other contracted party covered in clauses 13.6, 13.7 or 13.8 without first obtaining the express written approval of the Photographer. The obligations of the licence to use shall survive the finalisation or discontinuance of any Contract between the Client and the Photographer.

**Default and Consequences of Default**

14.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at the Photographer's sole discretion such interest shall compound monthly at such a rate) after it has become payable.

14.2 If the Client owes the Photographer any money the Client shall indemnify the Photographer from and against all costs and disbursements incurred by the Photographer in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, the Photographer's collection agency costs, and bank dishonour fees). Further to any other rights or remedies the Photographer may have under this Contract, if a Client has made payment to the Photographer, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by the Photographer. The Client agrees that the reversal of the transaction can be reversed if found to be illegal, fraudulent or in contravention to the Client's obligations under this Contract.

14.3 Without prejudice to the Photographer's other remedies at law the Photographer shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to the Photographer shall, whether or not due for payment, become immediately payable if:

(a) any money payable to the Photographer becomes overdue; or in the Photographer's opinion the Client is unable to meet a payment obligation;

(b) the Client has exceeded any applicable credit limit provided by the Photographer;

(c) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or

(d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

**Cancellation**

15.1 Without prejudice to any other remedies the Photographer may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions the Photographer may suspend or terminate the supply of Services or Photographic Works to the Client. The Photographer will not be liable to the Client for any loss or damage the Client suffers because the Photographer has exercised its rights under this clause.

15.2 The Photographer may cancel any Contract to which these terms and conditions apply or cancel delivery of Services and/or Photographic Works at any time before the Services and Photographic Works are commenced by giving written notice to the Client. On giving such notice the Photographer shall repay to the Client any money paid by the Client for the Services and Photographic Works. The Photographer shall not be liable for any loss or damage whatsoever arising from such cancellation.

15.3 Subject to clause 15.2, the Client may cancel any Session for which the Photographer is providing its Services then the Client shall be liable for:

(a) any monies owed to the Photographer, whether or not they are due for payment, and whether or not payment thereof is by instalments in accordance with clause 5.5(b); and

(b) the cost of any Services already provided to the Client by the Photographer; and

(c) the cost of all advertising and promotional costs incurred by the Photographer up to the date of cancellation and/or as a direct result thereof (including, but not limited to, any loss of profits).

**Privacy Policy**

16.1 All emails, documents, images or other recorded information held or used by the Photographer is Personal Information as defined and referred to in clause 16.3 and therefore considered confidential. The Photographer acknowledges its obligation in relation to the handling and processing of Personal Information pursuant to the Privacy Act 1993 (the "Act") including Part I of the OECD Guidelines and as set out in Schedule 5A of the Act and any statutory requirements where relevant in a European Economic Area "EEA" under the EU Data Privacy Laws (including the General Data Protection Regulation "GDPR") (collectively referred to as the "Data Protection Laws"). In the event that the Client becomes aware of any data breaches and/or disclosure of the Client's Personal Information held by the Photographer that may result in serious harm to the Client, the Photographer will notify the Client in accordance with the Act and/or the GDPR. Any release of such Personal Information shall be in accordance with the Act and the GDPR (where relevant) and must be approved by the Client in writing consent, unless otherwise stated in the Client's order of law.

16.2 Notwithstanding clause 16.1, privacy limitations will extend to the Photographer in respect of Cookies where transactions for purchases/orders transpire directly from the Photographer's website. The Photographer agrees to display reference to such Cookies and/or similar tracking devices for the purposes of assessing the Client's website effectiveness:

(a) IP address, browser, email client type and other similar details;

(b) tracking website usage and traffic; and

(c) reports and analytics generated when the Photographer sends an email to the Client, so the Photographer may collect and review that information ("collectively Personal Information").

In order to enable / disable the collection of Personal Information by way of Cookies, the Client may select to enable / disable the cookies by selecting the option to enable / disable / provide on the website prior to proceeding with a purchase/order via the Photographer's website.

16.3 The Client authorises the Photographer or the Photographer's agent to:

(a) access, collect, retain and use any information about the Client:

(i) (including, name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history or any other contact lines balance information held by the Ministry of Justice) for the purposes of assessing the Client's creditworthiness;

(ii) for the purpose of marketing products and services to the Client.

(b) disclose information about the Client, whether collected by the Photographer from the Client directly or obtained by the Photographer from any other source, to any other credit reference or credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Client.

Where the Client is an individual the authorities under clause 16.3 are authorities or consents for the purposes of the Privacy Act 1993.

16.4 The Client shall have the right to request the Photographer for a copy of the Personal Information about the Client retained by the Photographer and the right to request the Photographer to correct any incorrect Personal Information about the Client held by the Photographer.

**Service of Notices**

17.1 Any written notice given under this Contract shall be deemed to have been given and received:

(a) by handing the notice to the other party, in person;

(b) by leaving it at the address of the other party as stated in this Contract;

(c) by sending it by registered post to the address of the other party as stated in this Contract;

(d) if sent by facsimile transmission to the fax number of the other party as stated in this Contract (if any), on receipt of confirmation of the transmission;

(e) if sent by email to the other party's last known email address.

17.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.

**General**

18.1 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce any or all of the provisions of these terms and conditions shall be invalid, void, illegal or unenforceable, the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.

18.2 These terms and conditions and any Contract to which they apply shall be governed by the law of New Zealand. The Client agrees to accept the jurisdiction of the courts of New Zealand.

18.3 The Photographer shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Photographer of these terms and conditions (alternatively the Photographer's liability shall be limited to damages which under no circumstances shall exceed the Fee of the Services and/or Photographic Works).

18.4 The Photographer may license and/or assign all or any part of its rights and/or obligations under this Contract without the Client's consent.

18.5 The Client cannot license or assign without the written approval of the Photographer. The Client agrees that any licence or assignment may amend the general terms and conditions for subsequent future contracts with the Client by disclosing such to the Client in writing. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for the Supplier to provide Services or Photographic Works to the Client.

18.6 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.

18.7 Both parties warrant that they have the power to enter into this Contract and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this Contract creates binding and valid legal obligations on them.