

IN THE COUNTY COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL LIST  
GENERAL DIVISION

NO. CI-03-00593

13-00593.

BETWEEN

MMP Greater Geelong Pty Ltd A.C.N. 159 938 806

Plaintiff

and

Hayeswinkle Holding Pty Ltd A.C.N. 160 671 483

First Defendant

and

Team 3216 Pty Ltd A.C.N. 134 067 655

Second Defendant

**AMENDED STATEMENT OF CLAIM**

(FILED AND SERVED PURSUANT TO RULE 36. 03 (a) and (b) of the COUNTY  
COURT CIVIL PROCEDURE RULES 2008

Date of Document: 17th May 2013

Filed on behalf of: the Plaintiff

Prepared by:

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1. The Plaintiff ("MMP") is and was at all material times, a company incorporated pursuant to the laws of the State of Victoria and is registered under the *Corporations Act 2001*.
2. The First Defendant ("Hayeswinkle Holding") is and was at all material times:
  - (a) a company incorporated pursuant to the laws of the State of Victoria and is registered under the *Corporations Act 2001*; and
  - (b) a corporation within the meaning of the Competition and Consumer Act 2010 ("the CCA").
3. The Second Defendant ("Team 3216") is and was at all material times:

- (a) a company incorporated pursuant to the laws of the State of Victoria and is registered under the *Corporations Act 2001*; and
  - (b) a corporation within the meaning of the CCA.
4. At all material times:
- (a) prior to, and after, 26 October 2012 :-
    - (i) Team 3216 carried on and conducted business as a licensed real estate agent, inter alia, in and about the City of Geelong; and
    - (ii) the Geelong Advertiser carried on and conducted business as a regional daily newspaper, inter alia, in and about the city of Geelong, Western Victoria, the Surf Coast and the Bellarine Peninsula;
  - (b) prior to 26 October 2012:-
    - (i) Team 3216 had placed its print media advertising requirements with the Geelong Advertiser;
    - (ii) MMP was proposing, and looking, to establish a weekly real estate publication and advertising business ("the MMP Publication") in, and about, the City of Geelong, Western Victoria, the Surf Coast and the Bellarine Peninsula, in competition with the Geelong Advertiser.
5. By an agreement ("the Subscription Agreement") between MMP and Hayeswinkle Holding, made on or about 26 October 2012, Hayeswinkle Holding agreed to subscribe for, and MMP agreed to issue, shares in MMP in the terms set out in the Subscription Agreement.

#### **PARTICULARS**

A copy of the Subscription Agreement, including the Schedule and the Annexure X, consisting of a

Shareholder Agreement ("the Shareholder Agreement"), and the Annexure A to the Shareholder Agreement, consisting of an Advertising Agreement ("the Advertising Agreement") between Team 3216 and MMP, can be inspected at the office of MMP's solicitors by prior appointment during normal business hours.

6. There were terms of the Subscription Agreement, inter alia, that:
- (a) Hayeswinkle Holding covenanted and agreed to pay \$1 to MMP, to enter, or to cause its nominee to enter, into the Advertising Agreement with MMP, and commit to an Agreed Advertising Spend in the amount specified in item 3 of the Schedule to the Subscription Agreement with MMP, as and by way of subscription for the Shares specified in item 4 of the Schedule to the Subscription Agreement (clause 2.1 of the Subscription Agreement);
  - (b) in consideration of Hayeswinkle Holding's covenants and agreements in clause 2.1 of the Subscription Agreement, MMP covenanted and agreed to issue the shares specified in item 4 of the Schedule in accordance with, and pursuant to, the terms of clause 4.2.1(b) of the Shareholder Agreement (clause 2.2 of the Subscription Agreement);
  - (c) MMP and Hayeswinkle Holding covenanted and agreed that their relationship, inter alia, between them (and with other shareholders) was and is, regulated by the terms of the Shareholder Agreement (Annexure X to the subscription Agreement) (clause 3.1 of the Subscription Agreement);
  - (d) MMP and Hayeswinkle Holding further covenanted and agreed to meet, and comply with, their obligations to each other, and other shareholders, as set

out in the Shareholder Agreement (Annexure X) (clause 3.2 of the Subscription Agreement).

7. By, and under, the Shareholder Agreement between MMP and Hayeswinkle Holding, made on or about 26 October 2012, inter alia :
- (a) the objects of MMP were, and are, to:
    - (i) own and operate its real estate publication and advertising business carried on, and to be carried on, by it; and
    - (ii) maximise the value of its property and undertaking –  
(clause 3.1 of the Shareholder Agreement);
  - (b) on the commencement date, inter alia, Hayeswinkle Holdings, or its nominee, was to enter into an Advertising Agreement with MMP –  
(clause 3.3 of the Shareholder Agreement);
  - (c) MMP and Hayeswinkle Holding agreed that –
    - (i) in order to further the objectives of MMP, it is to co-operate with each other party in relation to the Agreement (clause 3.4.1 of the Shareholder Agreement) ;
    - (ii) each will at all times perform its obligations under the Shareholder Agreement in the utmost good faith and reasonably (including any discretions reserved in this Agreement for its benefit and whether or not expressed to be exercised reasonably or not) and must not seek to circumvent or permit circumvention of the operation of the Shareholder Agreement, or impair the value of or permit the impairment of the value, of any right granted under the Shareholder Agreement by any

legal or natural person which is directly or indirectly controlled or otherwise influenced by that party doing anything which that party has agreed not to do pursuant to, or which is inconsistent with, the terms of the Shareholder Agreement, or failing to do anything which that party has agreed to do pursuant to the terms of the Agreement (clause 3.4.3 of the Shareholder Agreement).

- (d) in the event that Hayeswinkle Holding appointed a nominee to enter into an Advertising Agreement with MMP, Hayeswinkle Holding represented and warranted that it would use its best endeavours to ensure that its nominee complies with its obligations under the Advertising Agreement and that it (Hayeswinkle Holding) would notify MMP immediately of any fact, matter or thing relating to the nominee which might be directly or indirectly relevant to the business of MMP (clause 9.2 of the Shareholder Agreement);
- (e) the Shareholder Agreement is governed by the laws of the State of Victoria and the parties submit to the non-exclusive jurisdiction of the Courts exercising jurisdiction in Victoria (clauses 19.1 and 19.2 of the Shareholder Agreement)

#### **PARTICULARS**

A copy of the Shareholder Agreement containing the said terms, amongst others, can be inspected at the office of the Plaintiffs' solicitor by prior appointment during normal business hours.

8. In the performance of its obligations under the Subscription Agreement and the Shareholder Agreement, MMP issued 50,000 CRPS shares to Hayeswinkle Holding.
9. In purported performance of its obligations under the Subscription Agreement and the Shareholder Agreement, Hayeswinkle Holding, caused its nominee Team 3216 to enter into the Advertising Agreement with MMP.

#### PARTICULARS

A copy of the Advertising Agreement made by Team 3216 with MMP can be inspected at the office of the Plaintiff's solicitors by prior appointment during normal business hours.

10. There were terms of the Advertising Agreement, inter alia, that Team 3216 was to, and would:
  - (a) market and promote the MMP Publication to the public at large in a manner agreed after consultation with MMP (clause 4.1 of the Advertising Agreement);
  - (b) facilitate the introduction of, and actively market, the MMP Publication to people on Team 3216's database, including marketing and promoting the Publication to its agents' database (clause 4.2 of the Advertising Agreement);
  - (c) ensure that the MMP Publication was introduced, and promoted, to the people in the Team 3216 database, and market and promote the Publication to potential clients (clause 4.3 of the Advertising Agreement).
11. However, wrongfully and in breach of publications under the Shareholder Agreement, inter alia, Hayeswinkle Holding:

- (a) has not co-operated, and did not co-operate, with MMP in relation to the Shareholder Agreement;
- (b) has not performed its obligations under the Shareholder Agreement in the utmost good faith and reasonably;
- (c) has sought to circumvent, or permit circumvention of, the operation of the Shareholder Agreement;
- (d) failed to do what it agreed to do pursuant to the terms of the Shareholder Agreement;
- (e) did not –
  - (i) use its best endeavours to attempt to ensure that its nominee, Team 3216, complied with its obligations under the Advertising Agreement; and
  - (ii) notify MMP immediately of facts, matters or things relating to Team 3216 which might be directly, or indirectly, relevant to the business of MMP.

#### **PARTICULARS**

In the period prior to the execution of the Subscription Agreement and the Shareholder Agreement by Hayeswinkle Holding, and the Advertising Agreement by Team 3216, (as stated) Team 3216 had placed its media advertising requirements with the Geelong Advertiser.

Upon, and after, their execution of the Subscription Agreement and the Shareholder Agreement (by Hayeswinkle Holdings), and the Advertising Agreement (by Team 3216), and unbeknown to MMP, Hayes, in his capacity as the director and officer of both Hayeswinkle Holding and Team 3216, pursued dealings and negotiations with a Mr.

Tom Panos ("Panos"), the National Director of Real Estate employed by News Ltd, of which company The Geelong Advertiser Pty. Ltd. was a wholly owned subsidiary, inter alia, informing Panos of his (Hayes's) dealings with MMP, and the agreements Hayeswinkle Holding and Team 3216 had made with MMP, all in attempting to negotiate with Panos for News Ltd, alternatively the Geelong Advertiser, a more favourable agreement for Team 3216 in order to, thereafter, further continue and proceed with the placement of its print media advertising requirements with the Geelong Advertiser (a related entity of News Limited, and one of the companies within the News Limited group of companies).

In, and from, November, and into December, 2012, as Hayes continued to give the appearance of Hayeswinkle Holding and Team 3216 performing their obligations under the respective agreements by the placement of Team 3216's print media advertisement requirements with MMP in those months, Hayes nonetheless :-

- pursued dealings and negotiations with Panos, without any disclosure of the fact to MMMP; and
- then, in or about late November 2012, on or about the 28 November 2012, in his position as director and officer of Hayeswinkle Holding and Team 3216, made, and entered into, a Sponsorship Agreement between Team 3216 and the Geelong Advertiser Pty. Ltd, the terms of which, inter alia, required Team 3216 not to enter into any advertising arrangement with any other entity which competed, and competes, directly with the business of the Geelong Advertiser and, further, pursuant to which (sponsorship Agreement) it (Team 3216) was to, and would, receive from the Geelong Advertiser Pty. Ltd. financial benefits including cash payments and rebates in the form of credit adjustments totaling in excess of \$200,000.00, plus free promotional pages and extensive editorial coverage, valued at in excess of \$15,000.00; and,
- upon and after making the Sponsorship Agreement between Team 3216 and the Geelong Advertiser, but without disclosing the fact of the making of the Sponsorship Agreement to MMP,



Hayes, in his capacity as the director and officer of Hayeswinkle Holding and Team 3216 then, on and from 1 January 2013, ceased and discontinued, placing any of its print media advertising requirements with the MMP Publication, but redirected its print media requirements to The Geelong Advertiser.

Further Particulars of the breaches of the agreements may be provided.

12. By its breach of its obligations to MMP under the Shareholder Agreement, Hayeswinkle Holding was in breach of its covenants and agreements with MMP contained in the Subscription Agreement, inter alia, to comply with, and perform, its obligations under the Shareholder Agreement.
13. Further, in breach of its obligations under the Advertising Agreement, Team 3216 did not, and has not:
  - (a) marketed and promoted the MMP Publication to the public at large in a manner agreed after consultation with MMP;
  - (b) facilitated the introduction of, nor actively marketed, the MMP Publication to the people on the Team 3216 database, including marketing and promoting the publication to the Team 3216 database; and
  - (c) ensured that the publication was introduced and promoted, to the people on the Team 3216 database, nor marketed and promoted the publication to potential clients.

#### **PARTICULARS**

Upon, and after, Team 3216 entering into the Advertising Agreement with MMP, in or about, and from, late November 2012, Team 3216 then entered into the Sponsorship Agreement with the Geelong Advertiser, the terms of which prevented, and

precluded, Team 3216 from entering into any advertising arrangement with any other entity which competed, and competes, directly with the business of the Geelong Advertiser and, from 1 January 2013, Team 3216 then, and thereafter, ceased, and discontinued, placing its print media advertising requirement with MMP but directed its print media requirements to, and with, the Geelong Advertiser.

14. By its conduct:
- (a) Hayeswinkle Holdings has evinced an intention no longer to be bound by the Subscription Agreement and the Shareholder Agreement and it has repudiated the same;
  - (b) Team 3216 has evinced an intention no longer to be bound by the Advertising Agreement and it has repudiated the same.
15. The repudiation of the:
- (a) Subscription Agreement and the Shareholder Agreement by MMP; and
  - (b) Advertising Agreement by Team 3216,
- Has been, and is, accepted by MMP.
16. As a result of the:
- (a) repudiation by Hayeswinkle Holdings of the Subscription Agreement and the Shareholder Agreement, MMP has suffered loss and damage.

#### **PARTICULARS**

The quantification of the loss and damage suffered by MMP is a difficult matter to quantify, on which expert evidence will be provided.

MMP would not have proceeded with the publication unless it was able to attract a minimum 70% of total residential property advertising volume in Geelong. Participating agents were asked to provide an accurate estimate of the average number of advertising pages each would purchase on a weekly basis at an agreed page rate of \$1,400. These

commitments formed the basis of revenue forecasts for the MMP business. At 70% volume, MMP the publication would be profitable and successful.

Hayes, for Hayeswinkle Holding and Team 3216, agreed to take a minimum of seven pages of advertising each week, equivalent to an annual "spend" of \$484,000 with the publication. In the first five weeks of publication, during which time Team 3216 advertised in the publication (exclusively) the publication averaged a profit of \$20,000 per week. Since January 2013, from which month Hayes ceased, and discontinued, placing any of its print media advertising requirements with the MMP publication, the MMP publication has suffered a monthly loss of \$30,000 (approximately).

By reason, and in consequence, of the conduct of Hayes in entering into the Sponsorship Agreement with the Geelong Advertiser and, from January 2013, ceasing to place any of its print media advertising requirements with MMP, but placing those requirements with the Geelong Advertiser, thereafter, MMP was required to increase circulation, increase marketing costs, retain, and engage, more staff.

MMP's loss and damage includes loss of profit over the anticipated three year term of the Advertising Agreement from 26 October 2012 to 25 October 2015.

Full particulars of MMP's loss and damage will be provided prior to trial.

17. Further, and/or in the alternative, in the period in or about and from October 2012 :
- (a) in the course of discussions and negotiations between a Mr Mark Hallo ("Hallo") for MMP and Hayes for Hayeswinkle Holding and Team 3216 ; and
  - (b) whilst MMP was considering the proceeding with the MMP Publication, inter alia, in the City of Geelong,

Hayeswinkle Holding and Team 3216 warranted and represented to MMP that, in consideration of the allocation of CRPS shares to Hayeswinkle Holdings, it (Hayeswinkle Holding) and/or its nominee Team 3216, would:

- (i) take a minimum seven pages of advertising in the weekly MMP Publication at an agreed page rate of \$1,400 ; and
- (ii) enter into the Subscription Agreement, the Shareholder Agreement and the Advertising Agreement (*"the MMP Commitment Representations and warranties"*).

### PARTICULARS

The MMP Commitment Representations and warranties were partly in writing, partly oral and partly implied.

Insofar as the MMP Commitment Representations and warranties were in writing, they were contained in, and evidenced by, the documents headed "MMP Greater Geelong Pty Ltd Subscription Agreement"; "MMP Greater Geelong Pty Ltd Shareholder Agreement" and the document headed "Advertising Agreement", delivered by Hallo to Hayes at the Team 3216 Pty Ltd Geelong business premises, copies of which documents can be inspected at the office of the Plaintiff's solicitor by prior appointment during normal business hours.

Insofar as the MMP Commitment Representations and warranties were oral, they were made in the course of face to face discussions held between Hallo, for MMP, and Hayes, for Hayeswinkle Holdings and Team 3216, the substance of which discussions were in the terms alleged.

Insofar as the MMP Commitment Representations and warranties were implied, they were implied from the said documents comprising the Subscription Agreement, the Shareholder Agreement and the Advertising Agreement ; further from the discussions between Hallo, for MMP, and Hayes for Hayeswinkle Holding and Team 3216; further from the conduct of the parties including that of Hallo in delivering the Subscription Agreement, the Shareholder Agreement and the Advertising Agreement to Hayes at the Geelong offices of Team 3216; from Hayes' then

subsequent advices to Hallo that the MMP documents were executed and available for collection from the offices of Team 3216 in Geelong; from MMP's collection of the documents from the Geelong offices of Team 3216; further by the need to give business efficacy to the MMP Commitment Representations and by operation of law.

18. At the time of the making of the MMP Commitment representations and warranties, Hayes, for Hayeswinkle Holding and Team 3216, failed and neglected to disclose to Hallo, for MMP, that he was, at the same time, in discussions with Panos, for News Limited and/or the Geelong Advertiser, disclosing to Panos his discussions and dealings with Hallo for MMP and his (Hayes') preparedness and willingness, for Hayeswinkle Holding and Team 3216 to make, and enter into, the Agreements with MMP – in an attempt to procure for Hayeswinkle Holdings and/or Team 3216 the best financial and business deal he could with the Geelong Advertiser in consideration of the Geelong Advertiser securing the commitment of Team 3216 and Hayeswinkle Holdings to deal (exclusively) with the Geelong Advertiser in the placement of the Hayeswinkle Holdings/Team 3216 print media advertising requirements.
19. Further, and alternatively, the MMP Commitment Representations and warranties were made, and given, on a serious business occasion, or occasions, and in circumstances in which Hayes, for Hayeswinkle Holding and Team 3216 knew or ought to have known that MMP would rely upon the MMP Commitment Representations, and the warranties, and the advices contained therein in deciding whether, inter alia, to then commit to, and establish, the MMP

Publication, inter alia, in the City of Geelong and proceed with the allocation of the MMP CRPS shares to Hayeswinkle Holding.

20. Further, and alternatively, at the time of the making of the MMP Commitment Representations, and the giving of the warranties, Hayes, for Hayeswinkle Holdings and Team 3216 intended, and well knew, or ought to have known, that MMP would rely upon the representations, and the warranties, and the advices contained therein, in deciding whether, inter alia, to then commit to, and establish, the MMP Publication, inter alia, in the City of Geelong and proceed with the allocation of the MMP CRPS shares to Hayeswinkle Holdings.
21. In the circumstances, Hayeswinkle Holding and Team 3216 owed to MMP a duty of care in and about the making of the MMP Commitment Representations, and the giving of the warranties.
22. Acting in reliance upon the MMP Commitment Representations, and induced thereby, and further, and alternatively, in consideration of the warranties referred to, inter alia, MMP then committed to, and established, the MMP publication, inter alia, in the City of Geelong and proceeded with the allocation of the MMP CRPS shares to Hayeswinkle Holdings.
23. However, the representations were false, and the warranties were breached in that, inter alia, as Hayes, for Hayeswinkle Holdings and Team 3216:
  - (a) continued in the making of the MMP Commitment Representations October 2012; and

- (b) executed the Subscription Agreement, the Shareholder Agreement and the Advertising Agreement,
- without disclosing the facts of the matter to MMP, Hayes:
- (i) continued in his dealings and negotiations with Panos, for News Limited and/or the Geelong Advertiser with a view to securing for Team 3216 the best financial and business deal he (Hayes) could from the Geelong Advertiser in consideration of Hayeswinkle Holding and/or Team 3216 dealing (exclusively) with the Geelong Advertiser with respect to, and concerning, the print media advertising requirements of Team 3216 Pty Ltd, trading as Hayeswinkle Agents;
  - (ii) in or about late 2012, Hayes, for Team 3216, then entered into a Sponsorship Agreement with the Geelong Advertiser, the terms of which, inter alia, prevented and precluded Team 3216 from entering into any advertising arrangement with any other entity which competed, and competes, directly with the business of the Geelong Advertiser and, further, pursuant to which (sponsorship Agreement) it (Team 3216) was to, and would, receive from the Geelong Advertiser Pty. Ltd. financial benefits including cash payments and rebates in the form of credit adjustments totaling in excess of \$200,000.00, plus free promotional pages and extensive editorial coverage, valued at in excess of \$15,000.00;
  - (iii) on 1 January 2013, Team 3216 did not, then and thereafter, place any of its print media advertising requirements with MMP but placed all such print media advertising requirements with the Geelong Advertiser.

24. In breach of their duty of care, Hayeswinkle Holding and Team 3216 made the MMP Commitment Representations and warranties and gave the advices contained therein, negligently.

#### **PARTICULARS**

Inter alia:

- Failing to take any, or any proper, measure to ascertain the truth of the representations and warranties;
- Making the representations and warranties without any, or any proper, regard to their correctness or accuracy;
- Making representations which they knew, or ought to have known, were misleading or deceptive or likely to mislead or deceive;
- Making representations, and giving warranties, which were untrue.

25. By reason of the negligence, and breach of duty of care, or Hayeswinkle Holdings and Team 3216, inter alia, MMP committed to, and established, the MMP publication, inter alia, in the City of Geelong, issued the MMP CRPS shares to Hayeswinkle Holdings and it has suffered loss and damage and continues to do so.

#### **PARTICULARS**

The Plaintiff refers to and repeats the Particulars sub-joined to paragraph 16 of its Statement of Claim herein.

26. Further, the MMP Commitment Representations and warranties, as alleged, were made by Hayes, for Hayeswinkle Holdings and Team 3216, in the course of trade and commerce.



27. In making the said MMP Commitment Representations and warranties in the circumstances pleaded at paragraph 17 and 18 of its Amended Statement of Claim herein, Hayeswinkle Holding and Team 3216 engaged in conduct which was, and is:
- (a) misleading or deceptive contrary to s.18 of Schedule 2 of the Australian Consumer Law; and
  - (b) unconscionable and contrary to s.20 of Schedule 2 of the Australian Consumer Law.
28. MMP was induced by the MMP Commitment Representations and warranties to act to its detriment in that, inter alia, it then, at that time, proceeded to commit to, and establish, the MMP Publication and the issue and allocation of the CRPS shares to Hayeswinkle Holding on the basis that Hayeswinkle Holding and Team 3216, had committed to, and was committing to, a minimum seven pages of advertising in the weekly MMP Publication at an agreed page rate of \$1,400 for the anticipated three year period of the advertising agreement and that it (MMP) would have 70% of total residential property advertising volume in Geelong to make the publication profitable for the initial three year period of, and pertaining to, the advertising agreement. But for the MMP Commitment Representations and warranties, MMP was not, then, committed to, and established, the MMP publication.
29. In the premises, and by reason of the matters alleged, MMP has suffered loss and damage.

#### PARTICULARS

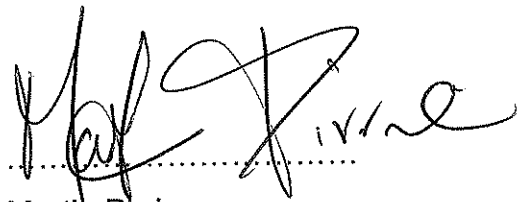
MMP refers to, and repeats, the particulars sub-joined to paragraph 16 of its Amended Statement of Claim herein.

30. In the premises, it (MMP) is entitled to statutory damages pursuant to Schedule 2 of the Australian Consumer Law.

**AND THE PLAINTIFF CLAIMS AGAINST THE DEFENDANTS:**

- A. Damages at common law for –
- B. (i) breach of contract;  
(ii) negligent misstatement
- C. A Declaration that The Defendants have contravened section 20 of Schedule 2 of the *Australian Consumer Law*.
- D. Damages including equitable damages ;
- E. Further and alternatively, Statutory Damages;
- F. Interest pursuant to Statute.
- G. Costs.
- H. Such further or other relief as the Court thinks fit.

Dated : 17<sup>th</sup> May 2013.

  
.....  
Martin Pirrie.



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Solicitors for the Plaintiff