Reference: 001/NBPL-2015/LLA

**Legal Lawyers and Associates**

1008 St Georges Terrace

PERTH WA 6000

25 March 2015

**New Beginnings Pty Ltd**

65 Uncharted Circuit

WEST PERTH WA 6008

**Attn: Mr Joel Drake**

**Director of New Beginnings Pty Ltd**

Dear Mr Drake,

**RE: CLAIM AGAINST BIG HUGE VIDEO PTY LTD**

We refer to your letter dated the 11 March 2015, where you sought our advice on a claim against Big Huge Video Pty Ltd (now trading as Easy Movies Online Pty Ltd) ('the seller') regarding the sale of a video store business, “Big Huge Video” ('the business') located at Shop 34, Prime Shopping Centre, Murdoch. Based on the instructions we have received from you, we understand the facts as follows: The seller provided information related to the business’s financial records, earnings, inventory and projected future profits in pre-contract dealings (‘financial summary’) verbally and in writing and these representations induced you into entering a contract ('the contract') with the seller for the business. You have since discovered that the information provided to you by the seller was untrue. Based on this,the first cause of action that can be claimed is misleading and deceptive conduct as per section 4, 18, 37(2) of the *Australian Consumer Law* (WA). Additionally, you can also seek action against the seller for the breach of term 3 of the contract.

We do wish to point out the weakness of your case, which includes the delay in bringing this matter. Please provide us further information of any correspondence over the past four years pertaining to issues with the above mentioned misleading conduct. Unfortunately, in similar cases such as these the courts have typically held that a plaintiff will be unable to claim for avoidable loss. However, it has also been held that a plaintiff is entitled to recover losses incurred when reasonably trying to mitigate losses. We believe that although your case has such weakness, it will most likely still be successful to some extent, although we are unable to guarantee the success.

**Facts and legal reasoning**

*Misleading and deceptive conduct*

As Term 6 of the contract states that this agreement is government by the laws of Western Australia, we will be claiming under the *Fair Trading Act* (WA), which encompasses the *Australian Consumer Law* (WA). Section 18 of the *Australian Consumer Law* (WA) provides ‘person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.’ The term ‘trade or commerce’ essentially means that the conduct must be within the course of business, which in this case the sale of a business satisfies.

The requirements of this cause of action, that must be satisfied in order to be successful in a claim, include:

* That the plaintiff was induced into believing an erroneous assumption as a result of the misleading and deceptive conduct. In this case we are of the belief that you were induced into believing a mistaken and erroneous assumption concerning the financial records, inventory quantities and future profits as provided to you in the form of the financial summary, meetings with the seller and the advertisement.
* The plaintiff must show he relied on the misleading and deceptive conduct when entering the contract. In this case, you did rely on the misleading and deceptive conduct, which is evident in the actions you took to complete and carry out your obligations of the contract.
* Furthermore, term 4 of the contract can be ruled invalid because exclusion clauses cannot protect against the law of misleading and deceptive conduct. Therefore, the misleading and deceptive conduct is not limited to the financial records, and does include the inventory and projected future earnings.

It is evident that you have relied upon the information provided by Ms Johnson, when entering into the contract, and have been able to satisfy the above mentioned elements of s 18 of the *Australian Consumer Law* (WA). The exclusionary clauses within the contract are not sufficient to protect the seller from misleading and deceptive conduct.

Therefore, we advise that you will most likely be successful in this particular claim. The seller has breached sections 18 and 37(2) of the *Australian Consumer Law* (WA) which is misleading and deceptive conduct concerning the financial summary, inventory amounts and future projected earnings.

Please note that the future projected earnings will be a much more difficult issue to establish, as the future success of a business is naturally in the hands of the owner and not the previous owner.

*Breach of Contract – Contractual Warranty*

The agreement commenced 13 July 2011, between the seller and New Beginnings Pty Ltd. Term 3 of your agreement states the seller acknowledges that the Buyer, in entering into this Agreement, has relied on the financial statement summary attached as the ‘Financial Summary Schedule’ (Financial Summary Schedule). The seller warrants to the Buyer that the statements and representations made in the Financial Summary Schedule are true and correct.

We consider that there is a valid contract in place between the seller and New Beginnings dated 13 July 2011, by way of offer and acceptance, as evidenced in writing, duly signed, with consideration and payment successfully transferred.

It is evident that the breach of Term 3 has caused you loss, and thus, you are entitled to seek damages for this loss. Additionally, we believe that this particular term is a warranty, which entitles you to seek damages to compensate for any damages arising from this breach. Furthermore, we believe you will most likely be successful in seeking damages to compensate you for such loss. Typically, the courts would offer unliquidated damages for this type of breach, whereby the courts will most likely order to put you in the same position you would have been as if no breach had occurred.

Please let us know if there is anything that is incorrect, or please clarify, add or amend any inaccuracies.

**Options and Recommendations**

*Direct negotiation*

Direct negotiation between yourself and the seller is of course an option. From what you have told us it appears that for whatever reason such has not occurred. Negotiating directly with the seller can be the lowest cost option and most efficient where circumstances permit. However, due to the complexity of the matter you have described, it is not our view that unaided negotiation at this stage would be fruitful.

*Lawyer negotiation or mediation*

We recommend to first exploring lawyer negotiation or mediation with the seller in order to reach a settlement. Lawyer negotiation has the advantage of generally proceeding faster than litigation and does offer a reduction in costs. Mediation is another cost effective and an efficient process that may prove successful.

*Letter of Demand*

We recommend preparing a Letter of Demand to notify the seller of the intention to take further action unless the matter is resolved. The letter will provide the seller with a final opportunity to settle before going to trial. Furthermore, if the matter is not resolved and does proceed to a court or tribunal, the letter of demand can be used as evidence that there have been steps taken to resolve the matter. You will notice the Letter of Demand we have prepared refers to a total amount of $1,148,250 taking into consideration the $100,000 profit per year guarantee listed within the newspaper advertisement.

Please note that we cannot guarantee, nor are we confident the newspaper advertisement will be taken into consideration. While the Letter of Demand reserves your right in this regard, we believe a total amount of $848,250, or less, is more likely to be awarded. This figure includes damages for the $650,000 purchase price of the business, $258,900 loss suffered during 3 years of trading minus $10,650 for the profit made in the first year and $50,000 profit made at the closure of the business. If the action is successful you may also potentially receive interest pursuant to section 32 of the *Supreme Court Act 1935* (WA) commencing on 13 July 2014. Once we have served the seller with the Letter of Demand, the letter provides the seller with approximately 14 days to respond.

*Action in the Supreme Court*

Should this fail, we recommend proceeding your claim against the seller for misleading and deceptive conduct and breach of contract pursuant to sections 18 and 37(2) of the *ACL* in the Supreme Court.

The advantages of proceeding with your claim against the seller in the Supreme Court is that you are not limited to the amount of damages you can claim. However, there are considerable expenses associated with such an action, which you need to be made aware of. The court fees include, but are not limited to; application $1887.20, entering for hearing $1887, allocation of hearing date $1683, daily hearing fees $1683, filing chambers matters $442, bill of costs lodgment fees $610 and others (costs on 25 March 2015). It is common for expenses of at least $10,000 to be incurred each month leading up to a trial and this period could be between 6 to 9 months or more. Depending on the complexity of the matter it is possible for your legal costs even if successful could exceed $200,000. Furthermore, even your obtain a positive outcome in the first instance, the seller may appeal. At any rate, if the action is ultimately unsuccessful the court may order costs against the plaintiff, which means risk of liability for an additional amount also as high as $200,000.

*Action in the District Court*

Another option is to consider proceeding your claim against the seller in the District Court. The advantage of this approach includes the lowered court fees. For example, an application is $1258 and a daily hearing fee is $1473. On a positive note, many actions commenced in the District Court are settled before the matter goes to trial, which could prove advantageous for you. Legal costs are also typically lower. However, the disadvantage of this approach is that $750,000 plus interest would be the maximum damages claimable.

There is no guarantee of success; however, upon our assessment of the information provided thus far, we believe there is merit in your case. Should you wish to proceed with this claim, we will be able to seek damages, with the aim of putting you back in the position you were in prior to the contract. Additionally, as you are a small business and in line with the definition of the term “small business” in regulation 3 of the *Supreme Court (Fees) Regulations 2002* (WA), we will most likely be able to successfully apply to have your court fees in both the Supreme Court and District Court instances reduced.

**Conclusion**

Please note that we provide this advice subject to receiving the facts and information enclosed within your letter dated 11 March 2015. We seek your further instructions whether to commence proceedings. We do require further information in order to provide a more thorough and accurate analysis of your case. As mentioned, we require further information of any correspondence over the past four years pertaining to issues with the above mentioned misleading conduct. We would also require inspection of the lease documents pertaining to this contract.

Should you wish to commence proceedings, please also find enclosed a cost agreement, which includes a range of court fees, barrister and solicitor fees that may be required, upon your approval and instructions. Please also find enclosed the account to date. Upon receipt of the account to date, we will commence proceedings on your behalf as per your instructions.

Please note you have a total of 6 years to bring an action against the seller for this matter. As the action occurred in 2011, you have approximately 2 years remaining to bring about a claim, should you wish to proceed.

Please also note that there is an ongoing obligation concerning discovery of documents. If you believe there to be any documents of relevance, or documents that may be relevant to this matter, please bring them to our attention as soon as possible.

Yours sincerely,

**Legal Lawyers and Associates**