



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S58/2022
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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

No S58/2022

BETWEEN:

RP DATA LIMITED

Appellant

and

JAMES KELLAND HARDINGHAM

First Respondent

REAL ESTATE MARKETING AUSTRALIA PTY LTD

Second Respondent

REALESTATE.COM.AU PTY LTD

Third Respondent

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. The appellant (**RPD**) certifies that this outline is in a form suitable for publication on the internet.

Part II: Submissions

2. On proper application of well-established principles of contractual construction¹ and contrary to the finding of the majority of the Full Court RPD was authorised by licence to reproduce or communicate photographs and floorplans created by the first respondent (**Hardingham**) in which copyright subsisted. This is because the licence the second respondent (**REMA**) granted to real estate agencies was not limited as the majority found.
3. The real estate agencies engaged REMA to produce photographs and floor plans (**Works**) for reward.² The evident commercial purpose and objects of

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¹ The scope of the licence is to be determined according to principle: see JAB73, FCR [82]. The flexible approach to implying terms should be applied to these informal contracts. The correct test is whether the term is necessary for the reasonable or effective operation of the contracts: see JAB76, FCR [82](14)-(20).

² Hardingham was the author of the Works and REMA was the exclusive licensee.

the engagements were to create the Works for use in marketing the properties for sale or lease.

4. A principal purpose of the engagements was to create the Works so that they could be uploaded to the third respondent's (REA) platform. Hardingham knew this. He also knew that the Works appeared on RPD's platform days later. For the relevant 20 transactions, he knew that RPD obtained the Works under a broad licence from REA.³
5. RPD's platform is widely used in marketing properties for sale or lease in Australia. It includes historical information about properties which is useful to agencies to conduct market research and develop an effective marketing campaign.
6. To upload content to REA's platform, agencies agreed to REA's standard terms and conditions. By cl 5(a), agencies granted REA a broad licence to use uploaded content during and after a marketing campaign had ended. They also warranted that third-party intellectual property rights were not affected. REA was permitted by cl 5(a) to sublicense others to use the content and they did so to RPD under this authority.
7. In these circumstances, REMA continued to accept each engagement from the agencies. REMA set its fees accordingly and received payment from the agencies.
8. It was for Hardingham and REMA to show infringement by RPD on the whole of the evidence.⁴ Wrongly, Greenwood J (Rares J agreeing) concluded that this onus was met. His Honour relied on Hardingham's evidence as to his subjective state of mind.⁵ This was wrong because Hardingham's evidence was not admitted as proof of the absence of a licence, which in any event is inconsistent with the (limited) licence REMA accepts it granted.
9. Greenwood J (Rares J agreeing) also placed too much emphasis on the express words of the engagements in finding the licence was limited. His Honour gave

³ The 20 transactions the subject of the separate question occurred after letters were exchanged between lawyers for REMA and RPD. The difference between the terms expressed in RPD's 2014 letter and those that relevantly applied under REA's terms is illusory. REA granted a broad licence to RPD to use the Works to market property for sale or lease including to keep using the Works for historical information on its platform.

⁴ *Acohs Pty Ltd v Ucorp Pty Ltd* (2012) 201 FCR 173, 202 [169] citing *Purkess v Crittenden* (1965) 114 CLR 164, 168.

⁵ JAB72, [78] citing *Acohs Pty Ltd v Ucorp Pty Ltd* (2012) 201 FCR 173 [172]-[174].

insufficient weight to the surrounding circumstances known to the parties and the commercial purpose or objects to be secured by the engagements.

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10. Limiting the licence granted to the agencies robs them of the lawful right to use the Works to communicate past sales or leases. Advertising completed transactions helps agencies to win new business; it cannot have been the parties' intention to give up this right.
11. The limitation also impacts the efficacy of the RPD (and REA) platform. The platform (including the historical information) is a valuable tool used by agencies to develop an effective marketing campaign. Again, the parties would not have intended to sterilise its effectiveness.
12. The limitation would put the agencies, REA, and RPD to the cost and inconvenience of having to cease communication of the Works at the end of a marketing campaign. Because it was a principal purpose that the Works be uploaded to the REA/RPD platforms, the parties would not have intended this uncommercial or inconvenient result.
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13. Greenwood J wrongly concluded that the parties would not have agreed to the broad licence because of the gravity of its scope and its partisan effect. Contrary to his Honour's view, Hardingham and REMA remained possessed of copyright subsisting in the Works. REMA was paid its fee and continued to accept engagements when there is real doubt this would have occurred had the limitation been expressed to the agencies; that RPD also profited by its use of the Works should be given prominence divorced from these matters.
14. In the circumstances of the case, it should be inferred that REMA and the agencies agreed to the broad licence for which RPD contends or it should be implied as being necessary for the reasonable or effective operation of the engagements.
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15. It is accepted that RPD used the Works consistently with the broad licence. If the broad licence is found to be binding on REMA, on the proper construction of s 15, RPD's use of the Works is deemed for the purposes of the *Copyright Act 1968* (Cth) to have been done with the licence of Hardingham.

Dated: 11 October 2022



Mark Martin KC and Anthony Messina