



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S58/2022
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Important Information

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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

APPELLANT'S REPLY

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Argument

Appropriate vehicle?

2. The first and second respondents (collectively **Hardingham**) raise preliminary points in support of the contention that the appellant's issues do not require consideration by this Court. For the following reasons the contention should be rejected.
3. *First* the first and second respondents (collectively **Hardingham**) contend that the term was not pleaded. This is plainly wrong.¹ Implicit in this is the contention that the precise words comprising the term were to be pleaded as if it were a term of a written

¹ Further Amended Defence [6](d)-(e); Reply to Further Amended Defence [3].

contract. That the term be capable of clear expression does not require this and it is not the case that Hardingham was taken by surprise.

4. *Second* Hardingham contends that the appellant failed to establish on the evidence that either of the contracting parties had the term within their contemplation. This contention ignores the established facts.²
5. *Third* Hardingham contends that the commercial purpose of the contracts contended for the appellant departs from the pleadings and puts a gloss on the findings of the primary judge. This should be rejected. Hardingham was not taken by surprise. The commercial purpose is consistent with the findings of the primary judge³ and inconsistent with the limited licence Hardingham accepted was granted.⁴
6. *Fourth* Hardingham contends that the surrounding circumstances contended for by the appellant are not supported by evidence. This should be rejected considering the established facts (which are not under challenge).⁵
7. *Fifth* Hardingham contends that the appellant has established an available alternative to the inference or implication of the term being the warranty and indemnity given by the real estate agencies to the third respondent. That agencies gave warranties and indemnified REA *may* be a factor relevant to the circumstances known to the parties when the informal contracts were made. But the existence of rights arising because of a warranty or indemnity does not bear upon the inference or implication of the term into the contract between Hardingham and the agencies.

Sublicence Issue

8. Hardingham contends that the sublicense issue arises because of REA's election not to sue the agencies and it lacks clarity. Rights REA may enjoy under its contractual arrangements with agencies does not bear upon this issue. If the contention that REA is attempting to rewrite the law as to inferring a term into a contract is advanced against the appellants, then the contention must be rejected. The appellant adopts established principle in support of inferring the term.

² Appellant's Submissions [14]-[22].

³ See PJ [9]; Joint Core Appeal Book (**JCAB**) 10.

⁴ See PJ [24]; FCJ [30], [46]-[47]; JCAB 17, 60, 63.

⁵ See Appellant's Submissions [14]-[22].

5 Dated: 1 August 2022

A handwritten signature in black ink, appearing to read 'Mark Martin QC', written over a dotted line.

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