HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S57 of 2022**

BETWEEN:

REALESTATE.COM.AU PTY LTD
Appellant

AND:

JAMES KELLAND HARDINGHAM & Ors
Respondents

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

Part I: Certification

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

Part II: Outline of Argument

2. *Copyright Act:* By s 31(1)(b)(i) and (ii), the owner of copyright in an "*artistic work*" (which includes a "*photograph*" and "*drawing*" (s 10(1)) has the exclusive right to reproduce the work in a material form and to "*communicate*" the work to the public (i.e. make available online or electronically transmit (s 10(1)) and to authorise the doing of those acts (s 13(2))): PJ[28] CAB18. An "*act comprised in the copyright in a work*" is "*any act ... the owner of the copyright has the exclusive right to do*" (s 13(1)): PJ[51] CAB23; FC[165] CAB105.
3. Copyright in an artistic work is infringed by a person who does or authorises the doing in Australia of "*any act comprised in the copyright*" "*without the licence of the owner of the copyright*": s 36(1); PJ[51] CAB23; FC[165] CAB105. The second respondent REMA was the exclusive licensee of Hardingham's rights (s 10(1), "*exclusive licence*").
4. Thus, absent Hardingham's licence, copyright infringing acts were: reproduction of the works by loading on the REA website; communicating the works by making them available online; authorising the reproduction of the works by permitting any website visitor to download or screenshot or printout the works (eg FM pp5-50); authorising RP Data to reproduce and make them available online.
5. The respondents accepted that each agency agreement included as a term a licence and a right to grant a sub-licence of the copyright to enable the works to be loaded on the REA website: PJ [54] CAB23; FC[30], [143] CAB60, 97. They do not identify whether the term was inferred or implied or specify its precise scope other than to deny it reflected the only terms on which the works could practically be loaded on the REA website.

6. *Unchallenged findings as to objective facts:*

(a) Hardingham expressly agreed to take photographs/make floor plans of a property for a marketing campaign: AS[9]-[11], [29]; PJ[8] CAB10; FC[5]-[7] CAB52; FC[122], [130] CAB92, 94;

(b) A principal mutual purpose of the parties was the creation of the works for loading on the realestate.com.au platform: AS[17], [30]; PJ[9],[59], [65], [68(1)], [79] CAB10, 25, 26, 27, 29; FC[48]-[51], [63]-[64], [68(17)] CAB63-66, 70; FC[148], [189(1)] CAB98,111;

(c) The parties knew that the photographs and floor plans would be loaded on the realestate.com.au platform in accordance with terms imposed by REA: AS[32]; PJ[67], CAB27; FC[62], [97] CAB65, 84; FC[185], [189(2)] CAB110-111;

(d) Those terms were freely available on the realestate.com.au website and were not practically negotiable: AS[18], [33]-[34]; PJ[59], [67] CAB25, 27; FC[52], [62], [68](9) CAB64, 65, 69; FC[148], [158], [189(2)] CAB98, 103, 111;

(e) At all times clause 5(a) was a standard REA term: AS[26]; PJ[11]-[12] CAB11; FC[84], [89], [93] CAB81, 82, 83;

(f) Hardingham/REMA knew that their uploaded photographs/floor plans remained accessible under the REA sold section and also on the RP Data website indefinitely: AS[16], [31]; PJ[60]-[62], [68] CAB25, 27; FC[53], [54] CAB64; FC[148] CAB98;

(g) Hardingham/REMA received valuable consideration to produce works so that they could be uploaded on the REA website: PJ[69] CAB27; FC[67], [152] CAB66, 99,100.

Inferred term

7. *Primary judge and Jackson J:* It was an inferred term of each agency agreement that the agency was authorised by way of licence from Hardingham/REMA to upload the works to the realestate.com.au platform and grant to REA a licence in the form required by REA and contained in REA's usual terms and conditions, including clause 5(a), because without it, the agreement would have failed to achieve a central mutual purpose of the parties: AS[26], [69], PJ[11]-[12] CAB11, PJ[78]-[79] CAB29; FC[190], [192]-[193] CAB112.

8. *Greenwood J errors (Rares J agreeing):* It is an error to require that a term will not be inferred unless the parties were *"actively aware of, and held common knowledge of, the precise scope"* of an inferred term *"of this gravity"*: AS[47]; FC[99] CAB84-85. An objective test based on the conduct of reasonable persons in their position readily accommodates an inferred agreement to authorise the uploading of works and the grant of a licence in accordance with a freely available standard term knowing that REA's terms

were a prerequisite of uploading, whether or not they read them: FC[170] CAB106. Further, an idiosyncratic test of "gravity" ought not inform the outcome: AS[48]-[50].

Implied term

9. *Primary judge and Jackson J:* Alternatively, it was an implied term of each agency agreement that the agency was authorised by way of licence from Hardingham/REMA to grant to REA a licence in the form of clause 5(a) because without it, the agreement would have failed to achieve a central mutual purpose of the parties: AS[26], [37], [69], PJ[11]-[12] CAB11, PJ[78]-[79] CAB29; FC[190] CAB112, [194] CAB113.

10. *Greenwood J (Rares J agreeing) errors:* It is an error to find that the term was not so obvious it goes without saying, and for that reason was not necessary for business efficacy, because of its partisan operation: AS[37]-[40]; FC[82(24)], [103] CAB79, 86. If the term satisfied business efficacy, it did not also need to be so obvious as to go without saying: AS[41]. In any event, it could not be partisan, and hence not so obvious, when its implication enabled a mutual purpose of the agreement to be fulfilled applying an objective standard: AS[42], [43]. The case is unlike *Codelfa v SRA (NSW)*: AS[45].

11. *Rares J error (Greenwood J not agreeing):* Contrary to FC[111] CAB89, where a principal purpose of each of the subject agreements was loading the works on the REA platform, the need of the term to give business efficacy was not countered by the possibility that in other agreements other agencies might not advertise on the REA website: AS[38].

12. At least in informal contracts such as these, the "*so obvious test*" is not an essential requirement beyond business efficacy: *The Moorcock* at 65, 68-71 (1202, 1205-1208); *Reigate* at 605 (1173); *Shirlaw* at 227 (1197); *BP* at 283 (111); *Hawkins v Clayton* at 573 (538); *Byrne v Australian Airlines* at 442 (204) but 446 (228); *Breen v Williams* at 90-91 (142-143); *Marks v Spencer* at [21] (1089), [57] (1099), [73] (1104), [75], [77] (1104-1105).

13. If the "so obvious test" is required, it is satisfied AS[62]. PJ[10] CAB10; FM pp51-79.

14. *Section 15:* It applies as: there is no contractual privity between Hardingham/REMA and REA/RP Data; the s 31 acts are relevantly the same; and the respondents are bound by the consent they gave the agencies: AS[66]-[68]; PJ[53], [81]-[82] CAB23, 29-30.

15. *Orders:* proposed remitter order 3 (AS[71]) relates to REA's undetermined cross-appeal against the primary judge's costs order 4 (CAB32).

Dated: 11 October 2022

A J L Bannon **H P T Bevan**