HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 05 Aug 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S57/2022
File Title:	Realestate.com.au Pty Ltd v. Hardingham & Ors
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	05 Aug 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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

BETWEEN:

REALESTATE.COM.AU PTY LTD
Appellant

AND:

JAMES KELLAND HARDINGHAM
First respondent

REAL ESTATE MARKETING AUSTRALIA PTY LTD
Second respondent

RP DATA PTY LIMITED
Third respondent

APPELLANT'S REPLY

I. CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

II. ARGUMENT

2. The Hardingham respondents' submissions (**HS**) deal at length with a variety of points (onus, versions, indemnity etc.) that serve to distract from one of significance: like the majority in the Full Court, the Hardingham respondents offer no cogent explanation as to how any of the contracts between them and the real estate agencies worked commercially without the term for which REA contends (i.e., the scope of the permission that the Hardingham respondents gave the agencies), irrespective of whether that term be inferred or implied. This goes to the nub of the majority's error.

3. In HS [17]-[20], [38], the Hardingham respondents contest the characterisation of "*the purpose*" of the commercial contracts between the Hardingham respondents and the agencies). In HS [21]-[24], they quibble about "*effective marketing*". Those contests are not open in light of the unchallenged findings at PJ [59] CAB 25. There, the primary judge stated that the evidence established *and* the Hardingham respondents "*conducted their case*" on the basis that: the "*overwhelming majority*" of real estate agencies use the realestate.com.au platform and would do so "*as a matter of commercial reality*" in marketing properties for sale or lease; the prospect of selling or leasing was "*enhanced*" by the use of that platform; and hence obtaining photographs and floorplans to upload to

that platform was "*one of the principal purposes*" for which the agencies commissioned the works. See also PJ [75] CAB 28 (first sentence, also unchallenged).

4. The submission at HS [25]-[26] as to onus misapprehends the facts and is otherwise confused. The legal onus on proving the absence of licence rested at all times with the Hardingham respondents: *Avel Pty Ltd v Multicoin Amusements Pty Ltd* (1990) 171 CLR 88. That was a burden that the Hardingham respondents had to discharge on the whole of the evidence: *Purkess v Crittenden* (1965) 114 CLR 164 at 168. Remembering that a licence was averred by the Hardingham respondents, REA then pleaded licence by way of defence to the cross-claim and as to infringement, filed on 18 February 2019 (CAB 236, item 10). REA's affidavit evidence in support of its case going to the use of the realestate.com.au platform and the acceptance of its terms and conditions by key agencies the subject of the separate question was filed on 8 March 2019 (CAB 132, item 22). It was not until 10 May 2019 in their reply that the Hardingham respondents introduced into the proceeding for the first time the specific temporal limitation that the admitted licence (and sub-licence) came to an end at completion of sale or lease (CAB 126, item 4; Appellant's Supplementary Book of Further Materials at pp 7-8 at para 3 (esp. subpara (c))). Despite that specific allegation in their most recent pleading, the Hardingham respondents' affidavit evidence in reply filed on 23 May 2019 (CAB 131, item 19) did not touch on it at all. Acceptance at trial of the very narrow proposition that Mr Hardingham's evidence as to an absence of licence (limited to his understanding) was the bare minimum the Hardingham respondents had to do to get over *Avel* at the threshold was no answer to the broader, and more significant, question of whether the Hardingham respondents discharged their onus on the whole of the evidence. That is the point made in AS [49], as it was at trial: *cf.* HS [26]; RBFM at p 6. REA had no burden, evidential or otherwise, to negative a limitation that the Hardingham respondents advanced in their last pleading deployed *after* service of REA's evidence. The burden of adducing sufficient evidence to establish that allegation was borne by the Hardingham respondents: *Braysich v The Queen* (2011) 243 CLR 434 at [33]; *Sidhu v Van Dyke* (2014) 251 CLR 505 at [63]. They did not even try to do so in respect of one, let alone all, the transactions the subject of the separate question: see PJ [65] CAB 26. That was the Hardingham respondents' forensic choice: *cf.* HS [7]-[8]. In any event, and inconsistently with the Hardingham respondents' pleaded case and HS [5], [72], the evidence showed continued use of photographs by agencies on their own websites and on those agencies' profiles on

the realestate.com.au platform in "*Sold*" sections (i.e., after the completion of the sale): see AS [14], [16], [19] and [24] (esp. fn 23) and the references there given.

5. Contrary to HS [33]-[37], there are not different "*versions*" of the term and REA's case has not changed. REA's case at trial was described by the primary judge at PJ [27] CAB 18: the Hardingham respondents "*granted an express or implied licence to the agencies which was, in turn, embodied in the express licence given by the agencies to REA under REA's terms and conditions*" and the "*express or implied licence granted to the agencies was of equivalent scope to that granted by the agencies to REA*". That case has remained constant. Further, and as submitted (AS [13], [26]; PJ [11]-[12] CAB 11), the applicable clause (clause 5(a)) in REA's standard terms and conditions (for agencies with residential subscriptions) was the same for all transactions the subject of trial and that too has not changed.[1] Still further, the tangential remarks in HS [28]-[32] about REA and its terms and conditions may be set aside: the case ultimately concerned the realestate.com.au platform and the Hardingham respondents conducted their case also on that basis (see, again, PJ [59] CAB 25). The facts about the realestate.com.au platform and its use by agencies for marketing are not challenged. Finally, a theoretical contractual capacity for alteration of any terms and conditions that may or may not be exercisable at some time in the future has no logical or rational bearing on the identification of the applicable term in the past for the transactions the subject of trial: *cf.* the hint to that effect in HS [30]-[31].

6. The argument in HS [6]-[7], [40] about the indemnity clause in REA's contracts with the agencies is misplaced. The presence of such a clause in REA's contract with the agencies does not negate the existence of the licence between the Hardingham respondents and the agencies for which REA contends. A licence as REA propounds (and as the primary judge found) might well obviate any need for reliance on the contractual indemnity with the agencies on these facts but such a clause would have work to do if the agencies had stolen, rather than commissioned, the photographs and purported to upload them to the realestate.com.au platform in breach of the warranty. Relatedly, and just as the Hardingham respondents contend that they did not have to sue REA or anyone else for infringement (e.g., HS [62(c)], it was not necessary for REA to sue the agencies on the

[1] For the avoidance of doubt, REA did not rely on the clause referred to in letter from RP Data's solicitors, Mills Oakley dated 9 April 2014 (PJ [19] CAB 15) but, as submitted, on clause 5(a) set out at PJ [11]-[12] CAB 11.

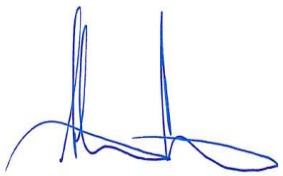
indemnity. That contention presupposes a finding of infringement, which REA denied. Moreover, the current non-existence of proceedings by REA seeking to enforce the indemnity against the agencies is a post-contractual circumstance that cannot rationally bear upon the identification of the terms of the contracts between the Hardingham respondents and the agencies. If anything, however, and contrary to the rhetorical question posed in HS [61], the existence of the corresponding warranty and indemnity supports REA's case. Viewed objectively, the commissioning agents secure from the commissioned photographer (who collects the fee he demands) the rights of equivalent scope to that which the agents then grant, supported by those agents' contractual warranty, in respect of the works to be loaded onto REA's online platform which was one of the principal purposes for which the works were commissioned.

7. As to implied terms: *First*, and contrary to HS [60], it is not an essential step in REA's appeal to re-open or overrule authority. The proposition for which REA contends is accommodated within the cases, as the reasons for Jackson J show (FC [174]-[181] CAB 107-109). *Secondly*, and contrary to HS [43]-[46], there is no confusion in nomenclature or signification. Plainly, the shorthand of "*business efficacy*" picks up the language of *The Moorcock* (quoted in AS [53]), *Reigate* ("*... necessary in the business sense to give efficacy to the contract ...*") and the second condition of *BP Refinery* (see AS [51]). This is not a case of a more efficacious working of the contract: *cf.* HS [61]. Rather, it is necessary in the requisite sense because the contracts between the agencies and the Hardingham respondents would otherwise have failed to deliver that which was commercially essential, for the reasons given by the primary judge and Jackson J. *Thirdly*, none of the observations in HS [62] as to the copyright context detract from REA's case. Tellingly, the Hardingham respondents omit mention of established principles as to licence, including its meaning as permission or consent which can be inferred from conduct: see PJ [38]-[41] CAB 19-20, and the authorities there cited. The facts in the cases of the 3 examples given in HS [62(c)] are neither the same as, nor analogous to, the facts in this case and so they can be set aside.

8. As to inferred terms: at HS [63]-[67], the Hardingham respondents' emphasis on "*actual intention*" betrays their misapprehension of the process of inferring terms which, as submitted at AS [63], turns on the objective ascertainment of the parties' intention in point of fact, and has nothing to do with subjective actuality.

9. As to s 15: the rhetorical observations as to the commercial activities of REA and RP Data advanced in HS [71]-[72] are extraneous to the proper construction of s 15. If, as submitted, s 15 applies to these facts, those matters are irrelevant.

Dated: 5 August 2022



A J L Bannon
Tenth Floor Chambers
Tel: 02 9233 4201
bannon@tenthfloor.org

H P T Bevan
Nigel Bowen Chambers
Tel: 02 9930 7954
hptbevan@nigelbowen.com.au