



HIGH COURT OF AUSTRALIA

14 December 2022

REALESTATE.COM.AU PTY LTD v JAMES KELLAND HARDINGHAM;
RP DATA PTY LTD v JAMES KELLAND HARDINGHAM
[2022] HCA 39

Today, the High Court allowed an appeal, and allowed another appeal in part, from the Full Court of the Federal Court of Australia. The appeals concerned the scope and terms of a licence and subsequent sub-licence to use photographs and floor plans of residential properties ("works") produced by Mr Hardingham and his company Real Estate Marketing Australia Pty Ltd ("REMA"), for the marketing of real estate properties.

Mr Hardingham and REMA supplied works produced by Mr Hardingham to real estate agencies for use in the marketing of properties for sale or lease by way of informal contract. One of the uses of the works by the agencies was to upload them to the platform operated by Realestate.com.au ("REA"). REA then provided the works to RP Data Limited ("RP Data"). RP Data operated a website and provided a subscription service for agencies where the works remained after the sale or lease of the property as part of the historical information about completed transactions.

Mr Hardingham and REMA brought proceedings in the Federal Court claiming RP Data had infringed the copyright in a large number of works. It was common ground that RP Data would infringe the copyright in the works if it used the works without a licence referable to Mr Hardingham or REMA. As such, this proceeding was directed to the terms of the licence Mr Hardingham or REMA gave the agencies, which in turn permitted the agencies to sub-licence the use of the works to REA. Mr Hardingham and REMA accepted that a licence was granted by REMA to the agencies which permitted them to sub-licence to REA. However, they contended that the licence was subject to a limitation that once a sale or lease of the property the subject of the works was completed, the licence came to an end. A licence in these terms would not have permitted the agencies to accept the terms of the licence required by REA, which included the ability to sub-licence to other persons such as RP Data.

The primary judge found RP Data did not infringe the copyright in the works as it was to be inferred from the conduct of the parties, or to be implied into the agreements to give business efficacy to them, that Mr Hardingham and REMA licenced the agencies to upload the works to REA's platform, and in so doing to grant a licence to REA in accordance with REA's standard terms and conditions. The majority of the Full Court allowed Mr Hardingham and REMA's appeal, concluding that the licence was limited to use for the sale or lease of the relevant property.

The High Court held that RP Data did not infringe copyright in the works as a reasonable person in the position of the parties would have known that one of the purposes of REMA providing the works to the agencies was so that the agencies could provide them to REA, and that the agencies had no real choice other than to accept a term requiring them to provide a licence to REA to use the works indefinitely and to provide them to RP Data.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.