FEDERAL COURT OF AUSTRALIA

REA Group Ltd v Real Estate 1 Ltd (No 2) [2013] FCA 968

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| Citation: | | REA Group Ltd v Real Estate 1 Ltd (No 2) [2013] FCA 968 |
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| Parties: | | **REA GROUP LTD (ACN 068 349 066) and REALESTATE.COM.AU PTY LIMITED (ACN 080 195 535) v REAL ESTATE 1 LTD (ACN 140 715 028), SIXTEEN BLAMEY PTY LTD (ACN 130 053 271), GEOFFREY LUFF, JULIE LUFF, CHRISTIAN ONGARELLO and BIANCA ONGARELLO** |
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| File number: | | VID 900 of 2010 |
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| Judge: | | **BROMBERG J** |
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| Date of judgment: | | 26 September 2013 |
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| Catchwords: | | **TRADE MARKS** – Infringement – Remedies – Declarations – Form of declarations – Whether utility in making declaration where infringing conduct ceased at time proceeding was commenced – Order for transfer of domain names – Injunctions – Whether terms of injunction should restrain conduct similar to infringing conduct – Whether it is appropriate for terms of injunction to incorporate wording of s 120(1) *Trade Marks Act 1995* (Cth).  **COSTS** – S 43(2) *Federal Court of Australia Act* *1976* (Cth) – Discretion to apportion costs – Considerations relevant to exercise of discretion to apportion costs – Whether circumstances justify apportionment of costs between the parties according to their success or failure on separate issues. |
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| Legislation: | | *Federal Court of Australia Act 1976* (Cth) s 43(2)  *Trade Practices Act 1974* (Cth) ss 52, 53(c), 53(d)  *Trade Marks Act 1995* (Cth) s 120(1) |
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| Cases cited: | | *REA Group Ltd v Real Estate 1 Ltd* [2013] FCA 559  *Stuart v Construction, Forestry, Mining and Energy Union* (2010) 185 FCR 308  *Mantra Group Pty Ltd v Tailly Pty Ltd (No 2)* (2010) 183 FCR 450  *Edgetec International Pty Ltd v Zippykerb (NSW) Pty Ltd* (2012) 98 IPR 1  *CSR Ltd v Resource Capital Australia Pty Ltd* (2003) 128 FCR 408  *QS Holdings Sarl v Paul’s Retail Pty Ltd (No 2)* [2011] FCA 1038  *Nokia Corporation v Truong* (2005) 66 IPR 511  *Universal Music Australia Pty Ltd v Sharman Networks Limited* (2006) 150 FCR 110  *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229  *Hughes v Western Australian Cricket Association (Inc)* (1986) 8 ATPR 40-748  *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd* (1993) 26 IPR 261  *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 3)* [2007] FCAFC 119 |
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| Date of hearing: | Determined on the papers | |
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| Place: |  | |
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| Division: | GENERAL DIVISION | |
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| Category: | Catchwords | |
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| Number of paragraphs: | 34 | |
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| Counsel for the Applicants: | Mr W Houghton QC with Mr S Rebikoff | |
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| Solicitor for the Applicants: | King & Wood Mallesons | |
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| Counsel for the Respondents: | Mr G Clarke SC with Ms H Tiplady | |
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| Solicitor for the Respondents: | J A Lawyers Pty Ltd | |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 900 of 2010 |

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| BETWEEN: | REA GROUP LTD (ACN 068 349 066)  First Applicant  REALESTATE.COM.AU PTY LIMITED (ACN 080 195 535)  Second Applicant |
| AND: | REAL ESTATE 1 LTD (ACN 140 715 028)  First Respondent  SIXTEEN BLAMEY PTY LTD (ACN 130 053 271)  Second Respondent  GEOFFREY LUFF  Third Respondent  JULIE LUFF  Fourth Respondent  CHRISTIAN ONGARELLO  Fifth Respondent  BIANCA ONGARELLO  Sixth Respondent |

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| JUDGE: | BROMBERG J |
| DATE OF ORDER: | 26 September 2013 |
| WHERE MADE: | MELBOURNE |

THE COURT DECLARES THAT:

1. The first and second respondents infringed Australian registered trade marks no. 811931 and 1075935 (**the realestate.com.au Trade Marks**) by using as a trade mark the sign “realestate1.com.au” in relation to online real estate advertising services:

(a) in advertising and marketing for the first and second respondents’ website located at the domain name “www.realestate1.com.au” (**the realestate1.com.au website**), including in sponsored links and organic search results for the realestate1.com.au website;

(b) on the realestate1.com.au website; and

(c) in the domain name “www.realestate1.com.au”.

1. The first and second respondents have infringed Australian registered trade mark no. 933123 (**the realcommercial.com.au Trade Mark**) by using as a trade mark the sign “realcommercial1.com.au” in relation to online real estate advertising services:

(a) in advertising and marketing for the Respondents’ website formerly located at the domain name “www.realcommercial1.com.au” (**the realcommercial1.com.au website**), including in sponsored links and organic search results for the realcommercial1.com.au website;

(b) on the realcommercial1.com.au website; and

(c) in the domain name “www.realcommercial1.com.au”.

3. The first and second respondents have infringed the realcommercial.com.au Trade Mark by using as a trade mark the sign:



(**the realcommercial1.com.au logo**)

in relation to online real estate advertising services:

(a) in advertising and marketing for the realcommercial1.com.au website; and

(b) on the realcommercial1.com.au website.

**THE COURT ORDERS THAT:**

4. Within 30 days of the date of this order, the first and second respondents transfer registration of the domain names “www.realestate1.com.au” and “www.realcommercial1.com.au” to the first applicant.

5. The first and second respondents, whether by themselves, their directors, employees or agents or otherwise, be restrained from infringing the realestate.com.au Trade Marks by using as a trade mark the sign “realestate1.com.au” in relation to online real estate advertising services, including without limitation:

(a) in advertising and marketing for any real estate advertising website;

(b) in sponsored links or organic search results for any real estate advertising website;

(c) on any real estate advertising website; and

(d) as the domain name for any real estate advertising website.

6. The first and second respondents, whether by themselves, their directors, employees or agents or otherwise, be restrained from infringing the realcommercial.com.au Trade Mark by using as a trade mark the sign “realcommercial1.com.au”, the realcommercial1.com.au logo or any sign substantially identical with or deceptively similar to the realcommercial.com.au Trade Mark in relation to online real estate advertising services, including without limitation:

(a) in advertising and marketing for any real estate advertising website;

(b) in sponsored links or organic search results for any real estate advertising website;

(c) on any real estate advertising website; and

(d) as the domain name for any real estate advertising website.

7. The first and second respondents pay 70% of the applicant’s costs of the proceeding.

8. There be no order as to the costs of the third to sixth respondents.

9. The applicant’s Application dated 21 October 2010 is otherwise dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| GENERAL DIVISION | VID 900 of 2010 |

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| BETWEEN: | REA GROUP LTD (ACN 068 349 066)  First Applicant  REALESTATE.COM.AU PTY LIMITED (ACN 080 195 535)  Second Applicant |
| AND: | REAL ESTATE 1 LTD (ACN 140 715 028)  First Respondent  SIXTEEN BLAMEY PTY LTD (ACN 130 053 271)  Second Respondent  GEOFFREY LUFF  Third Respondent  JULIE LUFF  Fourth Respondent  CHRISTIAN ONGARELLO  Fifth Respondent  BIANCA ONGARELLO  Sixth Respondent |

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| JUDGE: | BROMBERG J |
| DATE: | 26 September 2013 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

1. For the reasons set out in *REA Group Ltd v Real Estate 1 Ltd* [2013] FCA 559, I upheld the claim made by the applicant (“REA”) that by using the marks “realestate1.com.au” and “realcommercial1.com.au”, the first and second respondents (collectively “Real Estate 1”) infringed REA’s trade marks. REA’s claims that Real Estate 1 breached ss 52, 53(c) and (d) of the *Trade Practices Act 1974* (Cth) and REA’s associated passing off claim failed. As did REA’s claim that each of the third to sixth respondents (“the individual respondents”) were liable as accessories.
2. Having heard the parties as to relief and costs, I have made the accompanying orders which these reasons explain. These reasons should be read with my earlier reasons. Abbreviations there identified are here continued.

# relief

1. REA does not pursue its claim for damages or an account of profits by reason of Real Estate 1’s infringements of its trade marks. It does however pursue declarations that:

1 The first and second respondents have infringed Australian registered trade marks no. 811931 and 1075935 (**the realestate.com.au Trade Marks**) by using as a trade mark the sign REALESTATE1.COM.AU in relation to online real estate advertising services:

(a) in advertising and marketing for the respondents’ website located at the domain name www.realestate1.com.au (**the realestate1.com.au website**), including in sponsored links and organic search results for the realestate1.com.au website;

(b) on the realestate1.com.au website; and

(c) in the domain name www.realestate1.com.au.

2 The first and second respondents have infringed Australian registered trade mark no. 933123 (**the realcommercial.com.au Trade Mark**) by using as a trade mark the sign REALCOMMERCIAL1.COM.AU in relation to online real estate advertising services:

(a) in advertising and marketing for the respondents’ website formerly located at the domain name www.realcommercial1.com.au (**the realcommercial1.com.au website**), including in sponsored links and organic search results for the realcommercial1.com.au website;

(b) on the realcommercial1.com.au website; and

(c) in the domain name www.realcommercial1.com.au.

3 The first and second respondents have infringed the realcommercial.com.au Trade Mark by using as a trade mark the sign:



**(the realcommercial1.com.au logo)**

in relation to online real estate advertising services:

(a) in advertising and marketing for the realcommercial1.com.au website; and

(b) on the realcommercial1.com.au website.

1. REA further seeks orders that:

1 Within 28 days of the date of this order, the first and second respondents transfer registration of the domain names www.realestate1.com.au and www.realcommercial1.com.au to the first applicant.

2 The first and second respondents, whether by themselves, their directors, employees or agents or otherwise, be restrained from infringing the realestate.com.au Trade Marks by using as a trade mark the sign REALESTATE1.COM.AU or any sign substantially identical with or deceptively similar to the realestate.com.au Trade Marks in relation to online real estate advertising services, including without limitation:

(a) in advertising and marketing for any real estate advertising website;

(b) in sponsored links or organic search results for any real estate advertising website;

(c) on any real estate advertising website; and

(d) as the domain name for any real estate advertising website.

3 The first and second respondents, whether by themselves, their directors, employees or agents or otherwise, be restrained from infringing the realcommercial.com.au Trade Mark by using as a trade mark the sign REALCOMMERCIAL1.COM.AU, the realcommercial1.com.au logo or any sign substantially identical with or deceptively similar to the realcommercial.com.au Trade Mark in relation to online real estate advertising services, including without limitation:

(a) in advertising and marketing for any real estate advertising website;

(b) in sponsored links or organic search results for any real estate advertising website;

(c) on any real estate advertising website; and

(d) as the domain name for any real estate advertising website.

## *Declarations*

1. There is agreement between the parties that declaratory relief should be granted in relation to Real Estate 1’s infringing use of the mark “realestate1.com.au”. I agree that there is utility in doing so. There was some issue between the parties as to the form of an appropriate declaration. The form of relief sought by REA more accurately reflects the findings which I made. A declaration should reflect the final outcome of a case with certainty and precision: *Stuart v Construction, Forestry, Mining and Energy Union* (2010) 185 FCR 308 at [89] (Besanko and Gordon JJ, with whom Moore J agreed at [35]). I will make a declaration in the form proposed by REA, save that reference in the declaration to the sign “realestate1.com.au” should appear in lower case sans serif font which represents the form of the infringing use.
2. Whether the declaration sought by REA in relation to Real Estate 1’s use of the mark “realcommercial1.com.au” should be made is disputed. Real Estate 1 contends that there is no utility in the Court granting the declaration sought as the website in question was shut down in December of 2010. Whilst I accept that the impugned use of the mark “realcommercial1.com.au” ceased at or about the time that this proceeding was commenced, there nevertheless remains utility in the making of a declaration. A declaration will serve to vindicate REA’s claim and record the Court’s disapproval of the infringing conduct. The form proposed by REA reflects the findings made save that the reference to the sign “realcommercial1.com.au” is better expressed in lower case sans serif font.

## *Orders*

1. REA seeks orders requiring Real Estate 1 to transfer the domain names “www.realestate1.com.au” and “www.realcommercial1.com.au” to the first applicant. Permanent injunctions are also sought to restrain Real Estate 1 from using as a trade mark, the signs “realestate1.com.au” and “realcommercial1.com.au”.
2. Real Estate 1 does not resist the making of an order requiring it to cancel the registration of the domain name “www.realestate1.com.au” or alternatively to transfer that registration to REA within 30 days of the date of any order made. Nor does it resist an order being made permanently restraining it from conducting business or supplying services by reference to the name “realestate1.com.au”.
3. Orders requiring a respondent to transfer registration of a domain name to an applicant were made by Reeves J in *Mantra Group Pty Ltd v Tailly Pty Ltd (No 2)* (2010) 183 FCR 450 and in *Edgetec International Pty Ltd v Zippykerb (NSW) Pty Ltd* (2012) 98 IPR 1. Similar orders were made by Hill J in *CSR Ltd v Resource Capital Australia Pty Ltd* (2003) 128 FCR 408.
4. I will make an order requiring Real Estate 1 to transfer the registration of the domain names to the first applicant within 30 days.
5. Permanent injunctions are a conventional remedy in cases involving infringement of intellectual property rights: *QS Holdings Sarl v Paul’s Retail Pty Ltd (No 2)* [2011] FCA 1038 at [6] (Kenny J) citing Crennan J in *Nokia Corporation v Truong* (2005) 66 IPR 511 at [46] where Crennan J stated:

Permanent injunctions are granted conventionally in respect of cases of intellectual property infringement against proven infringement and a proven threat to continue infringing as this avoids multiplicity of proceedings.

1. Whilst the grant of a permanent injunction in relation to the use of the mark “realestate1.com.au” is not in issue, the terms on which such an injunction should be issued are somewhat disputed. The order proposed by REA would extend the restraint beyond the use of the mark “realestate1.com.au” to “any sign substantially identical with or deceptively similar to the realestate.com.au Trade Marks”.
2. The extended restraint proposed by REA reproduces the statutory language of s  120(1) of the *Trade Marks Act 1995* (Cth). The granting of injunctions which reproduce the statutory language of a provision which has been contravened is a practice which authority suggests should ordinarily be discouraged, although it is not the case that such injunctions should never be made: *Universal Music Australia Pty Ltd v Sharman Networks Limited* (2006) 150 FCR 110 at [42] (Branson J, with whom Lindgren and Finkelstein JJ agreed).In circumstances where a breach of an order exposes the respondent to the risk of sanctions for contempt, it is usually preferable that any restraint be confined to proscribing specific conduct. It is not unusual however for an injunction to be made restraining specific conduct as well as conduct similar thereto. In this instance, the use of the statutory language would only extend the restraint to conduct similar to the infringing conduct, so the use of the statutory language may not be objectionable.
3. However, there are particular reasons why in the case of the use of “realestate1.com.au” the restraint imposed should not be extended to similar conduct.
4. As my earlier reasons explained, I considered REA’s “realestate.com.au” mark to contain descriptive elements which, even when used in combination, form a descriptive term. As the evidence demonstrated, in the area of commerce with which this case was concerned, the phrase “real estate” in association with a top-level suffix is in common use in domain names without apparent difficulty. REA made no complaint about the use of “real estate 1”. It accepted that small differences would suffice to differentiate the name used by a rival from its domain name “realestate.com.au”.
5. I found that despite Real Estate 1’s logo containing each of the elements of REA’s trade mark, the logo did not infringe REA’s trade mark. The visibility of the large and bolded “1” in the logo was significant to the conclusion I reached. The indistinctive nature of the “1” when shown in ordinary typeface and used in the domain name “realestate1.com.au” on a search results page was significant to my conclusion that an infringement was established in the context of that use.
6. In circumstances where a finding of trade mark infringement has depended upon fine questions of degree in which small differences and context have been significant, it is not appropriate that a restraint imposed by an injunction should extend beyond the use of the specific mark which the Court has found constituted the infringement. That is because in such circumstances a respondent ought not face exposure to the risk of being in contempt of court orders in relation to its use of an uninfringing mark which is similar to the infringing mark.
7. I should add that in its submissions as to the proposed relief, Real Estate 1 indicated its intent to continue to carry on its business from the domain name “realestate.net.au”. Real Estate 1 intends to use that name as a domain name, as part of the URL on search results pages and in marketing and advertising material. It has also informed the Court that it intends to continue to use the Real Estate 1 logo which I found did not infringe REA’s trademarks. It contended that consistent with the Court’s findings, those intended uses would not infringe REA’s trade marks. It relied as well on statements made by REA during the hearing that it had no issue with the use by Real Estate 1 of the domain name “realestate1.net.au”. Real Estate 1 made those submissions for the purpose of urging the Court to record an acknowledgment as to the lawfulness of the foreshadowed uses in a prefatory section to the orders to be made.
8. The request for an ‘acknowledgment’ may well be motivated by Real Estate 1’s concern that if an injunction was made in the extended form sought by REA, the ability of Real Estate 1 to use the domain name “realestate1.net.au” would be in doubt. The orders I propose to make put that matter beyond doubt. There is, in the circumstances, no need for any ‘acknowledgment’ of the kind which Real Estate 1 seeks. I need not deal with whether, if a need had been established, the Court would have a capacity to address it.
9. There is no dispute that an injunction should be granted permanently restraining Real Estate 1 in relation to the use of the mark “realcommercial1.com.au”. I prefer the more precise form of order proposed by REA than that proposed by Real Estate 1. The difficulty identified above in relation to extending the restraint to the use of a similar mark, does not arise in relation to “realcommercial1.com.au” for reasons which will be apparent from my earlier reasons for judgment.

# Costs

1. Section 43(2) of the *Federal Court of Australia Act 1976* (Cth) confers upon the Court a wide discretion in relation to the awarding of costs. The discretion must be exercised judicially: *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at [9] (Black CJ and French J).
2. The respondents seek an apportionment of costs on the basis that they were successful on a range of issues. Considerations relevant to the exercise of the Court’s discretion where an apportionment of costs is sought, include the following:

* Ordinarily, costs follow the event and a successful litigant receives its costs in the absence of special circumstances justifying some other order.
* Where a litigant has succeeded only upon a portion of its claim, the circumstances may make it reasonable that the litigant bear the expense of litigating that portion upon which the litigant has failed.
* A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party’s costs of them. In this sense, “issue” does not mean a precise issue in the technical pleadings sense but any disputed question of fact or of law.
* Care needs to be exercised in relation to an apportionment so that parties are not dissuaded by the risks of costs from canvassing all issues which might be material to the decision in the case.
* Whilst the discretion to apportion costs and deny a successful party all of its costs, should usually be exercised where exceptional circumstances exist, the Court should not be reluctant to recognise the existence of exceptional cases. Community demands for greater economy and efficiency in the conduct of litigation are served by encouraging parties to realise that they will not necessarily recover the whole of their costs where they have unsuccessfully raised discreet issues.
* Where there is a mixed outcome in proceedings, the question of apportionment ought not be approached in a mathematically precise manner and will often depend upon matters of impression and evaluation.

See *Hughes v Western Australian Cricket Association (Inc)* (1986) 8 ATPR 40-748 at 48,136 (Toohey J); *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd* (1993) 26 IPR 261 at 271-272 (Gummow, French and Hill JJ); *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 3)* [2007] FCAFC 119 at [11] (Black CJ, Emmett and Middleton JJ).

1. The respondents sought an apportionment of costs and contended that REA should not recover as against the Real Estate 1 respondents more than 30 per cent of its costs. The basis upon which the respondents contend for an order in those terms may be summarised as follows:

* REA pursued three causes of action against the respondents - misleading and deceptive conduct, passing off and trade mark infringement. The first two causes were pursued together but were separate and distinct from the third. The respondents were entirely successful in resisting the claims of misleading and deceptive conduct and passing off. The individual respondents were entirely successful in resisting the claim of accessorial liability. The only aspect on which REA succeeded was its case of trade mark infringement.
* The respondents should not pay REA’s costs in relation to the misleading and deceptive conduct and passing off claims. Those causes of action were substantial and occupied most of the hearing including most of the oral and written submissions. By way of illustration, only 10 of 68 paragraphs in the respondents’ written submissions addressed trade mark infringement and 27 of 99 paragraphs of REA’s written submissions addressed trade mark infringement.

1. The respondents informed the Court that whilst the individual respondents were successful, they do not seek a separate costs order in their favour. Rather, they seek that the Court take into account REA’s liability for costs to the individual respondents in accepting the position on apportionment contended for by Real Estate 1.
2. REA contended that the Court should decline to apportion costs in favour of the respondents and sought an order that the “respondents” (by which I assume REA meant the corporate respondents) pay REA’s costs of the proceeding on a party/party basis. REA’s contentions in support of its position may be summarised as follows:

* Any consideration of the appropriate order as to costs must begin with the ultimate result. In this case REA achieved the ultimate result that it sought being the restraint imposed on the use of the impugned brand and domain names.
* The pursuit by REA of its claims based on misleading or deceptive conduct and passing off did not involve issues wholly separate and distinct from the trade marks claim and their pursuance did not involve any unreasonable or inappropriate conduct on the part of REA as:
* all claims related to the same conduct of the respondents, namely the use of the names “realestate1.com.au” and “realcommercial1.com.au” as brand and domain names;
* there was considerable overlap in the evidence adduced in relation to each claim and in particular the evidence of widespread consumer recognition of the name “realestate.com.au”;
* although the claims were separately addressed in written and oral submissions it cannot be said that a considerable part of the trial was taken up with separate and distinct issues on which REA failed; and
* it cannot be said that it was unreasonable or inappropriate for REA to make claims of misleading or deceptive conduct and passing off, in circumstances where REA had established “secondary meaning” in the name “realestate.com.au” and the Court accepted that there was a real danger of confusion on the part of consumers.
* Insofar as there were any additional costs incurred in relation to the misleading or deceptive conduct and passing off claims, the Court should take into account additional costs incurred by reason of the respondents’ unreasonable failure to make admissions about non-controversial facts.
* In contrast to that conduct, REA acted reasonably throughout the proceeding including by seeking to settle the proceeding by making an offer before trial to accept relief in substantially the same terms as has been achieved through the litigation.

1. In my view, the mixed outcome of the proceeding does warrant a discount of the costs that REA may otherwise have been entitled to from Real Estate 1. Whilst, as against Real Estate 1, REA is the successful litigant and has essentially achieved the outcome it sought from the proceeding, there are circumstances that make it reasonable that REA bear the expense of litigating those parts of the litigation upon which it failed.
2. There was nothing unreasonable in REA pursuing its claims for misleading or deceptive conduct and passing off. I accept that all of the claims brought by REA against Real Estate 1 related to what was essentially the same conduct and that there was considerable overlap in the evidence adduced in relation to those claims. Nevertheless, a considerable part of the trial, the affidavit evidence and written submissions was taken up by issues germane to claims on which REA failed and which were of no or little significance to the trade mark case in which REA succeeded.
3. My earlier reasons for judgment at [227] made the observation (by reference to the authorities there referred to) that the threshold for trade mark infringement is lower than that required to establish misleading or deceptive conduct and that the wider inquiry, of the kind that might be undertaken in a passing off case or where misleading or deceptive conduct is alleged, is not appropriate. Those observations not only reflect the law but are also reflective of the way in which the proceeding was, not unexpectedly, conducted.
4. Whilst much of the evidence and the submissions made were relevant to all three claims, the inquiry required to determine the misleading or deceptive conduct and passing off claims was wider. The wider inquiry addressed matters such as the particular internet context in which the impugned names were used by Real Estate 1 and which were said to be misleading or deceptive and the extent and significance of any such deception. Additionally, a large amount of evidence, submissions and court time was taken up by REA’s failed attempt to establish that some 12,000 consumers had actually been misled or deceived. Evidence, submissions and court time was also taken up by issues peculiar to REA’s failed claim that the individual respondents were accessories.
5. In my view those matters, when combined with the preparedness of the individual respondents to forego an order for costs in their favour, justifies an apportionment of costs and an order that Real Estate 1 pay 70 per cent of REA’s costs of the proceeding.
6. As indicated, REA asserted that the respondents acted unreasonably and thereby increased the costs of the proceeding. I have considered that issue including the two affidavits relied upon by REA to support its submission.
7. I accept that this was a case which largely involved uncontroversial facts. It was clearly a case in which a statement of agreed facts was both appropriate and sensible. REA prepared a draft list of agreed facts following an indication from the respondents that much of the factual issues in the case were unlikely to be disputed. Subsequently, the respondents changed their position. I accept that there was a degree of unreasonableness involved. Nevertheless, the work done by REA to prepare the draft list of agreed facts was not wasted. The draft list was converted into a Notice to Admit. A Notice of Dispute filed by the respondents admitted a large number of the facts sought to be agreed but disputed others. Most of the disputed facts related to what has been described as “the disputed statistics” dealing with REA’s website traffic statistics, agents’ subscriptions and property listing numbers and details of the number of subscribers to REA’s email alerts. Other facts were also disputed including facts relevant to Real Estate 1’s business. I am satisfied that many of the facts disputed should have been admitted. I accept also that some costs were incurred by REA in proving the disputed facts and in particular the disputed statistics. A solicitor for REA has deposed that the solicitor/client costs associated with proving the truth of the disputed statistics was between $55,000 and $70,000.
8. My assessment of the appropriate percentage of REA’s costs which Real Estate 1 should be ordered to pay, takes into account my view that the lion’s share of the unnecessary costs actually incurred by REA, by reason of the respondents’ failure to reasonably make admissions, should be paid by Real Estate 1.
9. For those reasons, I consider that the appropriate order is that Real Estate 1 pay 70 per cent of REA’s costs of the proceeding. I will also make the other orders earlier identified.

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| I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg. |

Associate:

Dated: 26 September 2013