



Neutral Citation Number: [2024] EWHC 3195 (Ch)

Case No: BL-2019-001446

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16/12/2024

Before:

MASTER KAYE

Between:

(1) THJ SYSTEMS LIMITED
(2) OPTIONNET LLP

Claimants

- and -

(1) DANIEL SHERIDAN
(2) SHERIDAN OPTIONS MENTORING
CORPORATION

**(a company incorporated under the laws of the State
of Illinois in the United States of America)**

Defendants

David Eaton Turner (instructed by Freeths LLP) for the Claimants
Daniel Sheridan on his own behalf and on behalf of the Second Defendant in person

Hearing dates: 8 July 2024
Further written submissions and evidence 20 September 2024 and 26 September 2024

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This judgment was handed down remotely at 10.00am on 16 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Approved Judgment**Master Kaye:**

1. This is my determination of two inquiries as to damages following a trial on liability. They relate to what are described as the Advertising Breaches and the Copyright Infringement Breaches.
2. For the inquiries and assessment of damages I had the benefit of written and oral submissions from **Mr Eaton Turner** on behalf of the claimants. **Mr Sheridan** appeared for himself and the second defendant (“**SOM**”). The defendants had been debarred from defending.
3. The hearing was conducted in a hybrid format at Mr Sheridan’s request to enable him to attend from the USA where he and SOM are based. Although there were some initial difficulties with the sound volume these were resolved.
4. The claimants relied on the thirteenth witness statement of **Mr Mitchell** a director and 50% shareholder in the first claimant (“**THJ**”) dated 30 May 2024 (“**Mitchell 13**”), and an expert accountant’s report from **Ms Hotson Moore** dated 19 June 2024. Both attended the hearing to give evidence, Mr Mitchell in person and Ms Hotson Moore remotely.
5. Following the conclusion of the hearing I sought further submissions and/or evidence on specific issues. The claimants responded by the fourteenth witness statement of Mr Mitchell dated 20 September 2024 (“**Mitchell 14**”). Mr Sheridan provided written submissions on 26 September 2024.
6. The full background and the findings on liability are set out in the judgment of Mr John Kimbell KC sitting as a Deputy High Court Judge at [2023] EWHC 927 (Ch) (“**the Liability judgment**”) and in the **Court of Appeal judgment** at [2023] EWCA Civ 1354.
7. Mr Mitchell is a computer software developer who created and developed software to help him with options trading (“**ONE Software**”). Mr Sheridan had been an options trader for 20 years before setting up SOM. SOM provides training and mentoring to members of the public who are interested in options trading. Mr Sheridan is the founder, President, CEO and owner of SOM. Mr Mitchell and Mr Sheridan met after Mr Mitchell had purchased a mentoring package from SOM in about May 2009. At the time SOM used Option Vue software as part of its training and mentoring offering.
8. The second claimant (“**LLP**”) was set up by THJ and Mr Sheridan as the vehicle through which they would exploit ONE Software for their mutual benefit.
9. Arnold LJ summarised the dispute at [4] to [6] of the Court of Appeal judgment:

“4. In 2009 Mr Mitchell created the Software to help himself with options trading. The Software displays financial information about the performance of options in the market. It takes live (or historic) market data and presents it in the form of a table of “call” and “put” positions. These are displayed side by side with a graph showing the “risk profile”.

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5. The two men went into business together in 2010/2011, setting up **the LLP** and entering into a suite of licence and partnership agreements. At a high level, the business model was that Mr Mitchell and his company, [THJ], would provide the Software for Mr Sheridan and his company, [SOM], to use in his mentoring business. In exchange, Mr Sheridan would advertise and promote the Software to his students and mentees.

6. The parties fell out in 2014/2015. Mr Mitchell sought to expel Mr Sheridan from the LLP, raising a wide range of complaints about alleged serious and persistent breaches of the parties' agreements. The Claimants also terminated the Defendants' licence to use the Software, and brought claims in passing-off and copyright infringement concerning alleged use of the Software by the Defendants after termination."

10. The Liability judgment determined that the defendants had breached the advertising obligations contained in clause 15.2.5 of the LLP Agreement. The SOM Software Sub Licence Agreement contained a corresponding obligation in clause 3.4 (together referred to as "**the Agreements**"). Mr Kimbell found that Mr Sheridan had been validly expelled from the LLP with effect from 7 January 2016 and that the defendants' licences to use the ONE Software had been validly terminated by no later than 25 January 2016. At [136] to [141] of the Liability judgment Mr Kimbell found the failure by Mr Sheridan to ensure that the ONE Software was advertised in accordance with the terms of the LLP Agreement to be sufficiently serious and persistent to justify the expulsion of Mr Sheridan. He was satisfied that it was not the sort of breach that could be remedied retrospectively. By his order dated 12 May 2023 he declared:

"Mr Sheridan and SOM acted in breach of their respective obligations under the LLP Agreement and the SOM Software Sub-Licence Agreement between 20 January 2010 and 25 January 2016 by:

- a. Failing to advertise the Software in the stipulated manner ('the Software Advertising Breaches');
- b. Failing to ensure that appropriate copyright marks as set out in the SOM Software Sub-Licence Agreement and the THJ Software Licence Agreement were displayed in educational material produced or participated in by the Defendants including website content, webinars seminars and presentations containing images of the Software (the 'Copyright Notice Breaches');

11. He directed that there be an inquiry in respect of the Advertising Breaches, however, he dismissed the claim for copyright infringement.
12. The claimants' losses in respect of the Advertising Breaches fall into two categories:
 - (i) loss of profits resulting from the Defendants' failure to advertise the ONE

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Software in accordance with and/or in the manner required by the Agreements and (ii) lost management time.

13. Following the Liability judgment Mr Kimbell determined various outstanding costs issues. By an order dated 30 May 2023 the defendants were ordered to pay costs of £32,000 in relation to various applications and the claimants were ordered to pay costs of £5,000. The net effect of the order was that the defendants had to pay the claimants £27,000 within 14 days. They did not do so.
14. In respect of the Advertising Breaches Inquiry, on 23 October 2023 I directed points of claim by 20 November 2023, points of defence by 18 December 2023, and points of reply by 15 January 2024 and listed a CCMC on 28 March 2024. The order included a 21-day unless order in respect of payment of the £27,000 which remained unpaid. If the defendants did not pay the costs, they would be debarred from defending. The defendants were ordered to pay the claimants' costs of the unless application summarily assessed in the sum of £5,000 by the same date but not on an unless basis.
15. The defendants appealed and the claimants cross appealed in respect of the copyright infringement claim. Arnold LJ limited the extent of the copyright claim to the risk and price charts ("**the Risk & Price Charts**") noting at [27] the low degree of creativity such that the scope of protection was correspondingly narrow but nonetheless determining that the claimants were entitled to a declaration of copyright infringement. However, the copyright which was infringed was only in the Risk and Price Charts as graphic works.
16. On 20 November 2023, the Court of Appeal framed the relevant declaration as follows:

"4. It is declared that copyright subsists in the risk and price charts produced by the Software, an example of which is reproduced in the Annex to this Order, (the "Risk and Price Charts") as graphic works within section 4(1)(a) of the Copyright, Designs and Patents Act 1988 of which Andrew Mitchell is the author and that such copyright is owned by the First Claimant.

5. It is declared that the two instances of display of the Risk and Price Charts particularised in paragraphs 40.1 and 40.2 of the Re-Re-Re-Amended Particulars of Claim constituted an infringement of the First Claimant's copyright in the Risk and Price Charts."
17. Paragraphs 40.1 and 40.2 of the Re-Re-Amended Particulars of Claim had pleaded:

"By letter dated 28 January 2016, Browne Jacobson LLP identified at least seven occasions on which SOM continued to use images generated by the Software after termination of the SOM Software Sub-Licence Agreement on 25 January 2016 without the licence of the Claimants or either of them. SOM was requested to cease and desist from activities previously

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authorised by the sub-licence and return copies of the Software in its possession. By way of example only, the Software and images generated by the Software were used in:

40.1. A presentation published on YouTube on 27 January 2016;

40.2. An Earnings class hosted on Mr Sheridan’s website on 27 January 2016. Mr Sheridan’s presentation entitled, “Learn how to Trade Earnings: Understanding Greeks and Volatility around Earnings”, did not display the copyright mark on slides which contained images of the Software (pages 3, 5, 7,10, 11, 12, 13, 14 and 15) or on the slide which advertised the Software (page 16). The appropriate copyright mark was not used on other slides of the presentation, which instead used the mark “© THJ System Ltd” in obscured and illegible script (pages 4, 6 and 8).”

18. The Court of Appeal directed an inquiry as to the damages or an account of profits at the claimants’ election. Damages are intended to put a claimant in the position they would have been in if the infringing act had not occurred, whilst an account of profits is intended to make a defendant disgorge the profits made as a consequence of the infringing act.
19. The Court of Appeal gave directions in the Copyright Infringement Inquiry up to the CCMC so that both inquiries could be case managed together.
20. Mr Sheridan was ordered to provide a witness statement containing information to enable the claimants to make an informed election between damages or an account of profits by 18 December 2023. This is commonly referred to as a *Tring* order, deriving from *Island Records Ltd v Tring International Plc* [1995] 3 All ER 444, and requires the relevant party to provide a witness statement and/or disclosure which is intended to provide the claimants with sufficient commercial information so that they can make the election.
21. The Court of Appeal order was specific about what the evidence was to include:
 - ... in respect of items (i) to (iii) below, the information set out in sub-paragraphs (a) to (f) below:
 - (i) YouTube presentations remaining on YouTube after 25 January 2016 and incorporating a reproduction of a Risk and Price Chart;
 - (ii) presentations hosted on the Defendants’ website after 25 January 2016 and incorporating a reproduction of a Risk and Price Chart;
 - (iii) presentations hosted on any other web platform after 25 January 2016 and placed there by the Defendants (or either of

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them) and incorporating a reproduction of a Risk and Price Chart and accessible from the United Kingdom;

the said information being an estimate of each of the following together with an explanation of the way in which the estimate has been made:

- (a) the number of such presentations;
- (b) the total number of times said presentations have been accessed;
- (c) the number of accesses that can be positively identified as being from the United Kingdom;
- (d) the number of accesses with no attributable geographical origin;
- (e) the sums received or receivable by the Defendants and attributable to the accesses set out in (b) above;
- (f) the costs incurred by the Defendants and attributable to the accesses set out in (b) above.

22. The defendants failed to comply with the *Tring* order by 18 December or at all. On 23 February 2024 Mr Sheridan exhibited a short 4-page witness statement and two bank statements to an application to vary an earlier debaring order. Even if the defendants had not otherwise failed to comply with the debaring order the witness statement was wholly inadequate and unsupported. Mr Sheridan's evidence took a dismissive approach consistent with his continued disagreement with the outcome of the liability trial and the appeal. In substance the defendants said, "we don't know", "we haven't looked", or "it is too late to look now". However, it was apparent from the limited evidence provided that the defendants would have been able to provide at least some of the evidence which they had been asked for if they had taken the time to do so.
23. Mr Sheridan did explain that when removing some of the offending videos/material from the SOM web channels during the course of the claim, it had been deleted. There were numerous contested applications and disputes during the course of the liability claim about the videos both pre and post termination and what should be done about them. The removal of material from the web channels may have been appropriate to avoid the risk of ongoing breaches. It was not clear whether it had been permanently deleted rather than preserved for the purposes of assessing damages in this dispute. The defendants were legally represented at least until December 2023. Mr Mitchell complains that despite this deletion of some materials other offending materials were still accessible as recently as May 2024.
24. The claimants elected to pursue damages. They say the defendants' *Tring* disclosure was so inadequate that they were unable to make that decision on an informed basis.
25. The claimants rely on the defendants' conduct more generally (as recorded in the Liability judgment) and their failure to properly engage with the *Tring* order as a basis

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for seeking an award of additional damage pursuant to section 97(2) Copyright Designs and Patents Act 1988 (“CDPA”).

26. For completeness: (i) the defendants were enjoined not to communicate the Risk and Price Charts to the public in the UK or otherwise to do any acts which would constitute an infringement of THJ’s copyright in the Risk and Price Charts in the UK; and, (ii) the Court of Appeal directed that the defendants make an interim payment on account of costs of £50,000. No payment was made.
27. The defendants complied with the unless provisions of the 23 October 2023 order but otherwise failed to comply with any of the other orders/directions given on 23 October 2023 or 20 November 2023. They did not (i) pay the £50,000 Court of Appeal interim costs order by 5 December 2023; (ii) pay the £5,000 costs order by 13 November 2023; (iii) file and serve points of defence or provide initial disclosure in relation to the Advertising Breaches by 18 December 2023; or (iv) comply with the *Tring* order or provide any disclosure in relation to the Copyright Infringement Inquiry by 18 December 2023.
28. The claimants issued a Second Unless Order Application on 5 December 2023 and a Third Unless Order Application on 5 January 2024 which were listed to be heard together on 26 January 2024. The defendants cross applied for an adjournment or stay on 22 January 2024.
29. The defendants had been represented by Maddox Legal LLP and counsel throughout the dispute up to and including in the Court of Appeal and at the hearing on 23 October 2023. On 26 January 2024 Mr Sheridan explained that the relationship had broken down in December 2023 over fees although a notice of change was not filed until 16 January 2024. The defendants had therefore been represented until at least shortly before 18 December 2023.
30. By 26 January 2024, the costs orders of 13 November 2023 and 5 December 2023 remained unpaid. No points of defence nor any witness evidence or disclosure pursuant to the *Tring* order had been provided. On 26 January 2024, I made a further unless order. Unless the defendants paid the two outstanding costs orders, served their defence to the Advertising Breaches Inquiry, and complied with the *Tring* order by 4pm on 16 February they would be debarred. The order provided that if the defendants did not comply:

“...then the Defendants will be debarred from relying on any points of defence, disclosure, factual and/or expert evidence and/or otherwise defending the Advertising Breaches Inquiry and the Copyright Infringement Inquiry and the Defendants shall only be entitled to put the Claimants to proof on any points of claim in such Inquiries.”
31. The defendants were not new to unless orders, the previous one had been made whilst they were represented. The order was clear and unambiguous, intended to enable the defendants, who were by then unrepresented, to understand the consequences of non-compliance. Mr Sheridan knew what the defendants had to do as is amply demonstrated by the defendants’ subsequent applications.

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32. The defendants issued an application for a further extension of time on 9 February 2024. The substance of the application was that the defendants considered the damages claim to be speculative and that it would be unfair if they could not defend it because they did not have funds to pay the costs awards. They sought an extension of time to pay the costs orders if they filed a defence by 16 February 2024. A further application dated 15 February sought similar relief but also attached the proposed points of defence, and the 4-page unsigned witness statement said to comply with the *Tring* order.
33. The evidence available at this quantum hearing includes evidence of the revenue of SOM and also the significant sums paid to Mr Sheridan from SOM. That might be said to put in question Mr Sheridan's submissions that he was not in a position to pay costs orders which ultimately caused the defendants to be debarred.
34. On 23 February 2024 Deputy Master Linwood dismissed the defendants' applications and the debarring order took effect. The defendants did not seek permission to appeal either Deputy Master Linwood's Order or the 26 January Order. The defendants have not since complied with the 26 January 2024 Order nor have they sought relief from sanctions. They remain debarred.
35. At the CCMC on 28 March 2024 Deputy Master Arkush gave permission for the claimants to call an expert in the field of forensic accountancy.
36. At the assessment of damages hearing, Mr Sheridan accepted that his role was limited and that the defendants were debarred. He made some limited submissions at the hearing and subsequently filed further brief written submissions on 26 September 2024.
37. Calver J recently reviewed the authorities on the effect of a debarring order in *Al Saud v Gibbs* [2024] EWHC 123 (Comm). Mr Gibbs had sought permission to defend the proceedings and call witnesses, despite his non-compliance with a debarring order. Calver J summarised the principles at [7]:

...the principles which are applicable to this application are as follows:

- i) When determining the effect of a debarring order the court should first consider the terms of the order. What does the order state the relevant party is debarred from doing? The wording of the "unless order" in this case is clear: the effect is to debar the Defendant from defending the proceedings at all. As the CPR makes clear at 29.9.2, citing *Michael v Phillips* [2017] EWHC 1084 (QB): "*Subject of course to its precise terms, a debarring order extinguishes any right the debarred defendant would otherwise have to participate in any way in the determination of all the issues which fall for determination at that trial*".
- ii) If an order debars a defendant from defending the proceedings (like the one here), at the trial the defendant should not be permitted to adduce evidence, cross-examine the

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claimant's witnesses, or make submissions in defence of the claim.

iii) Moreover, the defendant will usually be prevented not just from advancing a positive case, but also from making any submissions that challenge the claimant's case. In *Michael v Phillips*, Soole J at [19] rejected a submission to the contrary by counsel for the defendant:

"Nor can the matter be dealt with by the more limited form of involvement that Mr Beresford proposes. Challenges to the cogency of factual and expert witnesses by cross-examination and submission are a major participation in the trial and would be contrary to what the court has decided should not happen. There would be great difficulties for the trial judge in determining where the boundaries lay between such questions and submissions and putting forward an alternative case".

iv) The prohibition on making submissions (and cross-examining) applies to issues of quantum just as it does to issues of liability. See again Soole J in *Michael v Phillips* [2017] EWHC 1084 (QB) at [19]:

"In my judgment, there is no good reason to draw a distinction between issues of liability and quantum. The order debars the first and second defendants from defending the claim. A claim involves issues of both liability and quantum. I can see no principled distinction between the two. In some cases the issues of liability may be relatively straightforward whereas the issues of quantum are extremely complicated. It would not make sense if, notwithstanding a debarring order the defendant was nonetheless able to participate in what was really the meat of the claim".

v) There appears to be a narrow, residual discretion or trial management power to permit a debarred defendant to take some part in the relevant proceedings. For example, if a debarred defendant considers that a judge is proposing to grant excessive relief based on a misunderstanding of the scope of the claim, the defendant may seek and potentially be granted permission to make submissions on the limited issue of the extent of the pleaded claim; similarly a debarred defendant should normally be able to address the court on the form of order to be made after the substantive decision on the trial has been made, and on the costs of the proceedings.

vi) The court may also have regard to the nature of the pleaded defence of the debarred defendant for the purposes of understanding the nature and extent of the relevant claim. Indeed, to adopt the phrase adopted by Tomlinson LJ in the second decision of the Court of Appeal in *Thevarajah*, "The

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relevant defence may have left a lasting legacy on the statements of case as a whole".

vii) But in exercising this narrow power, the court should have regard to the importance of ensuring that a debarring order, which is an important sanction available to the court in the exercise of its case management powers, and an important method of ensuring that the court's case management orders are respected, means what it says and is not undermined by permitting the defendant to escape its effect by purporting to make supposedly "clarificatory" submissions.

viii) Of course, where a defendant is not permitted to participate in the trial, by reason of an order debarring him from defending a claim, the claimant does not automatically win by default. At the trial, the claimant must satisfy the court that he is entitled to the relief sought. In this case it remains for the Claimant to prove her claim and her entitlement to the damages sought.

38. As a general principle debarring orders mean what they say and any participation however limited should not allow a debarred party to avoid the consequences of their default by a side door.
39. The filing of the defence and compliance with the *Tring* order formed part of the very non-compliance which resulted in the debarment. It would be wrong in principle to allow the defendants to circumvent the debarring order in those circumstances. It would undermine the very essence of the overriding objective and the balance of fairness and the need for parties to comply with rules, practice directions and orders.
40. However, the claimants still have to prove their claims for loss and damage in relation to the Advertising Breaches and Copyright Infringement and their claim for additional damages.
41. I have considered carefully the written and oral submissions and the evidence. I have had the opportunity to hear from Mr Mitchell and Ms Hotson Moore. I have taken all of these into account when reaching this decision even if I do not set it all out in this judgment.

Advertising Breaches Inquiry

42. Where a party has suffered a loss as a result of a breach of contract caused by a failure of the other party to perform their part of the contract, the court must assess the damages by reference to what is commonly described as the compensatory principle. The innocent party should be put back in the position it would have been in had the contract been performed so far as money can achieve that aim.
43. Mr Eaton Turner argues that where the effect of the breach of contract is not to close down the claimants' business but to reduce its net profits one has to consider the actual profits made and those that the claimants' business would have been projected to make but for the breach. Essentially the net operating profit. Importantly however,

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it remains for the party seeking those damages to provide evidence of any reduced profits. See for example *Chitty on Contracts (35th ed)* Vol 1 at 30-001 and 30-198, Lord Leggatt in the Supreme Court in *Stanford International Bank Ltd v HSBC Bank Plc* [2022] UKSC 34 at [55] and [78], *Morris Garner v One Step (support) Ltd* [2018] UKSC 20, [2019] AC 469 at [35], *Classic Maritime v Limbungan Makmur Sdn Berhad* [2019] EWCA Civ 1102 at [66] and *MMP Gmbh v Antal International Network Ltd* [2011] EWHC 1120 (Comm) at [81].

44. The claimants relied on (i) the Points of Claim for the Advertising Breaches Inquiry dated 20 November 2023 signed with a statement of truth by Mr Mitchell, (ii) Mitchell 13 which itself referred back to and relied on some of Mr Mitchell's earlier witness evidence in the Liability trial, and (iii) Ms Hotson Moore's report. THJ sought damages for loss of profit in the sum of £7,020,694, and in the sum of £82,457 in relation to the lost management time claim.
45. By Mitchell 14, Mr Mitchell revisited the loss of profit in light of the queries I had raised. This produced revised figures for loss of profit of either £5,960,568 or £3,358,079.86.
46. Mr Kimbell found that the central reason for THJ to join forces with SOM was to sell more subscriptions for the ONE Software. He found that the very purpose of the LLP would be undermined if the ONE Software was not advertised in such a way that SOM customers were signposted to where they could find out more about the ONE Software and purchase a subscription. The conduct of the defendants in not doing so was a serious and persistent breach of clause 15.2.5 of the LLP Agreement. As a consequence, THJ did not receive the benefit that it reasonably could have expected to receive under the LLP Agreement.
47. The breaches included the failure to display the ONE Software logo in a prominent and visible position on certain materials used by the defendants when providing its mentoring and training courses and/or advertising them. The defendants were also required to include a slide within any deck used for their training and mentoring courses which included details of the ONE Software and its copyright marks. Mr Kimbell found that oral promotion of the ONE Software during the training and mentoring sessions did not satisfy the specific requirements of the LLP Agreement (see Liability judgment at [127] to [142])
48. This was summarised in the Liability judgment at [142]:

“142. I therefore accept the Claimants' submission that, as at 23 December 2015, the failure to advertise the ONE software was:

- (i) A serious breach of clause 15.2.5 of the LLP Agreement which robbed THJ of a benefit it reasonably expected to receive under the LLP Agreement.
- (ii) A persistent breach which could not be remedied.
- (iii) A breach which was capable of being a ground for expulsion.”

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49. The claimants say that had the defendants' advertised the ONE Software as they should have done both the ONE Software and THJ would have become known to many thousands of additional potential customers/subscribers.
50. The Advertising Breaches points of claim ("ABPOC") at [11] to [15] summarise the defendants' failures to advertise as more fully set out in both the Liability judgment and Mitchell 13.
51. In Mitchell 13 at [7] to [61] Mr Mitchell explains the evidence that he says supports the claim for loss of profits. He sets out his assumptions and how he has projected forwards from those assumptions and why. He has used information extracted from the LLP customer database and the LLP's accounts. Although the redacted LLP accounts are disclosed, the majority of the underlying documents or evidence have not been, instead Mr Mitchell has reduced the information he has extracted to schedules and graphs. The focus of the claimants' disclosure was instead evidence of the defendants' failure to advertise and/or evidence of the breach of copyright. It appeared to me that in respect of the Advertising Breaches the documents necessary to prove the damages claim were the claimants' and/or a matter of expert evidence. The defendants' debarment or failures to give disclosure should have had little effect on the claimants' ability to prove quantum in any particular amount in relation to the Advertising Breaches.
52. I did not have the benefit of seeing Mr Mitchell cross examined but he was sworn in and confirmed his evidence. He was asked to explain some aspects of his evidence. This resulted in an expansion of his evidence in relation to lost management time which had not been addressed in his witness evidence.
53. Although his evidence was not challenged in an adversarial context, he had been cross examined for nearly two days during the liability trial. Mr Kimbell had concluded at [86] that:

"Mr Mitchell's evidence in cross-examination was measured and precise. He answered the questions put to him by Mr Greager in a straightforward way without evasion or straying over into arguing the case. Mr Mitchell was very familiar with every detail of the case and every document."

I also found him to be measured and straightforward in his explanations.
54. Mr Mitchell set out the basis for his assumptions and then explained the defendants' failures to advertise ONE Software. He described the revenue streams before and after termination of the Agreements. He described some of the competitor software and how it expanded including TradeHawk. He explained that although TradeHawk came on stream later than the ONE Software so would not have been a direct competitor, it was a similar product that had been advertised and marketed in the way that Mr Mitchell says the ONE Software should have been.
55. The assumptions about the expected growth in subscribers on which Mr Mitchell's analysis was based included the following:

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- i) a report from Ernst Tanaka prepared for Mr Sheridan in 2009 and used by Mr Sheridan to evaluate the viability and financial prospects of the ONE Software and the defendants' likely financial benefit from the subsequent joint venture with the claimants. The report considered that the proposed venture using ONE Software could grow as big as TradeStation. Mr Tanaka concluded that if the marketing and development were managed correctly there could easily be 2000 users. Mr Mitchell explains that he and Mr Sheridan were encouraged by Mr Tanaka's report and agreed it provided sensible recommendations;
 - ii) that by 2022 TradeStation was reporting 226,000 active customer accounts;
 - iii) in 2009 there was only one other competitor in the same market Option Vue which had approximately 3,500 customers but which was selling licences for double the anticipated price point of ONE Software.
56. Mr Eaton Turner accepts that Mr Mitchells' assumptions involve a degree of speculation. However, he argues that the assumptions made by Mr Mitchell are modest, well-reasoned and err on the conservative side and are supported by the evidence he has been able to obtain and the expert evidence. He submits that in circumstances where that speculation or extrapolation is a consequence of the defendants' own failure to give any disclosure or otherwise assist the court it is not unfair. He argued that at least some of the evidence that might have assisted the claimants was peculiarly in the gift of the defendants. He argued that where that was the case the benefit of any doubt should weigh in favour of the claimants. This seemed to me to have more applicability as a submission to the Copyright Infringement Inquiry, but even then was of limited application on the facts. For the Advertising Breaches Inquiry, the majority if not all the evidence would be within the control of the claimants.
57. The approach urged on me by Mr Eaton Turner was described by Leggatt J (as he then was) in *Yam Seng Pte Ltd v International Trade Corp* [2013] EWHC 111(QB) at [188] as the principle of reasonable assumptions:
- “...On the one hand, the general rule that the burden lies on the claimant to prove its case applies to proof of loss just as it does to the other elements of the claimant's cause of action. But on the other hand, the attempt to estimate what benefit the claimant has lost as a result of the defendant's breach of contract or other wrong can sometimes involve considerable uncertainty; and courts will do the best they can not to allow difficulty of estimation to deprive the claimant of a remedy, particularly where that difficulty is itself the result of the defendant's wrongdoing. As Vaughan Williams LJ said in *Chaplin v Hicks* [1911] 2 KB 786 at 792: "the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract." Accordingly, the court will attempt so far as it reasonably can to assess the claimant's loss even where precise calculation is impossible. **The court is aided in this task by what may be called the principle of reasonable assumptions – namely, that it is fair to resolve uncertainties about what**

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would have happened but for the defendant's wrongdoing by making reasonable assumptions which err if anything on the side of generosity to the claimant where it is the defendant's wrongdoing which has created those uncertainties.” (my emphasis)

58. However, even with the principle of reasonable assumptions allowing for some generosity to the claimants, it is necessary for them to prove quantum. Any reasonable assumptions which the court is asked to make must be consequent upon the defendants' action or inaction and not as a consequence of any shortcoming in the approach adopted by the claimants themselves. It seems to me it is a narrow principle which is not intended to circumvent, dilute or reverse the burden of proof.
59. Mr Mitchell explains at [62] to [94] how he has applied the various assumptions he has made about the likely expansion of subscriber numbers based on the advertising which Mr Sheridan and SOM were supposed to have undertaken and consequent increase in sales and revenue and the likely operating costs of the LLP.
60. It seemed to me that in principle there would be likely to be a difference between the advertising and/or lack of it and the acquisition of new subscribers overall – the conversion rate. Mr Mitchell did not address this directly but instead used a cross check to demonstrate why the court should assume his assumptions were reasonable. He sought to demonstrate that his forecast or assumptions about the increase in subscribers amounted to a very modest percentage of the overall viewers of the defendants' various channels and videos.
61. Mitchell 13 explains that prior to the Agreements he had seen an early steep increase in both subscribers and turnover in respect of the ONE Software. That initial steep increase seems to coincide with the start-up of the sales of the ONE Software, but that initial rate of increase did not continue after the Agreements were entered into in 2013. Given the purpose of the Agreements was to bring the ONE Software to the attention of a wider audience that was not what had been anticipated. Instead of an increase both turnover and subscribers plateaued and then declined slightly.
62. Mitchell 13 explains that following the termination of the Agreements in January 2016 there was an increase in both subscribers and turnover even without any active dedicated marketing or advertising of the ONE Software.
63. This increase was dented between 2018 and 2020. Mr Mitchell explains that Mr Sheridan accepted during the liability trial that he had been developing a competing product and that he had told his customers many of whom were still using ONE Software of his intentions. Mr Mitchell describes the new software developed for Mr Sheridan as a copycat product, which he says is now being sold by the defendants and that it is now one of the claimants' competitors. However, following the dip in new subscribers and turnover which the claimants say was caused by this activity, the ONE Software customer subscriptions have continued to grow despite the competing product.
64. Of course, in a developing market there are likely to be new products and new competitors coming into the market that might affect an assessment of the continuing effect of the Advertising Breaches on the claimants' profits/damages claim. Mr

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Mitchell identifies TradeHawk as a newer competitor in the market. Mr Mitchell says that despite that there has been a significant increase in both turnover and subscribers since 2020. In the year from 26 April 2023 to 25 April 2024 active customers increased from 1256 to 1535. Although he provided these figures, and Ms Hotson Moore uses them in her report, he did not seek to claim for losses beyond 30 September 2023.

65. Mr Mitchell supports his figures by use of a schedule which records an annual summary of the actual gross and net income of the LLP and subscriber numbers supported by heavily redacted LLP accounts. Ms Hotson Moore says she has used the extracted actual sales revenue from the LLP accounts, and the more up to date information through to 2024.
66. Mr Mitchell says that given the success of other platforms over the same period that there would have been an earlier and greater increase in demand for ONE Software if the defendants had not been in breach, particularly given that the only competitor in 2013 was Option Vue.
67. Mr Mitchell explains what he believes might have happened to the growth of subscribers had there not been the Advertising Breaches between 2013 and 2016 based on the assumptions he has made. This is not really factual evidence but rather Mr Mitchell's opinion/projection/speculation about what he thinks might have happened with the benefit of hindsight. He has not relied on any business plans or projections made at the time the Agreements were entered into to demonstrate what he and Mr Sheridan considered to be the prospects for the LLP. It would not be unusual for a business to be able to produce forecasts or business plans. Instead, Mr Mitchell is trying to forward forecast years after the events which gave rise to the claim both past and prospective sales based around the date of termination. This is based on his assumptions about what would have happened between 2013 and 2016. It is his estimate of what the financial results would have been if the defendants had performed their side of the bargain under the Agreements in the way in which he says they should have done, but it is based on his evidence now and not underscored or supported by contemporaneous evidence of what he or Mr Sheridan had anticipated or expected at the time.
68. Mr Mitchell is by background a software engineer who traded options in his spare time. Whilst he appears to have been successful in the field of SAP implementation there is no evidence that he had any experience or track record in developing and marketing software businesses.
69. The entire exercise in relation to expected future sales and/or the valuation of the damages claim is one that I would have expected to have been undertaken by an expert experienced in valuing both software businesses and startup businesses. I would have expected that expert to have looked at the underlying materials and considered the appropriate assumptions to make and the source material available. I would have expected such a report to have included a consideration of for example comparable businesses if any as well as any evidence of the anticipated development and growth of the LLP considered against the actual growth in turnover and subscribers.

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70. Mr Mitchell sets out his assumptions at [75] to [79] of Mitchell 13. In simple terms he took the 2000 customers which Mr Tanaka said would be easily achievable and assumed that would be achieved over three years from 2013 to 2016 despite (i) competitors such as TradeHawk achieving more than this in 6 months and (ii) the main competitor in 2009 Option Vue having 3,500 subscribers at twice the price of ONE Software. He therefore says that his assumption of 2000 additional subscribers over a three-year period is very modest. It seemed to me that an increase of 2000 subscribers over 3 years based on the Tanaka report had at least some evidential support. It appears to have been considered to be a reasonable assumption on the part of the claimants and the defendants at the time the LLP was set up. Mr Sheridan would like to challenge that assumption now but is not able to do so. Ms Hotson Moore considered it to be a modest assumption. Based on the evidence available I am satisfied that the growth assumption of an increase of 2000 subscribers over three years is a reasonable one.
71. Having increased the base starting point Mr Mitchell then simply used the actual subscriber increases from 2016 which in principle seems both reasonable and sensible. However, he had initially removed the dip in new subscribers between 2018 and 2020. This provided a figure for projected subscribers up to 30 September 2023.
72. Mr Mitchell then calculated the additional subscribers as the difference between the actual subscribers and projected subscribers. The claimants say this is a conservative assessment of the likely growth in subscribers.
73. In support of the reasonableness of these assumptions Mr Mitchell relies on the actual increase in active customers of 279 in the period between April 2023 and April 2024. He explains that in that period the LLP gained 619 new subscribers but that 340 existing subscribers did not renew leaving a net increase of 279.
74. He explains that the net increase of 279 subscribers was achieved without the benefit of advertising through a dedicated You Tube Channel or CBOE TV – the types of benefit which the defendants were supposed to provide. It was also achieved without the benefit of Mr Sheridan whose role in the LLP was to provide the marketing and advertising for the ONE Software.
75. Mr Mitchell separately calculated the actual retention rate between 2013 and 2023 as 72.84%. This is a simple matter of arithmetic which was supported by Ms Hotson Moore, and I accept it on the basis of the evidence available.
76. He takes the figure of 279 new subscribers and the retention rate of 72.84% and uses it to calculate the total number of new subscribers he believes the LLP would have achieved over the period from 2013 to 2023. Mathematically this gives him a projected or assumed figure of 3,348 new subscribers over the period. He says this is a conservative figure when measured against the actual new subscribers over the last year of 619. Mr Mitchell further explains that he continued to manage all aspects of the business and spend time on the litigation throughout this period. He says that if the defendants had complied with the Agreements the LLP ought to have been able to achieve at least as good an outcome as it has since achieved without them.
77. Mr Mitchell explains that the recent increase has been achieved in a much more competitive market. He explains there are now 5 to 10 competitors providing similar

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services at similar price points to ONE Software.

78. As a cross check as to the reasonableness of his assumptions he notes that 3,348 new subscribers would equate to only 1.1% of the 300,000 viewers of the SOM YouTube Channels between 2010 and 2016 and 0.22% of the 1.5m viewers of CBOE TV.
79. The final element of this part of the calculation was Mr Mitchell's calculation of the average licence fee for the ONE Software. This was calculated on the simple basis of overall revenue divided by the number of subscribers.
80. The final part of the calculation was to consider the deductions to be made to the revenue to enable the profit to be calculated. The only deduction Mr Mitchell allowed for was the operating costs which he did not adjust despite the increase in subscribers. The operating costs include the costs of advertising, development and management and the day-to-day expenses of the LLP. Mr Mitchell explained that although subscribers would have increased, the operating costs had and would have remained broadly static. He explained that once the costs of developing the software have been incurred, the day-to-day operating costs in relation to the software aspects of the business were similar year on year. Mr Mitchell did not expect to incur additional operating expenses until the subscriber base reaches 4,000-5,000 at which stage he thought the claimants might need additional support to manage the number of subscribers. He did not suggest that there would need to be any additional support for any other aspects of the business. Consequently, the proportion of the revenue which was attributable to profit would not be affected by increased operating costs for the purposes of calculating the damages for the Advertising Breaches. It was if you like all profit.
81. Mr Mitchell then used these figures to calculate the damages from the lost sales of licences as a consequence of the breach of the Agreements. First, he calculated the profit by taking the overall revenue less the operating costs based on his assumptions and concluded that the profit would or ought to have been £9,856,841.
82. He then apportioned the lost profits in accordance with the split recorded in the LLP Agreement. Under the LLP Agreement THJ were entitled to 65% for external customers and 70% for internal customers. Mr Mitchell has taken an average of 67.5%. He has then applied that % to the £9,856,841 to give a figure of £7,020,964 for the period to 30 September 2023 which was the sum the claimants sought to claim.
83. Ms Hotson Moore is a qualified Chartered Accountant and a specialist forensic accountant. She has been an expert on over 300 occasions during her career focussing on the valuation, liquidity and income producing capacity of businesses including in relation to valuing software subscriber businesses (including startups). Her report is dated 19 June 2024.
84. It is important however to understand the limits of Ms Hotson Moore's report. Her instructions at [1.3] were to consider the claimants' approach and provide her opinion on that approach to quantum and her opinion on the claimants' reliance on certain financial information. She was not asked to value the claim by reference to her own expertise, she was not asked to consider and does not appear to have considered other comparable businesses. She was not asked to provide any alternative approaches to the assessment of quantum. She was not instructed to undertake the task herself as an

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expert. Her role was to audit or cross check the work undertaken by Mr Mitchell bedding in therefore Mr Mitchell's approach and assumptions.

85. At [1.3.3] she explains what she was asked to include in her analysis.

“1.3.3 The analysis should include:

1.3.3.1 “The actual vs. expected subscribers figures outlined in paragraph 20 of the advertising breaches points of claim, with the corresponding explanations given by Mr Mitchell from paragraph 6 onwards in his witness statement.

Please note that there is a detailed Excel spreadsheet as part of the Claimants' Extended Disclosure at document 10.

Please consider whether there might be any other factors that, in your expert opinion, could have an effect on the damages as claimed. For example, the delay in advertising and the intervening increase in competitors (see paragraphs 35, 74 and 83 of Mr Mitchell's statement).

1.3.3.2 The underlying cost base, which the claimants say would not have significantly increased (for example, please see the accounts of OptionNET LLP in item 3 of initial disclosure in the advertising breaches inquiry).

1.3.3.3 The retention rate for the ONE software as claimed – see paragraph 84 of Mr Mitchell's witness statement (including the subscription list at item 11 of the Extended Disclosure, which can be reinstated to its original form for your purposes with the confidential subscriber details included).

1.3.3.4 The approach to damages in paragraph 107 onwards of Mr Mitchell's statement based on the recent disclosure by the defendants of tax return information (albeit still incomplete).”

86. Ms Hotson Moore was sworn in and confirmed the contents of her report. She explained that she had undertaken a review of the quantum of damages arising from the Advertising Breaches as calculated by Mr Mitchell. She said she had reviewed and checked his excel workbooks and considered his key assumptions. Given the entire exercise is based on the extrapolation of answers based on assumptions and hypotheticals this was not ideal.

87. She has not used her undoubted expertise in valuing these types of claims/businesses including by reference to comparable businesses in the same space and then prepared her own expert report including her own assessment of what the appropriate assumptions might be based on that broader analysis.

88. Whilst the court should be cautious about rejecting uncontroverted expert evidence (*Griffiths v Tui UK Ltd* [2023] UKSC 48) I am not obliged to accept unchallenged evidence and/or any evidence must contain supporting reasoning. Where therefore the expert has simply undertaken an audit of the claimants' evidence and/or proposed an

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alternative figure based on that audit but also by reference to their experience without any supporting evidence it carries far less weight. Where the expert evidence therefore provides little or no reasoning and/or it appears inadequate or incomplete the judge must either do the best they can or if they do not have sufficient evidence, the claimant may not have proved their claim. That is so even if the defendant is debarred.

89. In section 5.1 of her report, Ms Hotson Moore summarised Mr Mitchell’s approach to the calculation of the Advertising Breaches damages. In section 5.4 she sets out a more detailed review of Mr Mitchell’s calculations and assumptions then at section 5.5.1 she says:

“In my opinion the assumptions which underlie the subscriber shortfall between 2010 and 2023 are reasonable and supported by the evidence provided in Mr Mitchell’s witness statement.”

90. She explains throughout section 5.5 how she has checked and tested Mr Mitchell’s assumptions and those which she accepts as reasonable. But those checks appear to be no more than checking that the assumptions made by Mr Mitchell correlate with the evidence in his witness statement. There is no wider analysis by reference to say any similar businesses and so on. It is as I say an audit. There is one assumption which Ms Hotson Moore does not accept but it is not about the underlying evidence. Ms Hotson Moore’s opinion is that the overall calculations should be based on the average subscriber shortfall in each financial year and not the year end subscriber shortfall as adopted by Mr Mitchell. From a mathematical perspective this makes sense. She recalculated the total revenues applying an average subscriber shortfall.

91. The effect of the use of the average subscriber shortfall is to reduce the damages figure for the Advertising Breaches to £6,733,106 to 30 September 2023. At section 3.1 she sets out her conclusion of her review of the Advertising Breaches damages:

“In my opinion the calculation of loss of £6,733,106 based on the assumptions outlined for subscriber growth is reasonable.”

92. Ms Hotson Moore considered that Mr Mitchell’s assumptions were modest and reasonable based on her audit of his work. She explains in [5.5] how she has audited Mr Mitchell’s figures ensuring that they are consistent with the assumptions he has made. In that sense she does not provide any independent expert evidence.

93. At 5.6 she sets out an alternative calculation which assumes a slightly more generous growth in subscribers. She notes at 5.6.3 that in her experience as a business valuer, revenue growth in software subscriber businesses can be significant but provides no evidence to support that proposition nor does she give any indication of what she means by significant. She then adopts an increased subscriber figure of twice that used by Mr Mitchell without explaining why that is the appropriate figure to adopt. Using her alternative increased subscriber growth figure, she recalculates the damages at either £9,060,251 or £8,977,564 depending on whether operating costs increased. She uses this calculation to emphasise the reasonableness of Mr Mitchell’s figures.

94. Mr Sheridan considers the figures to be wildly optimistic and speculative and would like to challenge the underlying assumptions and methodology, but he has not put the

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defendants in a position to do so. Whether his points are good or bad points, allowing him to advance them would exceed the very narrow limits of what he can assist the court with. It appeared that many of the submissions he wanted to make were focussed on his continuing disagreement with the findings in the Liability judgment and the appeal which would have been the wrong starting point. This is not unfair or inconsistent with the overriding objective. What would be unfair and inconsistent with the overriding objective would be to allow the defendants to take an active part in the Inquiries and undermine the effect of the debarring orders. The court polices compliance with its procedures and requires parties to comply with rules, practice directions and orders. The defendants have not done so and having been debarred cannot be permitted to circumvent that failure to comply.

95. Following the hearing and in advance of finalising this judgment I raised two queries in relation to the Advertising Breaches loss of profits damages claim:
- i) the basis on which the 2018-2020 dip should be erased from Mr Mitchell's figures. Whilst the claimants might be able to pursue a separate claim that the defendants had developed a competing product which affected their sales growth between 2018 and 2020, that was not a claim determined as part of the Liability trial. This inquiry was limited to the Advertising Breaches identified in the Liability judgment.
 - ii) the time period over which the Advertising Breaches claim should continue after the termination of the Agreements. Although there would be some ongoing impact after termination the quantum claim appeared to be based on the assumption that the losses attributable to the Advertising Breaches would continue to be felt with full force up to 30 September 2023.
96. Mitchell 14 addressed these issues. Mr Mitchell considered that in the period 2018 to 2020 the sales of the ONE Software would have been adversely affected by Mr Sheridan's competing product because the effect of the defendants' breaches of the Agreements was that a larger proportion of the LLP's customers were within the SOM community. However, Mr Mitchell provided no evidential basis for this but rather indicated that to err on the side of caution he had recalculated the figures incorporating the dip in sales between 2018 and 2020.
97. He did this including building in Ms Hotson Moore's method of averaging the number of subscribers by year as set out above. Having conducted that exercise for which he provided revised graphs and figures, using the methodology set out above, the revised damages figure was £5,960,568. This seemed to me to be a more realistic starting point based on the evidence available.
98. Mr Mitchell noted that Ms Hotson Moore's alternative calculations were higher and took into account the actual increase achieved in the year to April 2024 and that Ms Hotson Moore considered Mr Mitchell's figures were modest.
99. In relation to the time period query, Mr Mitchell explained that the consequence of the defendants' failure to advertise continued long after the termination of the Agreements and Mr Sheridan's expulsion. He explained that the ONE Software was not supplied on a one-off basis but rather was a subscription service (an annual renewable licence) with a high retention rate as set out in Mitchell 13. He also

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explained that the potential subscribers to whom the defendants should have advertised may not have signed up to become subscribers immediately but sometime later. He provided no evidence of the sort of time lag there might be or what proportion of subscribers this time lag might affect, and it was not addressed by Ms Hotson Moore. He did not provide evidence of any actual subscriber who had in fact purchased a licence for the ONE Software at a substantially later date than when they first saw any advertising and it is not clear if there was any such subscriber. So, whilst in principle I can accept that a prospective subscriber might think about purchasing the software and then acquire it at a later date I do not have any evidence to suggest what that time lag might be and/or how that should be accounted for in any claim for damages over time.

100. Mr Mitchell says that in order to take a reasonable approach he has recalculated the damages on the following basis:
 - i) That the primary effect of the advertising breaches would last for about one year until the end of the 2016/2017 financial year.
 - ii) That the retention rate of 72.84% as set out in Mitchell 13 should then be applied to the estimated subscribers until September 2023 being the date to which the claimants seek damages.
 - iii) This assumes that no new subscribers would have been attracted to purchase a subscription after 2017 from any advertising undertaken between 2013 and 2016 even if the defendants had advertised as they should have done – it does not therefore take into account the time lag referred to above.
101. Having undertaken that calculation, he arrived at a revised damages figure of £3,358,079.86. Mr Mitchell's reworked calculations and assumptions had not been separately cross checked or audited by Ms Hotson Moore.
102. Mr Sheridan complains that the effect of the queries was to give the claimants a second chance. However, that is to misunderstand the process and the role of the court in assessing those damages. I could instead have simply made findings or determinations in this judgment and then asked the claimant to recalculate the figures based on the findings (and if necessary have heard further submissions at that stage). That would have delayed matters further.
103. I am satisfied that on the basis of the claimants' evidence the Advertising Breaches will have caused a loss to the claimants. I have set out in this judgment my concerns about the nature of the evidence that has been produced by the claimants to support that loss.
104. However, Mr Mitchell was straightforward in his explanations and his evidence of his approach to the assumptions which Ms Hotson Moore considered to be reasonable. His calculations are detailed and supported by the audit carried out by Ms Hotson Moore. He adjusted those calculations to address the queries I raised. Despite what I consider to be the limitations of Ms Hotson Moore's report I take into account that she has audited and cross-checked Mr Mitchell's calculations and assumptions against the documents he had relied on to reach those figures and was satisfied that the majority of the assumptions he made based on that evidence were reasonable. She had

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checked his calculations. She was straightforward in her explanations and as I note in relation to the lost management time, she was prepared to accept that there may have been other considerations to be taken into account. That gives me more confidence in the auditing exercise she has carried out. She found Mr Mitchell's assumptions to be supportable. They may be generous or optimistic as Mr Sheridan sought to suggest but the defendants were not in a position to challenge them in that way.

105. Ms Hotson Moore was not asked to comment on Mr Mitchell's revisions, but both are ultimately a matter of arithmetic. The first simply removes the 2018 to 2020 dip. For the reasons I have already set out I am satisfied that that dip had to be removed from the calculation.
106. The second was to make additional assumptions about a reduction in the period over which the Advertising Breaches continued. I consider that there should be some reduction. I do not consider that it could reasonably be assumed that the effect of the Advertising Breaches between 2013 and 2016 would not have been ameliorated over time. Mr Mitchell has made some assumptions about that which seek to reflect my concerns. I consider the assumption that the worst ongoing effect of the Advertising Breaches would have been immediately following termination is a reasonable assumption. Mr Mitchell has then taken an approach that effectively assumes a position that perhaps may be said to favour the defendants. The claimants were given an opportunity to address the issue and that is the evidence they have advanced.
107. For the reasons set out in this judgment I consider that the figures set out in Mitchell 13 and Ms Hotson Moore's report overstated the position by wrongly including the 2018 – 2020 dip and by not allowing for an amelioration of the effect of the Advertising Breaches over time.
108. The claimants have produced revised figures in Mitchell 14 which is signed with a statement of truth, which seeks to address those concerns. I consider that those figures substantially address my initial concerns about the exercise undertaken by the claimants in calculating their losses arising from the Advertising Breaches.
109. Whilst the claimants' evidence appears to me to have gaps, I am satisfied that based on the evidence available I can be satisfied that the claimants have proved to the necessary standard an entitlement to the sum of £3,358,079.86 as representing a sum which compensates them for the loss resulting from the Advertising Breaches.

Loss Management Time

110. In addition, the claimants have sought to recover Mr Mitchell's lost management time. The claimants argued that it would have been foreseeable to the defendants at the time they entered into the Agreements that a breach of the contractual obligations to advertise would cause the claimants to expend time on investigating and remedying the breaches.
111. *Chitty on Contracts (35th ed)* Vol 1 at 30-198 explains that “*where defective performance of a contract causes disruption to a business, for example because its staff have to spend time dealing with the ensuing problems, the reasonable costs can be recovered.*”

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112. In *Aerospace Publishing Ltd v Thames Water Utilities Ltd* [2007] EWCA Civ 3 Wilson LJ reviewed the authorities on “Staff Costs” at [73] to [86] concluding at [86]:

“I consider that the authorities establish the following propositions. (a) The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of a finding that they have not been established. (b) The claimant also has to establish that the diversion caused significant disruption to its business. (c) Even though it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time.”

113. Wilson LJ concluded at [87] that:

“In that in the present case the diversion of the time of a significant number of the claimants’ employees, particularly their senior employees was set out in detail and adequately established, and in that there could be no sensible challenge to the conclusion that their business was thereby disrupted, indeed substantially so, I consider that the judge was entitled to draw the inference that the employees had been diverted from revenue-generating activities; and accordingly I see no error in his allowance within the damages for the costs of the employees referable to the diversion.”

114. Mr Eaton Turner further relied on the decision of Mr D Sweeting QC in *Haysman v Mrs Rogers Films* [2008] EWHC 2494 (QB) at [35] to [46]. Mr Haysman claimed loss of earnings relating to the diversion of his time from his business when he had had to attend at his home to deal with surveyors, loss adjusters and others in respect of the damage to his home. Mr Eaton Turner argued that this decision could be applied by analogy to the lost management time claim.
115. Mr Sweeting accepted that if Mr Haysman were absent from his business over any extended period of time it might affect the ability of his business to generate profit. However, at [46] he reviewed the evidence available in some detail concluding that only half of the time should be regarded as lost. This was in part because Mr Haysman had not adduced any evidence of appointments cancelled or opportunities lost. In addition, Mr Haysman had accepted that his absence from work for a number of hours did not necessarily equate to a loss of income and that his appointments could be arranged to suit his availability. These all seemed to me, by analogy, to be relevant considerations in this claim and in respect of which no evidence had been adduced.

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116. In both *Aerospace* and *Haysman* the nature and quality of the evidence advanced was the foundation for the answer which the court arrived at.
117. In principle I accept that a claim for lost management time is possible. It remains for the claimants to prove that claim on some proper basis. It had appeared to me that this part of the claim, might overlap and/or be inconsistent with the Advertising Breaches claim. The claim for lost management time was a claim that Mr Mitchell had been diverted from marketing and developing the ONE Software/the business of the LLP. This seemed to me to be potentially undermined at least in part by the argument that the operating costs for the purposes of the Advertising Breaches claim should remain static and that increased operating costs would only be necessary when additional resource was needed to support the increased numbers of subscribers. Mr Mitchell did not suggest that there had been any need to increase the operating costs which included management, advertising and development for the purpose of the Advertising Breaches claim.
118. ABPOC at [27] to [30] set out the claim for lost management time. THJ says that Mr Mitchell, its director, and employee, had to devote extensive time to investigate the defendants' breaches, and spend time involved in the claim. It is said that this time could otherwise have been spent on revenue and profit generating projects and further development of the One Software but that this had to be put on hold.
119. At [30] the quantum of £82,457 is calculated as follows:
- “THJ claims payment equivalent to its lost management time of 149.9 days to date and continuing (as recorded and calculated by Andrew Mitchell), resulting from the Defendants' breaches of the Agreements. Management time has been calculated at the rate of £450 per day, amounting to at least £82,457.00 to date. £450 per day is the rate at which THJ typically charged Mr Mitchell's services to clients prior to the inception of the LLP, and is the rate at which THJ's services have been charged to the LLP for modifications to the ONE Software. The Claimants reserve the right to serve a more detailed schedule of loss.”
120. The calculation at [30] is obviously wrong since $149.9 \times 450 = £67,455$. Ms Hotson Moore reviewed this calculation. She said the calculation was $183.88 \times £450 = £82,745$ for lost management time to 6 October 2023. She extracted these numbers from Mr Mitchell's Management Time Log (“**MTL**”).
121. There is no evidence from Mr Mitchell about the lost management time. Instead, Mr Mitchell explained his claim for lost management time orally at the hearing.
122. Mr Mitchell explained that the figures represented only a fraction of the time he had spent on this dispute and that he had been unable to add value to the claimants because so much of his time was taken up by this dispute. Consequently, he had not been able to spend time on the development of his business. He explained that as one man he had not had the time to develop his ONE Software further and it was still running on a Beta version.

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123. This seemed at odds with Mr Mitchell's justification for maintaining a low operating cost base on the basis that he did not need any additional resource. His evidence was that having developed the ONE Software there were no ongoing development costs to eat into the profit. Further that he would not need additional resource to help manage his subscribers until he reached 4000 to 5000 subscribers. These statements seemed incompatible with his lost management time claim.
124. Despite the claim for lost management time the claimants did not retain anyone to undertake the development work whilst Mr Mitchell was diverted. That is the development work that Mr Mitchell says could not be undertaken which is why he says the platform was still a Beta version but at the same time submitted that once the development was complete there was no ongoing cost for development leading to the submission that there was no need for increased operating costs. The consequence being that in relation to the Advertising Breaches the proportion of the revenue that was profit would increase. The Agreements ran from 2013 to 2016. Mr Mitchell did not explain why any further development that was needed for the ONE Software to develop it into a final version so that it was not still running as a Beta version was not undertaken in that period. During that time, the division of work in the LLP meant that Mr Mitchell was supposed to be undertaking work such as development for the LLP whilst Mr Sheridan was undertaking the advertising. That was all before this dispute.
125. Coupled with that it appears that despite saying they were time poor the claimants did not rely on their legal team to undertake for example disclosure. It appears Mr Mitchell undertook much of that work himself as well as finding time to design and run a programme to search the defendants' videos for evidence of copyright infringement. There is no evidence to explain why the claimants diverted their limited resources (Mr Mitchell) to undertake this work or why it was reasonable to do so.
126. Like Mr Haysman there is no evidence explaining what Mr Mitchell would have done with his time if it had not been taken up with the dispute. He explained to me that the main issue was lack of development time. But otherwise, he appeared to have been managing to run the business, support the litigation and support the customers, however, difficult that may have been. This highlights an issue considered in the authorities. If Mr Mitchell was able to adjust how he used his time, and the claimants were not disrupted the claim for lost management time will be undermined.
127. Looking at the numbers, the MTL records a total of 1334 hours between 2015 and 17 April 2024 – a period of 9 years. The total number of hours has been converted into days on the assumed basis of a 7-hour day. This equates to the external contractor day rate which is calculated on a 7-hour day. There is no single day for which a period of more than 7 hours is recorded, and yet the MTL does record weekend working.
128. Mr Mitchell has used a day rate of £450 which he explained had been his contracting out day rate before the LLP was set up. THJ was the vehicle through which he provided his consultancy services. He also explained that he considered that it was the rate he would have had to pay someone to undertake the work he could not do because he was diverted by this dispute.
129. The 1334 hours over 9 years is converted by the claimants to the following $1334\text{hrs}/7 \times £450 = £85,757$.

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130. But as will be readily apparent the 1334 needs to be seen in context. It amounts to an average of 148 hours per year over 9 years. Mr Mitchell says it is under recorded, but it is the only evidence that is available. If one applies the 7-hour day rate that is 21 days a year. But the 7-hour day rate does not assist in understanding whether the business was disrupted; it is the wrong metric. This claim is about Mr Mitchell satisfying the court that the time he spent on the dispute disrupted the claimants' business.
131. The nature of claimants' business was not obviously limited to particular office hours or days. The vast majority of the subscribers – over 97% – were not based in the UK which might make it more likely that Mr Mitchell would manage any subscriber queries outside what might be considered normal office hours if those are relevant at all to this type of business. Given the nature of Mr Mitchell's business and what he says he was diverted from – for example development, it is not immediately obvious that a diversion of 148 hours a year to this dispute would have had any impact on the business at all and or why that 148 hours could not be accommodated at times when he was not focussed on the business – outside the 7-hours a day or at weekends or evenings or vice versa. And indeed, Mr Mitchell appears to have undertaken work in respect of the dispute over weekends.
132. Ms Hotson Moore sets out at [5.1] to [5.3] the cross-check/audit of the loss of management time based on Mr Mitchell's MTL.
133. Ms Hotson Moore considers that the hourly rate adopted by Mr Mitchell could be higher and has considered contractor market rates and she exhibits some information about contractor rates. She considers that a day rate of £900 should be charged for management and £550 for software development. She then assumes that 33% of Mr Mitchell's time would be spent on management whilst 67% would have been spent on developing software. She therefore recalculates the figures as £127,000.
134. I was not immediately attracted by this analysis. It seemed to me that on the facts of this case it raised several issues. First the claimants have sought damages to compensate them for the Advertising Breaches – those damages address the reduced growth of the business as a consequence of those breaches and therefore accounts for any loss of advertising over the period.
135. Mr Mitchell explained in his evidence that he had not undertaken any advertising, nor employed anyone else to do so, but that his business had expanded following Mr Sheridan's expulsion in any event but not as fast as it should have done. He explained that he had not needed any additional support to manage the business because of the number of subscribers and that his operating costs had remained static because once the software was developed there was not a lot of cost related to further development.
136. It had appeared to me that there was a risk of overlap and/or double counting in this particular case if at the same time as maintaining that a low operating cost was appropriate Mr Mitchell were to seek to recover damages for lost management time on the basis that he was unable to devote time to his business because of the litigation in circumstances where his evidence was that he did not need to.
137. In addition, a brief review of the MTL shows that when considered in context it is very difficult to understand whether there was any disruption at all. Other than in the

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intensive periods when Mr Mitchell was undertaking disclosure or attending trial, the MTL records Mr Mitchell spending modest amounts of time liaising with his legal team. There are a considerable number of days or weeks each year when no time is recorded at all but there are also numerous examples of days when as little as 1, 5 or 7 minutes are recorded and on many of the days the time recorded is less than 1 hour. Apart from the few intensive periods of work it was not immediately obvious to me how the MTL supported the claim or how such modest amounts of time on any one day would have diverted Mr Mitchell and caused disruption to the business. There was no evidence from Mr Mitchell of any actual disruption to his business or the diversion of his time or any explanation as to why this was the case.

138. Without some clear and cogent evidence, I am not persuaded that the loss of a few minutes over the course of a day would have any impact on the business at all. I would have expected to see some evidence to explain why either the work relating to the dispute or the work related to the business of whatever type could not have been undertaken on a different day or at a different time and or some explanation about the disruption or diversion.
139. Whilst in principle if an entire day or week were lost to the dispute that might divert resources from other work or cause disruption there is no evidence that it did or what that other work might have been.
140. I raised with both Mr Eaton Turner and Ms Hotson Moore whether the lost management time should in any event be calculated at cost rather than at Mr Mitchell's actual or hypothetical contractor rate. And further why it was not part of the damages claim or at least why there was no overlap.
141. Ms Hotson Moore explained the lost management time as the lost opportunity cost of time that that was not invested in the business. She sought to persuade me that the £450 day rate was the best estimate of that lost opportunity cost, but this seemed to me to be the wrong measure. What the claimants have lost if anything is Mr Mitchell's own time to undertake the work in his business not the contractor day rate which would include a profit margin. It seemed to me that were I to allow Mr Mitchell to recover his own lost management time at the external contractor rate rather than the cost rate this would be a windfall. If Mr Mitchell had paid an external contractor to undertake the work, then that would give rise to different considerations.
142. As for Ms Hotson Moore's suggestion that the calculation should be recast using even higher contractor rates but then apportioned between development and management there was no evidence at all to support this allocation and the higher contractor rates were not the rates that Mr Mitchell was in fact claiming. This did not therefore assist me.
143. In evidence Ms Hotson Moore accepted that on reflection that there could be some overlap between the Advertising Breaches damages and the claim for management time and that it might be prudent to allow for such an overlap but that she was not in a position to quantify the extent of it. Ms Hotson Moore's evidence seemed to me to embed the difficulties with the loss of management time given that she had not considered or addressed the possible overlap at all when simply auditing Mr Mitchell's figures.

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144. Mr Eaton Turner submitted that the approach to management time was necessarily broad-brush having regard to the approach identified in the authorities and that the court could discount for the possible overlap and that the damages and loss of management time were not mutually exclusive.
145. I agree that a claim for damages for loss of profit and a loss of management time are not necessarily mutually exclusive but in this case given the basis of the claim for damages and the manner in which it has been calculated and Mr Mitchell and Ms Hotson Moore's evidence it appears there is a risk of a significant overlap. The evidence advanced by the claimant does not begin to address those issues.
146. It seemed to me that there were a number of insurmountable difficulties with the lost management time claim in this case that had simply not been addressed in the evidence. On the evidence available I do not see how I can infer that there had been disruption to the claimants nor that I can infer that that disruption had diverted Mr Mitchell from activities that would have directly or indirectly generated revenue – at least equivalent to his cost to the business.
147. I am not satisfied that the claimants have proved the claim for lost management time. The evidence does not establish that even if Mr Mitchell did spend 1334 hours (or more) over 9 years not focussed on his business that it was a diversion that caused any disruption to the business. Nor have the claimants established the cost of Mr Mitchell over the period.

Copyright Infringement

148. The claimants are entitled to damages or an account of the profits made by Mr Sheridan and SOM by reason of their infringement of the claimants' copyright in the Risk and Price Charts. These charts are produced by the use of the ONE Software. Whilst Arnold LJ at [27] determined that there was a low degree of creativity in the Risk and Price Charts he did determine there was some visual creativity and that there was some copyright protection albeit restricted to the Risk and Price Charts.
149. Although the claimants say the defendants' *Tring* disclosure was inadequate, they elected to claim damages but rely on the inadequate nature of the evidence to support their claim. As set out above the principle of reasonable assumptions may have more applicability in respect of this Inquiry but only if those assumptions are necessary as a consequence of some shortcomings on the part of the defendants.
150. Copyright damages are tortious damages. The measure of damages is intended to put the party who has suffered the copyright infringement, so far as possible in the same position as they would have been in if they had not sustained that wrong. The claim is territorial such that the damages relate to the loss suffered by the defendants' use of the Risk and Price Charts in the UK.
151. The court has to assess the measure of loss by reference to the evidence available. The court is ultimately seeking to assess the licence fee/royalty that could reasonably have been charged to SOM for its use of the Risk and Price Charts – not to a hypothetical person. Such licence fee must reflect the actual infringement.

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152. Mr Eaton Turner reminded me that damages were at large and that I should keep in mind that the purpose of the LLP was to exploit the ONE Software. He referred me to *McGregor on Damages* (22nd Edition) at 46-063 to 46-066.
153. Copyright is territorial. Mr Sheridan explains that “*A very small percentage of our database is identifiable as living in the UK. We don’t know how many viewers of our content are from the UK. All we know is how many UK customers we have in our database and it’s a very minimal percentage of our data base. We think less than 1% of our Database is identifiable as UK.*” This confirms that at least some of SOM’s customers were based in the UK. There is therefore some basis for the claim in damages.
154. The claimants’ copyright infringement points of claim (“**CIPOC**”) set out the basis for the damages claim at [5] to [10].
155. The claimants claim the profits that would have been made by them from sales of licences to use the ONE Software if subscribers had not been diverted from the claimants to the defendants by reason of the infringement. Alternatively, if I were to find that the claimants would not have sold a licence to one of the diverted customers the claimants claim damages on the basis of a reasonable royalty. That is the royalty that the defendants would have paid for their use of the Risk and Price Charts. The claimants say that should be set by reference to their usual licence fees.
156. Mr Eaton Turner says that in the further alternative if the court is not satisfied that the usual licence fee represents an appropriate royalty it should assess a notional licence fee being a licence fee that would have been payable between a willing licensor and a licensee. This should be done, he says, by reference to the profits resulting from the infringing use of the One Software with the notional licence fee calculated on a profit-sharing basis. Importantly it seems to me that when looking at the willing licensee and licensor one is not looking in the abstract but rather looking at the actual parties engaged in a hypothetical negotiation but equally the defendants’ alleged lack of funds is not a factor to take into account. This was the focus of both Mr Mitchell’s evidence and Ms Hotson Moore’s approach.
157. CIPOC at [11] to [13] explains that the average annual licence fee for an individual subscriber of the ONE Software ranged from £432 to £560 over the period 2010 to 2023. The claimants therefore seek damages reflecting their lost revenue resulting from the number of sales they would have made multiplied by the appropriate licence fee. However, the claimants do not provide any evidence that they in fact sell the ONE Software on a commercial license basis so any calculation of such a licence fee or royalty would be a hypothetical exercise. There is no evidence from Mr Mitchell or Ms Hotson Moore of the approach to quantifying such a hypothetical licence fee other than by reference to the profit method of calculating the licence fee for which they use the limited information available from the defendants’ tax filings and accounts.
158. The claimants say that at least 105 of the defendants’ YouTube training and mentoring videos containing the Risk and Price Charts could still be viewed after the termination of the Agreements. The claimants have obtained view counts for each of those videos. They say there had been some 50,000 views of those videos. However, given the territorial nature of the claim that is only the starting point.

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159. The defendants accept that a proportion of their customers are UK based. The claimants submit that the court should simply assume that one can read across from customer numbers to views and that once the proportion of customers is determined that should be equated to views for these purposes.
160. As set out above Mr Mitchell's evidence was that the licence fees were almost entirely profit as the software had already been developed and the claimants operating costs were static.
161. Mitchell 13 at [95] to [106] explains in more detail the number of the defendants' videos which included the Risk and Price Charts both pre-termination and post termination. Mr Mitchell watched 373 post termination videos of which 259 contained at least one image of the Risk and Price Charts. From this he calculated a percentage of infringing videos as 69.9%. On the basis of the evidence available this is not an unreasonable assumption. He explains that the videos were included in mentoring and training packages sold by SOM post termination and that it was still possible to access, download and play videos containing the Risk and Price Charts from the UK as recently as 30 May 2024. It seemed to me that if the videos with the Risk and Price Charts are still accessible then that was likely to be a breach of the injunction at paragraph 6 of the 20 November Order.
162. At [107] to [116] Mr Mitchell explains how he calculated the Copyright Infringement damages with his conclusions set out in the CIPOC at [23] to [26] resulting in a claim for £58,042.
163. Mr Mitchell first calculated that 2.3% of the LLP's total sales were to UK customers over the relevant period. He applied this percentage to SOM's revenue as extracted from their accounts and tax filings. In the absence of any other evidence the claimants say this is a reasonable assumption to use to derive SOM's revenue from UK sales between 2016 and 2023. This exercise produced a figure of £90,750.
164. There was no evidence to support the assumption that one could read across from the LLP percentage. Indeed, such evidence as there was from Mr Sheridan suggested a smaller percentage. Mr Mitchell's evidence was that the defendants' business was to provide financial market-related products relating to the US financial markets in the same way as the LLP and it was therefore reasonable to assume that it would have a similar proportion of UK focussed business. This seemed to me to be over-simplistic.
165. The businesses are different. The claimants sell licences to the ONE Software to assist or support subscribers to trade options and to provide support for that software. SOM provides training and mentoring packages about how to trade options which includes demonstrating how various software products can be used to assist in that process. What the defendants failed to do was to promote or advertise the ONE Software through the training and mentoring programme offered by SOM. The use of the One Software was an adjunct to or ancillary to the SOM business not the purpose of it unlike the LLP.
166. The defendants were not selling the Risk and Price Charts as such but rather using them as part of the materials for their training and mentoring videos. The continued use after January 2016 was without permission if the termination was valid. There are therefore no "sales" figure for the videos which included the Risk and Price Charts.

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The videos were primarily training materials made available to those who signed up to the defendants' services.

167. Further SOM was already an established business when the LLP was set up as a joint venture. It had already been providing training and mentoring services including to Mr Mitchell using other software. Neither Mr Mitchell nor Ms Hotson Moore addressed this difference, nor did they explain why it should be ignored.
168. Additionally, even if the nature of the businesses are not dissimilar SOM is US based whilst the claimants are UK based. The ONE Software is aimed at options trading. No attempt was made to consider whether that would make a difference to the approach of subscribers when buying software and/or considering when or how they would obtain support.
169. I am not satisfied that one can say that a UK based software licensing business and a US based training and mentoring business that uses the software as part of its training and mentoring business are the same. No allowances have been made for these differences and they are not addressed in the expert evidence.
170. I do not accept that one can just read across from the LLP to SOM or that such a read across is a reasonable assumption that allows the court to disregard the differences between the LLP and SOM. It was not comparing like with like.
171. I do not therefore consider that the £90,750 is a reasonable starting point from which to calculate the damages.
172. Mr Mitchell then calculated the profit margin using two different approaches. First, he took the figures from a single January 2024 bank statement disclosed by the defendants. This shows revenue of US\$38,913 for the month but with 91.5% having been paid as "wages" to Mr Sheridan and his family. Mr Mitchell says that that reasonably reflects his assumption that there would have been very little expenditure to set off against the sales income. He treats the entirety of the sums paid out as "wages" as the profit. Neither Mr Mitchell nor the expert appear to have made any allowance for wages at all. This did not appear to me to be a reasonable assumption even if the paucity of evidence was the fault of the defendants.
173. Mr Mitchell applied the 91.5% profit percentage to the £90,750 giving him an assumed UK revenue of £83,036. He then applied the 69.9% rate of infringement to that figure. This produced the figure of £58,042 which is the sum that the claimants claim in the Copyright Infringement Inquiry.
174. To cross check the reasonableness of that figure he divided that figure by the number of years to reach an annual royalty payment of £7,441 which he says equates to an approximate annual licence fee of 1.5%. He did not provide any evidence to support the reasonableness of such an annual licence fee.
175. Mr Mitchell's alternative calculation was based on financial information extracted from the accounts and tax filings for the defendants, although he identified gaps in the information including a lack of information about Mr Sheridan's personal broking and trading. Mr Mitchell says that the SOM tax filings record that SOM received US\$7m in revenue over the relevant period.

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176. From Mr Mitchell's analysis of the tax filings he concludes that SOM has generated a profit for Mr Sheridan of US \$4.5m. He explains at [115] and [116] that this figure is calculated by adding together all the revenue and the salaries paid to Mr Sheridan and his family together with all the equity and profit distributions. As set out below Ms Hotson Moore calculated a slightly different figure.
177. Using these figures, he calculated that the percentage profit was 94.7% rather than the 91.5%, he had originally used. Re-running his calculation using these figures increased the claim for copyright infringement damages from £58,042 to £60,491.
178. Mr Mitchell relies on the similarity of outcome from the two approaches as reinforcing the claimants' position. It does not however assuage my concerns about the robustness of the underlying assumptions.
179. Ms Hotson Moore addresses the Copyright Infringement damages claim in section 6 of her report. Her review and opinion of Mr Mitchell's approach extends to four paragraphs. The exercise she carried out was an audit or cross-check of Mr Mitchell's approach to the figures rather than the provision of independent expert evidence. She reviewed the SOM tax filings and accounts and appended a summary of SOM's position between 2014 and 2023. She concluded that the revenue between 2014 and 2023 was US\$6,977,048. She calculated that Mr Sheridan's salary over the period was US\$1,884,439. She extracted figures to show further shareholder distributions of US\$1,674,444. She identified a further US\$789,581 which she assumed had been paid to family members of Mr Sheridan. She totalled those three sums and treated them as Mr Sheridan's assumed total profit drawn for the period 2014 to 2023. This gave her a profit figure of US\$3,592,499 rather than Mr Mitchell's US\$4.5m. No other adjustments were made to this figure.
180. Neither Mr Mitchell or Ms Hotson Moore explained why I should assume that all distributions of any nature whether salary or equity distributions to Mr Sheridan or family members were reasonably to be considered part of Mr Sheridan's drawn profit for these purposes. For SOM to operate its training and mentoring activities it appears reasonable to assume that there would be some of the salary costs which should be treated as part of the operating costs and set off against that revenue. Its core business was training and mentoring of which the videos were an integral part. Whilst it is clear that some of the videos included the Risk and Price Charts, they were only part of the SOM business.
181. Ms Hotson Moore did not provide any expert evidence about what one might expect to see for both revenue and operating costs and/or salary or profits for either a software licensing business or a training and mentoring business working in this area. She does not explain why one can simply ignore the differences between the businesses.
182. It was not clear to me why using figures that assume that the entirety of the distributions whether salary or otherwise was a reasonable assumption on which to base the overall calculation of a royalty payment or licence fee. Neither Mr Mitchell nor Ms Hotson Moore addressed this in their evidence.
183. Ms Hotson Moore applied Mr Mitchell's 2.3% assumption for UK based customers to her profit figure. She told me she considered the 2.3% to be a reasonable estimate. But

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she did not explain why it was a reasonable estimate for a US based company with a different underlying business. She did not explain why the percentage would be the same irrespective of where the base of the company was. It is not immediately obvious to me why that might be the case. I am simply not satisfied that I can simply read across from the claimants' business to SOM.

184. Ms Hotson Moore then applied Mr Mitchell's 69.9% infringement percentage from which she derived a notional copyright licence fee over the period of £45,628 compared to Mr Mitchell's revised £60,491. This reduces the hypothetical annual fee/royalty to about £3,560 before any other adjustments.
185. She notes that there was a further adjustment in SOM's accounts which if it amounted to a further equity distribution would result in an increase in her overall figure of £6,381.
186. Even if one allows some generosity or flexibility because of the defendants' non-compliance, the assumptions need to be reasonable and have some credible basis. It is not obvious why the debaring order has affected the claimants' ability to address these issues by way of expert evidence.
187. It seemed to me that a much more nuanced approach was needed to address the differences between the businesses and the consequential effect on revenue, on what should be treated as drawn profit and on the appropriate UK percentage of subscribers. A change in any of the revenue, profit or UK percentage figures would make a very substantial difference to the quantum. If one took into account only say shareholder or equity distributions to Mr Sheridan and/or applied a more modest percentage to the UK subscribers and/or applied a reduction to reflect the mixed nature of the SOM business before applying the 69.9% infringement percentage, the starting point for any calculation of damages would be very substantially reduced to perhaps no more than a nominal sum even before any other adjustments were made.
188. Whilst mathematically one can reach the figures advanced by Mr Mitchell and Ms Hotson Moore there needs to be some credible and cogent basis for the underlying assumptions. Here there did not appear to have been any real consideration or engagement in that process for the reasons I have set out. I was not satisfied the assumptions were reasonable and did not have any evidence available either from Mr Mitchell or Ms Hotson Moore from which I could undertake an alternative hypothetical calculation.
189. A further difficulty with the approach adopted by Mr Mitchell related to the extent of what had been infringed. The Risk and Price Charts are part of the ONE Software but are only a part of it. The copyright infringement claim only relates to those Risk and Price Charts. The defendants are in effect required to disgorge the profit made as a consequence of the infringement of that copyright which if necessary is calculated on a hypothetical basis. The claimants' claim as advanced is based on the equivalent of the full licence fee for the ONE Software.
190. Mitchell 14 explains that the Risk and Price Charts are an integral feature of the ONE Software. He explains that all the other parts of the ONE Software contribute to the Risk and Price Charts. As I understand his explanation, the Risk and Price Charts are populated by the information derived from the information the subscribers inputted

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into the software which then show the effect of those inputs to model their proposed trades. The clever bit for which the Court of Appeal found there was copyright infringement relies on the output - that is the populated Risk and Price Charts as a graphical user interface- not the inputs by the subscriber.

191. Mr Mitchell says that the Risk and Price Charts are so integral to the software that without them it would have no commercial value. He therefore says that the notional licence fee should be calculated as one for use of the ONE Software as a whole as they are one and the same. But I have to take into account that Arnold LJ noted the low degree of creativity and limited the infringement claim to the Risk and Price Charts and that the degree of protection would be narrow.
192. The court's role is to assess the claim by reference to the actual infringement. Here the only part of the ONE Software in respect of which the Court of Appeal determined copyright subsisted as a graphic work was the Risk and Price Charts and that had a low degree of creativity. Whilst it may be that the ONE Software does not have any commercial value without the Risk and Price Charts that does not mean that the licence fee for the ONE Software is the same as the value of the copyright subsisting in the Risk and Price Charts. Whilst in principle it would be possible to argue that position in an appropriate case, there would need to be some evidence to support it beyond Mr Mitchell's assertion.
193. The claimants are only entitled to damages for the copyright infringement in the Risk and Price Charts and no more. Even if they were to calculate their damages by reference to a notional licence fee or royalty for the ONE Software, they would still then have to apply an adjustment such that the damages claimed were limited to a notional licence for the purposes of enabling the defendants to undertake the (otherwise infringing) act of using the Risk and Price Charts.
194. It was not at all clear to me why the defendants' debarment would have any impact on this aspect of the claim. Mr Mitchell has reviewed 373 of the defendants' videos and designed the ONE Software – no one is better placed to make some assessment about how to apportion the licence fee for the ONE Software or to provide Ms Hotson Moore with input to enable her to make such an assessment which could then be applied to the overall calculation of loss.
195. In order to calculate the loss, the court needs to be able to assess what portion of the defendants' profits were made due to that infringing act however, hypothetical, or difficult the claimants may consider it to be. The claimants have not engaged with that exercise. Instead, the claimants have completely ignored this additional step assuming that without more they could simply equate the licence fee for the ONE Software to the infringement of the copyright in the Risk and Price Charts. There is no evidence from Mr Mitchell or Ms Hotson Moore on this issue at all.
196. When given an opportunity to revisit it the claimants have doubled down seeking to maintain an entitlement to claim the equivalent of a full licence fee or royalty despite the limits of their copyright infringement claim. It seems to me that their approach would cut across the Court of Appeal decision and over-compensate them.
197. It seems to me that any figure calculated by the claimants would have to be adjusted downwards further after the adjustments referred to above to reflect the limits on the

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copyright infringement claim but I am unable to assess by what amount. However, it appears to me that the adjustment would be likely to have a reasonably significant impact on any quantum given that the Risk and Price Charts are only a part of the ONE Software. It appears to me that the Copyright Infringement damages may at best be no more than a nominal sum.

198. There was no evidence that the claimants ever entered into a comparable commercial licence for the use of the ONE Software and so there was no evidence on which to base any future hypothetical licence. There is no evidence from Mr Mitchell as to what he might have done in any such hypothetical negotiation. Whilst in the absence of evidence of comparable licences the available profits method can be used as set out above the method adopted here seems to have very little basis in reality.
199. Indeed, the evidence is focussed on how one might mathematically reach a particular outcome without any apparent thought as to what might be the right approach to assessing the commercial reality of what agreement the parties would have reached.
200. The exercise in assessing the damages due to the claimants is to compensate them not to punish the defendants. If such punishment is appropriate that is dealt with by a claim for additional damages.
201. I am not satisfied that the claimants' evidence in respect of the Copyright Infringement Inquiry supports the claim to copyright infringement damages in the sums sought for the reasons set out above. Whilst the defendants' debarment may have hampered the claimants in relation to some of the evidence they may have wanted to advance, that does not mean that the court should not critically review the evidence and assumptions made by the claimants and require them to prove their claim and provide a credible supportable basis for the figures they seek to recover.
202. I am not satisfied that on the evidence available I am in a position to undertake any alternative calculation. Even where there might be some basis for being more generous to the claimants adopting the principle of reasonable assumptions, for the reasons set out in this judgment I do not consider they have provided cogent credible evidence on which to base the assumptions they make.
203. The claim for Copyright Infringement damages therefore fails.

Additional Damages

204. Additional damages would only be payable if I had first found that the claimants were entitled to damages for copyright infringement. I am however satisfied on the basis of the evidence that the infringement of the claimants' copyright continued until at least 30 May 2024. Nonetheless the claimants have been unable to prove an entitlement to any specific sum for damages for infringement of their copyright for the reasons set out above. In case I am wrong about that I will deal briefly with the claim for additional damages.
205. The court has a discretion to award such additional damages as it considers the justice of the case requires having regard to all the circumstances and in particular, the flagrancy of the infringement and any benefit accruing to the defendants by reason of the infringement pursuant to Section 97(2) CDPA.

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206. In *Software Solutions v 365 Healthcare Solutions* [2021] EWHC 237 (IPEC) HHJ Melissa Clarke set out a summary of the relevant principles at [141] as follows:

“(i) The award is discretionary, and there must normally be some special circumstances to justify them, such as profit: *Pro Sieben Media AG v Carlton UK Television Ltd* [1998] FSR 43 at [61] (Laddie J);

ii) Flagrancy normally involves a calculated infringement. It need not be dishonest, but should be outside the norm: *Ravenscroft v Herbert* [1980] RPC 193 at 206, and *New English Library Limited* [1980] RPC 192 at [206] (Brightman J);

iii) For this purpose, the infringement can either be reckless or deliberate, and a "couldn't care less" attitude will suffice: *Nottinghamshire Healthcare National Service Trust v News Group Newspapers Ltd* [2002] RPC 49, at [52] and [54] (Pumphrey J);

iv) Given the breadth of the discretion, all the circumstances should be considered: the court is also permitted to take into account other factors, such as injury to pride and dignity, distress, etc: *Nottinghamshire v NGN* at [33];

v) Where the defendant has been pursuing a profit, additional damages can take account of any benefit by the defendant: *Nottinghamshire v NGN*;

vi) Another relevant factor is whether a defendant has attempted to destroy evidence of infringement: *Nottinghamshire v NGN*;

vii) Also relevant are any attempts by the defendant to conceal the infringement through disingenuous correspondence: *Peninsular Business Services Ltd v Citation plc* [2004] FSR 17.”

207. However, as she noted at [143], even if a liability judgment made findings that were adverse to the defendants on a claim for additional damages, it is still for the judge undertaking the inquiry as to damages to determine whether the justice of the case requires such an award to be made.

208. In the Liability judgment Mr Kimbell described Mr Sheridan’s performance as a witness as follows:

“287. Mr Sheridan’s performance as a witness was less impressive. His demeanour throughout was of someone who was somewhat distracted. He gave the impression of detached from many the events in question. It would be going too far to say he was evasive during cross-examination but he was very

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wary of even the simplest question and insisted on reading every e-mail or other document put to him very carefully before answering. He seemed unfamiliar with even the basic documents in the case such as the LLP Agreement itself and the pleadings.

88. To give one example, when Mr Sheridan was asked whether the reason why there was a shortfall in the overall number of webexes delivered was because Mr Mitchell had insisted that there should be no catch-ups, Mr Sheridan's response was that he did not recall any such statement by Mr Mitchell. When he was taken to paragraph 11 of the Re-Re Amended Defence which contained this very allegation and to the statement of truth signed by him, he performed a volte face and unconvincingly said: "OK. I recall him saying this".

89. His recollection of why certain things happened the way they did was generally very poor. His evidence was clearest when answering questions in general terms about how SOM operated."

209. Mitchell 13 provides some colour to that assessment and provides evidence of the defendants' ongoing use of the Risk and Price Charts since January 2016 and what Mr Mitchell describes as attempts to conceal that ongoing use. This is set out in more detail in Mitchell 13 at [98] to [102] and [106 (c)] to [(e)].
210. As set out above the complaints include the deletion of material although it appears this may be linked to precisely what the claimants were seeking which was the removal of offending material from public view. It would be an odd outcome if in removing the offending material from public view as part of the dispute that was to be found to be a basis for additional damages.
211. Mr Mitchell was still able to access a selection of pre-termination videos containing the Risk and Price Charts as recently as 30 May 2024 when preparing his evidence for this inquiry.
212. Mr Eaton Turner relies on this evidence of ongoing infringement in support of flagrancy. Further he says that Mr Sheridan's dismissive approach to the *Tring* disclosure was symptomatic of his approach overall. He submits that the principles set out in *Software Solutions* at (v), (vi) and (vii) are particularly relevant in this case.
213. However, I am not persuaded that the claimants have made out flagrancy. The claimants and the defendants were in business together. Mr Sheridan and SOM did not meet their part of that bargain, and the relationship broke down. There was subsequently a hotly contested dispute about whether the claimants had been entitled to terminate the Agreements in January 2016.
214. This claim was not issued until 2019, and liability was not determined until 2023. The copyright infringement claim was dismissed at first instance. The claimants were successful on appeal in November 2023 in respect of the Risk and Price Charts only.

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215. The claimants rely on the continued use of the Risk and Price Charts after termination as supporting the claim for flagrancy and additional damages. However, the copyright infringement about which the claimants complain appears to be primarily focussed on materials produced pre-termination, at a time when their incorporation into SOM's training materials and videos would not have amounted to an infringement but which are still accessible online now.
216. Mr Mitchell explains that the introduction to some of the training videos was changed/re-recorded in about 2018 to remove reference to the ONE Software but that the actual video content to which the SOM customers had access still made use of the Risk and Price Charts and ONE Software. From the claimants' perspective this was evidence to support concealment and a claim for additional damages rather than ineptitude.
217. Mr Mitchell's 6th witness statement explained that a customer of LLP had used his own personal licence when acting as a trainer for SOM to share his screen to show the ONE Software in operation after the termination. These sessions appear to have been recorded. This does appear to be a deliberate if misguided attempt to circumvent the dispute. The claimants seem to have taken action at the time in relation to the subscriber but not in relation to the defendants.
218. Whether and how SOM should have removed or edited out any references to or use of the Risk and Price Charts post termination pending determination of any dispute about the validity of the termination whether in 2016 or later should have been agreed between the parties and/or if it could not be agreed then either party could have taken such action as they were advised was appropriate to manage the position. Both parties were represented throughout the claim which was issued in 2019.
219. The validity of the termination of the Agreements which included the ability to use the ONE Software was in dispute until the Liability judgment was handed down in early 2023. Whilst the claimants may have been confident in their claim, this was a claim in which the starting point was the termination of a joint venture under which SOM were entitled to use the ONE Software. The continued use of the Risk and Price Charts in those unusual circumstances does not seem to me to fall within the scope of additional damages. Indeed, the Liability judgment dismissed the original copyright infringement claim so that it was not until November 2023 that there was any finding that the use of the Risk and Price Charts amounted to an infringement at all.
220. This is not a claim where the defendants have copied the claimants' ONE Software without permission from the outset. They had the use of it for proper purposes under the Agreements and incorporated it into their training materials with the agreement of the claimants. Indeed, it was the failure to include more obvious and clear references to it and to advertise and market it for the benefit of the LLP which led to this dispute. This is not therefore the usual copyright infringement claim where a third party has used, without permission, the copyright of the claimant. Here the defendants had permission at least until January 2016.
221. On the evidence available the complaint that some of the videos appear to have been removed from view and may have been destroyed during the course of the claim thus limiting the ability to consider them for quantum purposes appears to be linked to

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steps taken in respect of the Liability trial and does not appear to have been a deliberate attempt to destroy evidence of infringement.

222. It does not seem to me that whilst the validity of termination of the Agreements remained in issue that one can say that the defendants' failure to remove all historic materials which included the Risk and Price Charts was a flagrant breach deserving of additional sanction by the court. It is no more than the consequences of a business dispute about the validity of the Agreements, in respect of which both parties could have taken action.
223. The apparent creation and use of new materials using a trainer's personal subscription to ONE Software to demonstrate options trading after termination would be more problematic for the defendants. The defendants ought to have known that this was not an appropriate way in which to circumvent the termination of the Agreements. There is at least some evidence of attempts to circumvent the effect of the termination which were inappropriate and might suggest that there was some benefit to the defendants in having continued use of the Risk and Price Charts. These events appear to have taken place prior to the issue of proceedings but the extent of them is not clear and as I note above the claimants had taken action in relation to the individual subscriber but do not appear to have taken any steps in relation to the defendants.
224. Following the 20 November 2023 Order the defendants should have complied with the Injunction. Mr Sheridan and SOM should have acted promptly to remove any references to the Risk and Price Charts from the historic materials however difficult that may have been and in so far as they had not already done so, they should do so now. Of course, any order or remedy from this court can only apply to those materials visible to UK users of SOM's products.
225. Because the defendants are debarred there is no evidence of what if any steps were taken to achieve that outcome. Mr Mitchell's evidence that videos with the Risk and Price Charts were still accessible from the UK as recently as May 2024 demonstrates an ongoing infringement which would appear to be in breach of the injunction. There may be a remedy available for that breach if substantiated.
226. The claimants complain about the defendants' conduct in relation to the Liability trial and the fact that Mr Sheridan was an unsatisfactory witness and rely on it as additional evidence to support their position. But this conduct does not tip the balance in favour of an award of additional damages. Caution is always necessary when considering a claim for additional damages. The focus should be on the infringement itself not on the general conduct of the proceedings or whether Mr Sheridan was a poor witness.
227. The facts of this case are unusual. As set out above these parties were in business together and this is at its heart a business dispute about the validity of the termination of the Agreements. The apparent creation of new material which infringed the claimants' copyright in about 2018 cannot be condoned nor can the apparent failure to remove the pre-termination offending material (and any other infringing material) at the latest following Court of Appeal's decision in November 2023.
228. However, none of that on the particular facts of this case seems to me to be sufficient to say that the defendants have flagrantly infringed the copyright in the Risk and Price

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Charts such that I can be satisfied that the defendants conduct is outside the norm such that they should be required to pay additional damages.

229. Additional Damages are a question of discretion taking into account all the circumstances. On the facts of this case the justice of the case given the prior business relationship and the live dispute about copyright infringement until at least November 2023 does not to my mind tip this into the realms of flagrancy or additional damages. Had the claimants not been successful on appeal there would have been no claim for damages for infringement of the claimants copyright in the Risk and Price Charts at all. I do not therefore consider that an award of additional damages can be justified in this case.

Conclusion:

230. For the reasons set out in this judgment the claimants are entitled to Advertising Breaches damages in the sum of £3,358,079.86.
231. They are not entitled to damages for lost management time and the claim for damages on the Copyright Infringement Inquiry fails as does the claim for additional damages.
232. This judgment will be handed down remotely. Separately and as the defendants are unrepresented and based in the USA a short remote consequential hearing will be listed limited to 1 hour ideally before the Christmas break. At that hearing the court will consider questions of interest and costs and the form of order.