Neutral Citation Number: [2023] EWHC 927 (Ch) Case No: BL-2019-01446

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**BUSINESS LIST (ChD)**

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 26 April 2023

**Before** :

**JOHN KIMBELL KC**
**SITTING AS A DEPUTY HIGH COURT JUDGE**

**Between :**

| | |
|---|---|
| **(1) THJ SYSTEMS LIMITED**<br>**(2) OPTIONNET LLP** | **Claimants** |
| **- and –** | |
| **(1) DANIEL SHERIDAN**<br>**(2) SHERIDAN OPTIONS MENTORING CORPORATION**<br>**(a company incorporated under the laws of the state of Illinois in the United States of America)** | **Defendants** |

**DAVID EATON TURNER** (instructed by **Nelsons**) for the **Claimants**
**JOHN GREAGER**, solicitor-advocate, **AMANDA HADKISS** and **TED LOVEDAY** (instructed by **Maddox Legal**) for the **Defendants**

Hearing dates: 10, 11, 14, 15, 16, 17, 18 November 2022
Written submissions provided on 27 November 2022, 3 December 2022 and 9 December 2022

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# APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on Wednesday 26th April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

## Introduction

1. These proceedings arise from the breakdown in 2015 of the commercial relationship between two men: Mr Andrew Mitchell and Mr Daniel Sheridan. The chosen vehicle for their joint business venture was the Second Claimant, a limited liability partnership (‘**the LLP’**). The main issue in these proceedings is whether the notice served on Mr Sheridan on 24 December 2015 expelling him from the LLP was valid or not.

## Factual background

2. Much of the factual background to the dispute is set out in contemporaneous email exchanges. The following section is based on these emails supplemented, where necessary, by witness evidence which put the exchanges in context.

3. Mr Mitchell is a computer software developer. He graduated from De Montfort University, Leicester in 1994 and has worked in software development since then. He is the sole director of THJ Systems Limited (‘**THJ**’), which is an English company incorporated in England in 2007, whose name is derived from the initials of his children. THJ’s shares are owned equally by Mr Mitchell and his wife. THJ employs Mr Mitchell full time.

4. Mr Sheridan is an American citizen and resident. He worked for 20 years as an options trader at the Chicago Board Options Exchange (‘**CBOE**’). After retiring from professional trading, Mr Sheridan became a trainer and mentor for members of the public interested in buying and selling options via brokers. He formed his own company to deliver training and mentoring, Sheridan Options Mentoring Corporation (‘**SOM**’).

5. SOM is a company registered in Illinois. SOM delivered training and mentoring in a number of different formats to students, including live programmes (Sheridan TV) and via webinars. Some of the students eventually became mentors and assisted Mr Sheridan and SOM. Mr Sheridan referred to his students and mentees as the 'SOM community'. SOM has its own website where it offers access to an archive of videos and other materials.

6. In 2008, Mr Mitchell started to buy and sell CBOE options in his spare time.

7. In 2009, Mr Mitchell wrote the source code for a piece of software to help him with his own options trading. He originally referred to it as Options Explorer. He subsequently named it OptionNET Explorer ('**ONE**'). The purpose of the ONE software is to display financial information about the performance of options in the market. ONE takes live (or historic) market data and presents it in the form of a table of 'call' and 'put' positions. These are displayed in side by side graphic representations in the form of a 'risk profile'.

8. In May 2009, Mr Mitchell purchased a mentoring package from SOM. There was a waiting list for the course to start. While he waited, Mr Mitchell continued to work on ONE.

9. When Mr Mitchell started to receive mentoring from Mark Fenton of SOM, he showed the other students and Mr Fenton how he used ONE to monitor his trading positions.

10. After a few sessions, Mr Sheridan asked to meet Mr Mitchell. The meeting took place by WebEx video in autumn 2009. Both men felt that there might be an opportunity for SOM and THJ to work together. SOM had previously used another

software programme to display information to students, OptionVue. Mr Sheridan asked someone in the SOM Community to assess the ONE software. The assessment was very positive.

11. In 2010, THJ acquired the domain name of a website through which it could advertise and sell ONE. The software was sold in the form of a three month or annual subscription. Mr Mitchell also started to receive enquires from SOM students. Mr Sheridan and SOM entered into an End User Licence Agreement with THJ so that SOM could use ONE.

12. In the course of 2010 and early 2011, Mr Sheridan and Mr Mitchell conducted sporadic discussions about the terms of a potential formal business arrangement. At some point, it was suggested that the best vehicle for the venture would be an LLP. Mr Mitchell had already incorporated the LLP on 20 January 2010. Both partners engaged lawyers to assist with the negotiations. THJ engaged Browne Jacobson LLP and Mr Sheridan engaged a Mr Doug Rupert of the US law firm, Wildman Harrold.

### The LLP Agreement

13. By 7 April 2011, an agreement was reached on the terms of a Limited Liability Partnership Agreement (‘**the LLP Agreement**’). The parties to the LLP Agreement were the LLP, Mr Sheridan and THJ. The Initial Members and Designated Members of the LLP were THJ and Mr Sheridan. Recital A of the LLP Agreement recorded that:

> “The Initial Members have commenced business as providers of software and training and education on option strategies”.

14. The Business of the LLP was defined as:

> "The sale, supply and support of the ONE Software together with option strategy training to end users of the ONE Software".

15. The members of the LLP were defined as "the Initial Members and such other or additional persons as are admitted as members of the LLP in accordance with this agreement".

16. It was agreed that the LLP Agreement should retrospectively take effect from the date on which the LLP was incorporated, 20 January 2010.

17. It is noteworthy that whilst THJ was a party to the LLP Agreement, SOM was not. However, clause 3.3 of the LLP Agreement granted a qualified exclusive right for SOM to use the ONE software in these terms:

> "The Business shall not be conducted with any company that provides education or training in relation to trading options (an "Options Company") other than SOM save that the LLP shall have the right to conduct Business with an Options Company other than SOM if during the period of the LLP: …. SOM seriously breaches the SOM Software Licence Agreement …"

**The Licence Agreement**

18. The reference to the SOM Licence Agreement in clause 3.3 is a reference to an agreement between THJ and the LLP ('**the Licence Agreement**'). The Licence Agreement granted the LLP an exclusive worldwide licence for the period of the LLP Agreement to use ONE for teaching, seminars and presentations.

19. Clause 2.2 (g) of the Licence stipulated as follows:

> "[the LLP] and SOM shall ensure that a clear Copyright Notice is displayed on all iterations of the ONE Software and all documents, presentations, webexes and seminars relating to or containing images of the ONE Software".

20. Clause 10.1 of the Licence Agreement provided as follows:

> "Without prejudice to any rights that have accrued under this licence or any of its rights or remedies, this licence will terminate with immediate effect if: (a) any party commits a material breach of any term of the LLP Agreement and (if such breach is remediable) fails to remedy that breach as set out in the LLP Agreement".

**The Sub-Licence**

21. By a sub-licence agreement of the same date as the Licence Agreement, the LLP granted SOM a non-exclusive sub-licence to use the ONE software for teaching, webex presentations and seminars.

22. Clause 2.2 (g) was as follows:

> "[SOM] shall ensure that a clear Copyright Notice is displayed on all iterations of the ONE Software and all documents, presentations, webexes and seminars relating to or containing images of the ONE Software".

**Division of profits under the LLP Agreement**

23. It was agreed that any profits made by the LLP would be divided 67.5% to THJ and 32.5% to Mr Sheridan.

24. It was envisaged that the membership of the LLP might increase beyond THJ and Mr Sheridan. Clause 12 made provision for the admission of new Members "by unanimous agreement" of the then Members.

**Decision making**

25. Clause 13 contained provisions for decision making. Clause 13.1 provided:

> "The day to day running of the LLP shall be undertaken by THJ and, subject always to clause 13.6, THJ shall have authority to make any day to day

> decisions as are necessary of the smooth running of the Business of the LLP, including the appointment of new employees".

26. Clause 13.3.5 defined the quorum of any meeting as being when both Initial Members are present.

27. Clause 13.6 reserved certain matters for the "unanimous decision of the Members". These reserved matters included "any material change to the nature of the Business" and "appointment of any persons as a Member of the LLP. One matter not reserved was the expulsion of a member.

28. The distinction between day-to-day matters falling within clause 13.1 of the LLP Agreement and those falling within clause 13.6 broadly corresponds to the distinction between 'ordinary' and non-ordinary matters in section 24(8) of the Partnership Act 1890:

> "Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners."

29. Clause 15.2 imposed certain obligations on Mr Sheridan:

> "Whilst a member, he shall:
>
> 15.2.1 personally give a one hour live webex every other week (26 per annum) to External Users for the duration of their subscription and make the archives available to them **("ONE Software Paper Trader")**. The content of the webex must be such that the External Users would not be able to obtain it elsewhere without charge and must be options strategy related rather than training on the ONE Software itself;
>
> 15.2.2 ensure that he and all other employees of SOM (or any other firm or company in which he is involved) and/or contractors, agents, servants or other representatives of any kind howsoever use only the ONE Software for all options training related teaching, webex, presentations and seminars, except where a specifically required feature is absent from the

ONE Software, in which case he and all other employees of SOM (or any other firm or company in which he is involved) and/or contractors, agents, servants or other representatives of any kind howsoever shall be permitted to use the software programs set out in Schedule 7 or as agreed from time to time by the Members;

15.2.3 not (and shall procure that all other employees of SOM and/or contractors agents, servants or other representatives of any kind howsoever do not) in any way (including without limitation in relation to the display of images in any and all materials) use, endorse or publicise any product which competes with the ONE Software (except as set out in Schedule 7 or as agreed from time to time by the Members), which for the avoidance of doubt shall include without limitation the prohibition of the products listed in Schedule 8;

15.2.4 ensure that the appropriate copyright marks as set out in the THJ Software Licence Agreement are displayed on all educational material that relates in any way to the ONE Software, including but not limited to website content, webinars, seminars, and presentations containing images of the ONE Software (whether given inside or outside of SOM);

15.2.5 ensure that if SOM advertises its services in internal or external webex / seminars / presentations then it must also advertise the ONE Software in such webexes / seminars / presentations by displaying the ONE Software logo in a prominent and visible position on such materials and by providing a slide which includes the details of the ONE Software including copyright marks."

30. Clause 15.3 imposed obligations on THJ, namely to:

"15.3.1 undertake the day to day running of the Business

15.3.2 provide technical second line support to users of the ONE Software, where first line support has been attempted but it becomes clear there is an issue with the ONE Software which is not attributable to user error (i.e. where a material change to the ONE Software is required (for example a code or configuration change) in order to resolve the issue) and for the avoidance of doubt, first line support (involving dealing with customers in order to resolve any issues they may have with the ONE Software) shall be provided by the LLP at its own expense

15.3.3 not (and shall procure that all other employees of THJ and/or contractors agents, servants or other representatives of any kind howsoever do not) in any way (including without limitation in relation to the display of images in any and all materials) use, endorse or publicise any product which competes with SOM".

31. The LLP Agreement contained the following provisions on expulsion:

> "19.1 The LLP may, by written notice to the Member concerned, expiring 7 days from service of the notice, expel that person from membership of the LLP where the Member concerned:
>
> 19.1.1 commits any serious breach or persistent breaches of this agreement; or
>
> 19.1.2 has a bankruptcy order made against him or enters into any composition or arrangement with or for the benefit of his creditors; or
>
> 19.1.3 fails to pay any money owing by him to the LLP within 14 days of a written request for payment from the LLP; or
>
> 19.1.4 fails to account for or pay over or refund any money received and belonging to the LLP within 14 days after being so required by notice from the Designated Members; or
>
> 19.1.5 is guilty of any conduct likely to have a serious adverse effect on the Business; or
>
> 19.1.6 ceases to hold any professional qualification or certification required for the normal performance of his duties as a Member; or
>
> 19.1.7 is convicted of any criminal offence involving dishonesty; or
>
> 19.1.8 becomes, in the reasonable opinion of the other Members, physically or mentally unfit (whether or not certified as such by a medical practitioner) to carry on his duties and obligations as a Member under this agreement for a continuous period of 15 Business Days, or for a total of 30 Business Days in any period of 12 months (excluding any periods of holiday, maternity leave, parental leave or family leave) immediately preceding the service of the notice
>
> 19.2 The LLP may, by written notice to Daniel Gerard Sheridan, expiring 7 days from service of the notice, expel Daniel Gerard Sheridan from membership of the LLP:
>
> 19.2.1 where there has been a serious breach, or there have been persistent breaches, of the SOM Software Licence Agreement, and (if remediable) Daniel Gerard Sheridan has failed to remedy such breach/breaches as set out in the SOM Software Licence Agreement; or
>
> 19.2.2 if the SOM Software Licence Agreement is terminated by SOM for any reason…"

### The Ancillary Agreement

32. An ancillary agreement (‘**the Ancillary Agreement’**) made provision for the division of the proceeds of sale between THJ and Mr Sheridan in the event that ONE was sold during the lifetime of the Licence. The division was 67.5% to THJ and 32.5% to Mr Sheridan.

### Performance (before the LLP Agreement was signed)

33. There was unchallenged evidence that before the LLP Agreement had been signed, Mr Sheridan and SOM had started to promote ONE in the SOM Community and that Mr Mitchell provided technical assistance to users. A 12 month subscription cost £380. Mr Mitchell accepted that there were “significant teething problems” with ONE in the early stages.

### Performance (after the LLP Agreement was signed)

34. There was no evidence from either party about how the business of the LLP was carried on and how decisions were made in the two-year period between April 2011 and May 2013.

35. It appears that the LLP started selling ONE subscriptions to external users in early May 2013.

36. In June 2013, Mr Mitchell added an automatic ‘pop-up’ copyright notice to the software for ONE with the following content: “OptionNET Explorer 2014 © THJ Systems Ltd”. This pop-up notice remained on screen embedded in the risk profile graphic. Its appearance to any particular viewer would depend on screen resolution and other factors but it was similar to a water mark and looked like this:

37. In August 2013, Mr Sheridan started delivering Webex training sessions on ONE. Mr Mitchell was annoyed with Mr Sheridan because in Mr Mitchell's view the webexes had started "over two months late". However, he said in his witness statement that he was "not overly concerned" at this delay because he was "committed for the long term."

38. In February 2014, Mr Mitchell complained that he had watched some trading videos presented by Mr Sheridan in which the ONE software was used but no "powered by ONE logo" appeared. What he meant by that was this:

39. He also complained that the videos contained advert slides for SOM at the start but there were no corresponding advert slides for ONE as required by clause 15.2.4 of the LLP Agreement.

40. On 8 March 2014, Mr Mitchell sent an email complaining about the lack of the powered by ONE logo and copyright notice:

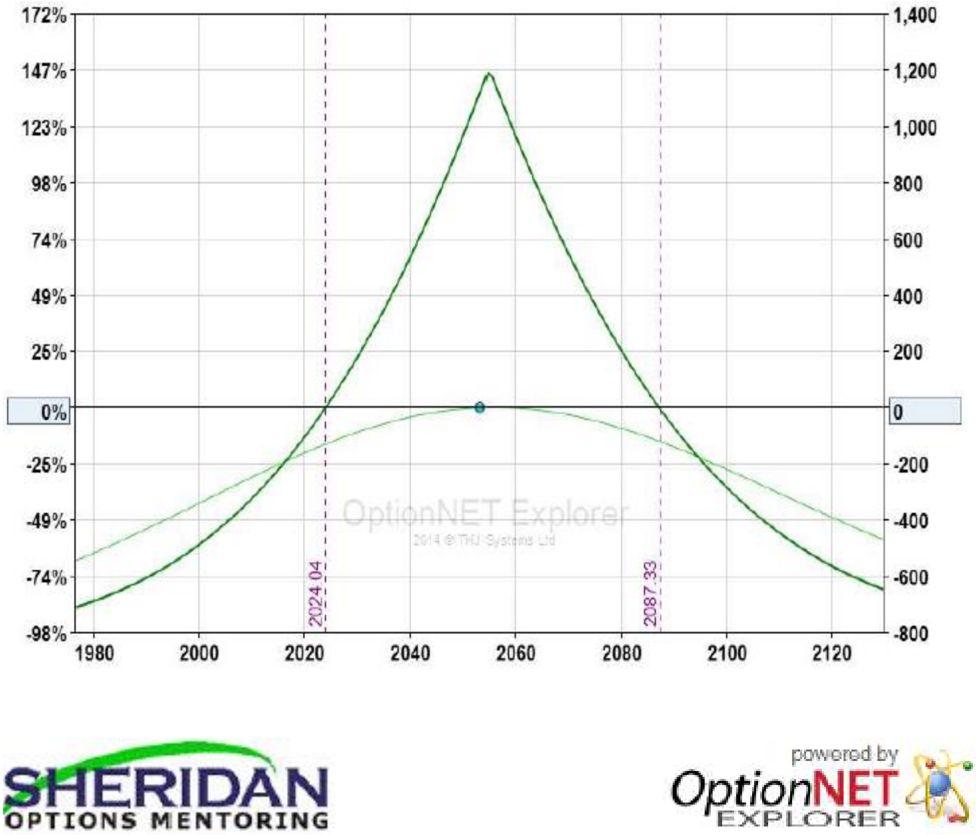
> "Option safari for 3 March – again no powered by ONE logo/copyright notice.
>
> As I said 3 weeks ago, do not allow the images to be used without proper attribution. This is a persistent breach of both our contract and the software license agreement. I can't believe you are still allowing this to happen. Again, please explain what is going on."

41. There are no responses from Mr Sheridan to the February or March emails which I have just referred to in the trial bundle. However, it is common ground that the

matter was discussed on the phone between the two men and Mr Sheridan promised to remedy the situation. His position seemed to be that he was not fully in control of the Safari videos because they were produced by CBOE themselves and he was in effect nothing more than a hired presenter.

42. I was not shown any minutes from meetings of the LLP in 2014 in which Mr Mitchell raised any alleged breaches of the LLP Agreement or Licence Agreement. The disclosure does however suggest that at some point, the slides used in Safari presentations began to display equal sized logos at the bottom, one for SOM and the 'powered by ONE logo' for ONE together with the automatically generated THJ watermark copyright notice as described above.

43. At some point in 2014, a typical slide containing a ONE graphic would thus look like this when being used by Mr Sheridan:



44. In October 2014, Mr Mitchell requested a crisis meeting with Mr Sheridan to discuss some negative feedback received about a decision by SOM to charge a fee to ONE users. The matter seems to have been discussed by Mr Mitchell and Mr Sheridan in a Skype call and resolved. The proposed SOM fee was revoked.

45. At around the same time, there is an exchange of emails about some students in a SOM forum apparently discussing the possibility of developing an alternative to ONE. In an email Mr Sheridan reassured Mr Mitchell that the matter had been resolved by him and his nephew, John (Shankle):

> "I had Johnny reach out to him for clarification and to get to the heart of the matter. John informed me that Gary was crushed by how his request was perceived. He said he was in no way trying to "steal the secret sauce" his only intent was to try and better the existing product by adding to the Automated back-testing. He agreed that he did not phrase any of his request the right way and Johnny asked him to reach back out to you as well to clarify."

46. The relationship between Mr Sheridan and Mr Mitchell began to sour markedly in early 2015. On 12 March 2015, Mr Sheridan sent a message to Mr Mitchell referring to a lack of communication:

> "Hi Andy,
>
> We haven't chatted in quite a while now. Not chatting doesn't help either of us. If you want to chat this week or next and try to work on improving things together, let me know.
>
> Thanks,
>
> Dan"

47. Mr Mitchell's response contained a complaint about what he considered to be the central issue between them which needed to be addressed, namely: the lack of sales and what advertising of ONE was being done by Mr Sheridan/SOM:

> "I'm happy to speak next week, but I think it needs to be a productive conversation to address the issue at hand, i.e. lack of sales. If you are still advertising the software, give me a list of the webex/presentations you've done over the last few weeks so that I can review. We can then use this as a starting point for our discussion with a view to developing a sales/advertising strategy going forward."

48. Mr Sheridan did not provide the requested list of presentations or even a reassurance that the software was still being advertised. When challenged about his lack of response to the request for a list of webex/presentations, he responded a month later on 13 April 2015 as follows:

> "Andy,
>
> I didn't respond yet because your response seemed to require actions on my part before we could talk. My e-mail was to simply try and have a meeting and try and open lines of communication between us that have been non-existent for quite a while. I was trying to get us chatting again. I'm happy to discuss any topic you want over a Call.
>
> Dan"

49. Mr Mitchell's response (sent on 14 April 2015) to the suggestion of a call was cool. He repeated his concern about sales and the request for information about how ONE was being advertised:

> "As I said Dan, I'm happy to talk but there needs to be some purpose to this. I don't want to spend 3 hours going round in circles as we have done in the past and got nowhere. We need to address the issue of sales because as you are aware, the numbers are down. To do that, I will need to see how and where the software is being advertised in your presentations. Please provide the links to webex/presentations so that I can review."

50. Mr Sheridan did not provide the links and it seems clear that the two men did not speak to each other for a number of weeks.

51. It was Mr Sheridan who broke the silence by sending an email on 16 June 2015, in which he said:

> “1-2 months ago I sent an e-mail trying to get a chat with you to talk about the business and discuss ideas . You responded that you would meet if we did certain things, namely if I remember correctly, showing you where we advertised the software on webinars. Happy to discuss anything and won't turn discussion into argument, but at some point we need to chat, setting conditions on meetings won't help things. I will discuss anything as long as you will also if we meet in a call. Let me know.”

52. Mr Mitchell’s response on 18 June 2015 contained a detailed complaint and called into question the future of the relationship:

> “You are correct in that I’ve asked you to provide a list of the webex’s where you have been advertising ONE (my emails of 13 March (3 months ago) and 14 April) because I cannot find a single webex over the last 12 months where you have been doing so. I’ve watched numerous webinars where you advertise specific SOM information on one and sometimes two slides (see attached), but you don’t do the same for ONE in the same webinar, which as you will recall, is one of your specific obligations under the terms of the SOM software (3.4) and LLP agreements (15.2.5). Couple this with the drop in sales, I think I am entitled to ask for you to provide this information. I cannot watch every webinar you do, but I am concerned with the lack of advertising in the ones I have seen.
>
> Having asked you a number of times now, it seems that you are either unwilling or unable to provide this information, which I suspect (because I can’t find any either) is because you haven’t been advertising ONE as we agreed. Just using ONE in a webex is not advertising unless it is accompanied with a slide providing the information on the product and how to purchase it, as you do with SOM services, which is clearly outlined in our agreements...
>
> Advertising ONE was meant to be your biggest contribution to this company's growth but it's simply not happening. I just don't understand it at all. I don't want to keep reminding you about your responsibilities and shouldn't have to persuade you. That's what the contracts were for and if you recall, this was my concern right from the start and the reason for specific obligations …
>
> This business isn’t something that you can put down when SOM gets busy and then pick up during quieter times, it cannot work like that but that is unfortunately the impression I get. We’ve discussed the difficulties with not seeing or recognising what each other is doing before, but it’s difficult to ignore the lack of advertising in the webinars.

> This is a difficult business to run Dan, but when we have this type of problem, it makes it almost impossible to compete with others who have committed owners with their one and only goal being to relentlessly promote their product at every opportunity."

53. In the same email, Mr Mitchell suggested that it might be time to end the LLP and for SOM to become an affiliate instead.

54. Mr Sheridan responded by again suggesting a meeting and complained that he had been trying to reach Mr Mitchell without success. Mr Mitchell, however, was clear that he wanted information about advertising before having any discussion. This time he set a deadline. In email sent on 20 June 2015, he said this:

> "I've been asking you for the last 3 months to provide me with evidence that you have been advertising the product and meeting your contractual obligations and you have refused to answer/ignored my emails (13 March,14 April, 18 June) because we both know you have persistently breached the contract while continuing to advertise SOM. And yet you expect me to honour my obligations restricting the product distribution etc. Would you say this is fair and respectful?
>
> If you disagree with this then simply provide me with the links/webexes where you have been advertising (which you should have done 3 months ago, because it really shouldn't have come to this) or a reason why you have decided not to honour the contract, by close of play on Monday".

55. The requested evidence of advertising did not arrive but Mr Sheridan made clear that he did not accept that he had breached the LLP Agreement. His concern was about what he perceived to be a threat to withhold profits. On 22 June 2015, he wrote to Mr Mitchell:

> "Andy,
>
> I believe that I have met my obligations under the contract. I am willing to consider your suggestion to modify the relationship to that of an affiliate. I will be glad to discuss this with you, but only after you honor your obligation of distributing my portion of the profits from the last fiscal year.
>
> Dan"

56. Mr Mitchell was not impressed. He responded almost immediately. He again repeated his request for evidence of Mr Sheridan's compliance with the advertising obligation in clause 15.2.5 of the LLP Agreement. His response ended with:

> "If you cannot by the end of today then I have no choice but to hold you in breach of contract".

57. Unsurprisingly, Mr Sheridan understood this to be a threat of legal action and responded by simply saying:

> "I do not believe I have breached the contract. I will respond once I have consulted legal counsel".

58. Mr Sheridan did not in fact see a lawyer and Mr Mitchell chased (once again) in July for a response to his request for proof of compliance with clause 15.2.5. In this email Mr Mitchell brought in a reference for the first time in 2015 to an alleged breach of clause 15.2.4 (failure to display copyright notice).

59. Thereafter there were a number of exchanges about tax and accounting issues. In summary, Mr Sheridan believed that money due to him under the LLP Agreement was being withheld by Mr Mitchell and raised various questions about the draft accounts.

60. On 9 December 2015, Mr Mitchell requested that Mr Sheridan make arrangements to file the accounts of the LLP once he had approved them. The LLP's accountant explained in an email dated 11 December 2015 how the profit was split and added to capital accounts.

61. On 15 December 2015, Mr Mitchell received a letter from Michelmores LLP in which they informed him that they had been instructed by Mr Sheridan and were preparing a substantive letter to him. In the meantime, they said that Mr Sheridan was "not in a position" to approve the draft accounts.

62. The promised letter arrived two days later dated 17 December 2015. In that letter, Michelmores said:

> "Our client would like to reassure you that he does advertise the ONE software in his webex, presentations and seminars when advertising the services of Sheridan Options Mentoring Corporation and that he has continued to do so since your email of 18 June 2015…
>
> In relation to your request for a list of the webexes, we understand that you have administrative access to view our client's webex, presentations and seminars at any time and therefore our client does not consider that it is necessary to provide you with a separate list to demonstrate his compliance with the Sub-Licence Agreement."

63. The letter went on to request information about drawings and ended as follows:

> "Our client wishes to continue with the business relationship and arrangements that have been in place since 2010. Our client remains of the view that the ONE software is a good learning tool for his students and would be pleased to continue to advertise the ONE software as agreed…However, it is clear that the level of trust between you and our client has, to some extent, broken down. With this in mind, our client would be pleased to meet with you in England to discuss the above issues that have arisen and the ongoing business relationship and the future direction of the business. Please confirm if you would be willing to meet with our client and your dates of availability in January 2016."

64. Mr Mitchell's response sent on 18 December took issue with much of what Michelmores had said. Mr Mitchell again asked for a list of all webex sessions in the financial years 2014/15 in which ONE was advertised. It is clear from the following passage that this is the issue which was at the forefront of his mind:

> "The trust you refer to has broken down because your client has persistently failed to adhere to his contractual obligations, including, but not limited to, advertising ONE, protecting its intellectual property and

> refusing to cooperate with the LLP and License owner when asked to provide the necessary information contractually required of him. In contrast, he has continued to advertise SOM at every possible opportunity.
>
> Your client has stipulated in the LLP Agreement (3.3) that business shall not be conducted with other options educators and yet he has failed to promote ONE to the greatest advantage of the LLP. This combination has significantly and adversely affected the sales and growth of the business, a matter which I have raised with him repeatedly."

65. The impasse in relation to the accounts was solved on 22 December 2015 when Michelmores sent to Mr Mitchell a signed minute approving the accounts for the year ending 31 March 2015. However, they ended up being filed later than the 31 December deadline.

### The Notice of Expulsion

66. On 24 December 2015, Mr Sheridan received a notice of expulsion dated 23 December 2015 ('**the Notice of Expulsion**') in the following terms:

> "OptionNET LLP (the "LLP") hereby serves notice on you in accordance with clause 19 of the Limited Liability Partnership Agreement between THJ Systems Limited (1), Daniel Gerard Sheridan (2) andthe LLP (3) dated 20 January 2010 (the "LLP Agreement") expelling you from membership of the LLP.
>
> This notice is given pursuant to:
>
> (i) clause 19.1.1 of the LLP Agreement as a result of serious and persistent breaches by you of the LLP Agreement (including, without limitation breaches of your obligations pursuant to clauses 15.1.1, 15.1.2, 15.1.3, 15.1.4, 15.2.1, 15.2.4 and 15.2.5 of the LLP Agreement); and
>
> (ii) clause 19.2.1 of the LLP Agreement as a result of serious and persistent breaches by you of the SOM Software Licence Agreement (as defined in the LLP Agreement) (including, without limitation breaches of your obligations pursuant to clauses 2.5(a), 2.6, 3.3 and 3.4 of the SOM Software Licence Agreement).
>
> The expulsion affected by this notice will take effect on the date falling 7 days after service upon you of this notice in accordance with clause 19 of the LLP Agreement and you will cease to be a member of the LLP from that date without any further notice being served."

67. The Notice of Expulsion was signed by Mr Mitchell as a director of THJ "For and on behalf of [the LLP]". If valid, the notice to expel took effect on 7 January 2016.

68. Michelmores responded on 18 January 2016 by disputing the validity of the notice and the alleged breaches. Browne Jacobson Solicitors responded on behalf of THJ and the LLP on 25 January 2016 reiterating the validity of the notice of expulsion. That letter also contained notices of termination of the Licence Agreement and the Ancillary Agreement. These took effect on 25 January 2016.

69. On 27 January 2016, Mr Sheridan found himself locked out of the ONE software. Thereafter, he and SOM reverted to using another software in seminars and presentations.

## These Proceedings

70. The claim form was issued in August 2019. The main relief claimed was a declaration that Mr Sheridan had been validly expelled from the LLP by the Notice of Expulsion.

71. The pleadings were the subject of extensive amendment. By the time of the trial, the Particulars of Claim were in Re-Re-Re-Amended form. There were also extended and hard-fought interlocutory battles over disclosure and amendments.

72. On 5 October 2020, Deputy Master Nurse ordered a split trial to determine liability issues before quantum.

73. By an order made following no less than three hearings (on 19 January 2021, 7 June 2021 and 11 October 2021), Deputy Master Nurse ordered the Defendants to

provide access to what was described in the order as the "Pre-termination Videos" produced by SOM or Mr Sheridan in the period 1 January 2010 to 31 January 2016. Paragraph 3 of the Order then said this:

> "The Claimants …shall be entitled to analyse the Pre-termination Videos for the purpose of identifying those parts of those videos they wish to rely upon in support of their claims, and their defence to the Defendants' counterclaim, in these proceedings ('the Analysis')."

74. The Claimants were ordered to provide the results of the Analysis to the Defendants' solicitors by 15 October 2021 and were ordered to bear the initial cost of the Analysis.

75. Witness statements were ordered to be exchanged on 20 October 2021.

76. At a PTR before me on 18 October 2021, it was clear that the matter was not ready to proceed to trial and the original five-day trial due to commence on 1 November 2021 was vacated. The Claimants were ordered to incorporate the results of their Analysis into their Particulars of Claim. Witness statements were ordered to be exchanged by 27 October 2021.

77. The Analysis was duly incorporated into the Claimants' pleaded case by means of a Table at para 22A.3:

**"Use of Copyright Marks**

> The Defendants failed to use the contractual Copyright Notice (as required by the LLP Agreement and SOM Sub-Licence Agreement) on any occasion. Appendix 7 itemises 8,698 uses of the ONE Software images in WebEx and Powerpoint presentations, without use of the contractual Copyright Notice, identified in the Analysis.
>
> The WebEx and PowerPoint presentations contained a legible version of '© THJ Systems Ltd' notices in only 1,130 times out of 8,698

(being 13% of such videos). Appendix 8 itemises the WebEx and Powerpoint presentations which have been identified in the Analysis.

The WebEx and PowerPoint presentations contained a legible version of 'THJ Systems Ltd' notice (without a copyright symbol) only 2,370 times out of 8,698 (27.2%). Appendix 9 itemises the WebEx and Powerpoint presentations which have been identified in the Analysis.

**Advertising**

In 243 of the WebEx and PowerPoint presentations in which SOM advertised itself, it advertised the ONE Software by a slide on only 6 occasions. Appendices 11 and 12 respectively itemise the 243 WebEx and Powerpoint presentations and 6 WebEx and Powerpoint presentations referred to and identified in the Analysis."

78. The Appendices referred to in the pleading quoted above are the product of a computer program written by Mr Mitchell. The purpose of the program was to provide a technology aided review of all the videos in issue. It was accordingly referred to by both parties as the 'TAR'. The way in which the TAR was structured and designed to function was described by Mr Mitchell in paragraph 140 of his trial witness statement dated 6 October 2021.

79. The Defendants have long harboured a grievance that the TAR was an unfair device for the Claimants to be allowed to deploy. The alleged unfairness formed the basis of an application to strike out references to the TAR analysis and to adjourn the trial. Both applications were dismissed for reasons set out in an ex tempore judgement given on Friday 11 November 2022.

80. The points of criticism as to the reliability of the TAR raised by the Defendants in the evidence served in support of those applications (contained in the witness statement of John Greager dated 20 October 2022 and the witness statement of Mr Seraphin dated 31 October 2022) were instead put to Mr Mitchell in cross-examination and were the subject of submission at trial.

81. Mr Mitchell responded to the criticisms of the TAR in his 11th and 12th witness statements dated 3 November 2020.

**The List of Issues**

82. The parties agreed a detailed list of issues which was approved at the Pre-Trial Review. A copy of the list of issues is attached as an appendix to this judgment.

**The form of trial**

83. The trial proceeded as a fully remote trial at the request of the Defendants (because their witnesses were based in the US) but with the consent of the Claimants. There were no technical problems and all the witnesses could be seen and heard very clearly. I was not hindered in my observation of the witnesses' demeanour during cross-examination because they were giving evidence remotely.

**The witnesses**

84. Mr Mitchell was the only witness for the Claimants. He gave evidence from the office of Nelsons, the Claimants' solicitors. Mr Sheridan and Mr Shankle (who subsequently changed his name to John Seraphin) give evidence from their respective offices in America.

85. The time at trial was divided up equally. Mr Mitchell was cross-examined for nearly two days by Mr Greager with the assistance of Ms Hadkiss. Mr Sheridan and Mr Seraphin were cross-examined over the course of two days by Mr Eaton Turner.

86. 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.

87. 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 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.

90. Mr Seraphin's evidence was helpful and short. He gave clear and concise answers to the few questions put to him by Mr Eaton Turner.

91. I was asked to view a number of videos and was provided with helpful submissions by the parties as to what points they wished to draw to my attention.

92. Following the conclusion of the evidence, both parties exchanged sequential written closing submissions.

**Relevant legal principles for Issues 1 - 2**

93. The relevant clauses of the LLP Agreement are set out above. It is common ground that what the Claimants must satisfy me of in order to justify expulsion under clause 19.1.1 is that Mr Sheridan committed either a "serious breach" of the LLP Agreement or committed "persistent breaches" of the LLP Agreement.

94. As to clause 19.2, the same standard of breach is required as under clause 19.1.1 but with the additional requirement that, if the breach is remediable, it must be shown that Mr Sheridan failed to remedy the breach.

95. In their closing submissions, the Defendants referred me to Moody v Estate of the Late Norman Jones [2021] EWHC 3443 (Ch) ('*Moody*') and Farnan v Sunderland Association Football Club Ltd [2015] EWHC 3759 (QB) [2016] I.R.L.R. 185 ('*Farman*').

96. *Moody* concerned the disputed exercise of contractual right of dissolution in a partnership agreement. HHJ Cawson QC, sitting as a High Court Judge, construed *"grave breach"* or *"persistent breaches"* in the context of an expulsion clause and said this at [221]-[222]:

> "221. "*Grave breach*" clearly, by reference to ordinary definitions, connotes something "serious" … The expression "*serious*" has been held not to require that the conduct complained of be repudiatory in nature - see *DB Rare Books Ltd v Antiqbooks* [1995] to BCLC 306 (CA)). In his dissenting judgment in the latter case, Dillon LJ spoke in terms of the appropriate test as being that:
>
> > "*It is enough if a breach goes to the root of the confidence and good faith which should exist between partners*."

> To my mind, this is a helpful and appropriate test as to apply in respect of the language used in clause 13(iii)(c).
>
> 222. As to "*persistent breaches*", the editors of *Lindley and Banks* (supra), at 10-134, suggests that in addition to the breaches in question being repeated there should also be some gravity to them, i.e. be non-trivial. This, to my mind, makes perfect sense in that again, one would not ordinarily expect one partner to be able to expel the other unless something had occurred that had fundamentally affected the confidence and good faith that existed between them."

97. The current edition of *Lindley and Banks on Partnership* says this at paras 10.238 - 239:

> "10.238 …In one employment case, it was held that, in assessing whether a breach was "serious", account needs to be taken of all relevant circumstances, including the nature of the term breached, the nature of the breach itself and its actual or potential consequences. This is, perhaps, a matter of common sense. If the ground permits expulsion on "any" breach of the partnership agreement, it is probable that the same approach may be adopted, although it has been held in a different context that, as a matter of business common sense, this might be construed as requiring a breach of a potentially repudiatory nature.
>
> 10.239 Where reliance was to be placed on "repeated" or "persistent" breaches, it is necessary that the breach should have "some gravity", since a trivial breach, even if repeated, would not suffice, although the current editor questions whether that will *always* be the case. If, however, the breach complained of was triggered by earlier breaches committed by the other partners, an expulsion may not be permissible."

98. *Farman* was an employment case in which the relevant clause referred to the employee committing a *"serious or repeated breach"*. Whipple J said this at [62]-[63]:

> "62. In assessing whether a breach is 'serious' within clause 20.1.4, all relevant circumstances should be taken into account, including the nature of the contract, the nature of the contractual term that has been breached, the nature of the breach, and the consequences or potential consequences of the breach.
>
> 63. The reference to 'repeated' breach in clause 20.1.4 must be construed, in context, and objectively, as requiring some gravity in the individual breaches, even if they are repeated. It is only if the repeated breaches collectively amounted to something serious, that this clause could be invoked by the employer. A breach that is trivial, even if repeated is insufficient."

99. I gratefully accept and adopt these observations of Whipple J. They are consistent with what was said about "material" and "substantial" breach clauses giving rise to a right to cancel a contract in Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest) [2013] EWCA Civ 200 and Gallaher International Ltd v Tlais Enterprises Ltd [2008] EWHC 804 (Comm) [764] Christopher Clarke J, both of which Mr Eaton Turner referred me to. In the Mid Essex case, Jackson LJ said this at [126]:

> "I must consider what "material breach" means in the context of clause 28.4.1 of the conditions. In my view, this phrase connotes a breach of contract which is more than trivial, but need not be repudiatory. Clause 28.4 has the drastic effect of allowing [Compass] to cancel a long term contract on one month's notice. Having regard to the context of this provision, I think that "material breach" means a breach which is substantial. The breach must be a serious matter, rather than a matter of little consequence."

100. Mr Eaton Turner submitted:

i) The law as to serious or material breaches of contract is summarised in Chitty on Contracts ($34^{th}$ edn.) at 25-057 – 25-059 and that Chitty is correct to say at 25-059 that a material breach is something less than a repudiatory breach, and that a material breach is a serious breach;

ii) A serious or material breach is one that has '*serious effect on the benefit which the innocent party would otherwise derive from performance of the contract in accordance with its terms*': Hanger Holdings v Perlake Corpn SA [2021] Bus LR 544 at [40] – [41].

101. I accept those submissions.

102. As to whether any breach is capable of remedy, the Defendantsreferred me to L Schuler AG v Wickman Machine Tool Sales [1974] A.C. 235. At [249], Lord Reid said this:

> "The question then is what is meant by the word 'remedy'. It could mean obviate or nullify the effect of a breach so that any damage already done is in some way made good. Or it could mean cure so that matters are put right for the future. I think that the latter is the more natural meaning. The word is commonly used in connection with diseases or ailments and they would normally be said to be remedied if they were cured although no cure can remove the past effect or result of the disease before the cure took place. And in general it can only be in a rare case that any remedy of something that has gone wrong in the performance of a continuing positive obligation will, in addition to putting it right for the future, remove or nullify damage already incurred before the remedy was applied. To restrict the meaning of remedy to cases where all damage past and future can be put right would leave hardly any scope at all for this clause. On the other hand, there are cases where it would seem a misuse of language to say that a breach can be remedied. For example, a breach of clause 14 by disclosure of confidential information could not be said to be remedied by a promise not to do it again."

103. Drawing the threads together from the cases cited to me, the position in relation to the "serious breach" requirement in the LLP Agreement would seem to be as follows:

i) A serious breach is a material breach which is more than trivial but something less than a repudiatory breach.

ii) A serious (or material) breach is one that has a serious effect on the benefit which the innocent party would otherwise derive from performance of the contract in accordance with its terms.

iii) In deciding whether a breach is serious or not the court should consider all relevant circumstances, including the nature of the contract, the nature of the contractual term that has been breached, the nature of the breach, and the consequences or potential consequences of the breach.

104. In relation to the "persistent breaches" clause, the position is:

i) In addition to the breaches in question being repeated there should also be some gravity to them, i.e. they should be non-trivial.

ii) The repeated breaches must amount collectively to something serious in all the circumstances, including the nature of the contract, the nature of the contractual term that has been breached, the nature of the breaches, and the consequences or potential consequences of the breaches.

105. The test to be applied in order to determine whether a breach is remediable is that set out by Lord Reid in the passage cited above from <u>L Schuler AG v Wickman Machine Tool Sales</u> [1974] A.C. 235.

106. Bearing those principles in mind I turn now to consider the individual alleged breaches relied upon.

**Failure to deliver Webexes (Issues 3 and 4)**

107. The appropriate starting point is clause 15.2.1 of the LLP Agreement, as set out above. This clause required Mr Sheridan to provide to External Users, as defined in the LLP Agreement (i.e. non SOM members), a "one hour" "live webex" "every other week (26 per annum)" and to do so "personally" for "the duration of their subscription". The clause goes on to require that an archive of the webexes be created to make them available to users. The clause also stipulates that the

content of the webex be options strategy related rather than training on how to use ONE itself.

108. I was provided with agreed evidence as to the precise dates, length and content of the 59 Webex seminars delivered by Mr Sheridan between 21 August 2013 (date of the first session) and 31 December 2015 (last session).

109. Both parties produced schedules about the webex seminars. By the time of trial, the two schedules had been helpfully merged into one table with the Claimants' details marked in by pink shaded column headings and the Defendants' details marked by blue shaded column headings.

110. A glance down the duration column in the consolidated table reveals that almost all of the Webexes lasted either just a few minutes shorter or less often a few minutes longer than 60 minutes. There were two short outliers: one lasting 35 minutes and another 44 minutes respectively. The average length of the sessions actually delivered between 21 August 2013 (date of the first session) and 31 December 2015 (last session) was 56 minutes and 33 seconds.

111. When asked about why the Webexes had tended more often to go slightly shorter than the 60 minutes than beyond 60 minutes, Mr Sheridan said that this was because he aimed to finish the formal teaching part of the Webex at around the 45 minute point so as to leave 15 minutes or so for questions. The questions sometimes filled the remaining time and sometimes did not. I accept that evidence.

112. In my judgment, the webexes as delivered and as described in the combined schedule met the criteria of being one hour in duration. No sensible reader of clause 15.2.1 would expect every single seminar to last for exactly 60 minutes,

still less would anyone reading the clause object to time being set aside to allow questions to be put and answered in the last 15 minutes. How long questions might last would inevitably vary. What was expected, is that an hour of Mr Sheridan's time would be made available. If the questions in any particular webex session finished at the 55 - 57 minute point, no reasonable person would in my judgment read the LLP Agreement as requiring Mr Sheridan to recommence with further formal instruction to fill the final 3-5 minutes.

113. It is noteworthy that there was no evidence of any complaints from students that the sessions were too short. Had a minimum guaranteed formal teaching time been intended, the clause could easily have stipulated this but it did not. All that was required, in my judgment, by the clause read sensibly was that the sessions be scheduled for one hour, that Mr Sheridan made himself personally available for the full period in a combination of teaching and answering questions and that the sessions in fact lasted around one hour in length. An over or undershoot by a few minutes is not, in my judgment, a breach of clause 15.2.1 let alone a serious breach.

114. Mr Eaton Turner cited three particular factors in support of his submission that the sessions as delivered did in fact represent a serious breach of the LLP Agreement:

i) The sessions started "late" (not commencing until 21 August 2013) and should have commenced, at the latest, on 1 July 2013.

ii) The interval between Webexes was not always 14 days.

iii) If the total required time is calculated by taking 60 minutes per session multiplied 26 times a year from 1 July 2013 (when they should have started to run) until 7 January 2016 (when the Notice of Expulsion, if valid, took effect) then there was a 14.5% shortfall or 6.6 sessions.

115. I have no hesitation in rejecting these submissions for the following reasons:

i) It is wholly artificial to present the obligation in clause 15.2.1 as being to deliver a grand total of 3,936.33 minutes of webex training. The obligation properly construed was to deliver 26 sessions a year each of which was to be scheduled for an hour and would in fact last around an hour on an alternate week basis.

ii) There is nothing odd or untoward about the interval between sessions being sometimes 22, 28 days or 35 days to take account of holidays and then sometimes shorter (6, 7, or 11 days) as a ‘catch up’. Given that users had access to the sessions as an archive, in my judgment, all that mattered was that 26 sessions were delivered in the course of a year with the general pattern being that they are delivered in alternate weeks. The table shows that this is what generally happened. The vast majority of the intervals shown in the consolidated table are 12 – 14 days. This is sufficient to demonstrate compliance with the obligation as I have construed it.

iii) Notwithstanding that there may have been a later than planned start, that was in my judgment water under the bridge by 23 December 2015 when the Notice of Expulsion was given. Even if the slow start was a breach in 2013, it was not a live or continuing breach (let alone a serious breach) by 23 December 2015.

iv) The Claimants' over strict analysis takes no account of the ordinary give and take to be expected between business partners in a business involving the delivery of training and mentoring.

116. There is email evidence in early 2014 of Mr Mitchell expressing frustration at having to chase Mr Sheridan about the scheduling of webexes. It is possible that, as pleaded by the Defendant, Mr Mitchell asked Mr Sheridan to give seminars exactly 2 weeks apart and without catch-up. However, I am not persuaded that even if Mr Mitchell did have to chase Mr Sheridan and did ask for a more rigid adherence to the fortnightly pattern, it makes any difference to the issue I have to decide. It is the LLP Agreement which sets out each member's obligations and I have the full detail of what was in fact delivered and when.

117. It follows that in my judgment the Claimants' claim that Mr Sheridan was in serious breach of his obligation to give webexes fails. I find that there was no breach at all in this respect.

**Failure to display a copyright notice (Issues 5 – 7)**

118. The contractual obligation in clause 15.2.4 is quite clear. Mr Sheridan accepted this in cross-examination. He was obliged to "*ensure*" that:

> "appropriate copyright marks as set out in the THJ Software Licence Agreement are displayed on all educational material that relates in any way to the Software, including but not limited to website content, webinars, seminars and presentations containing images of the Software (whether given inside or outside of SOM)".

119. The Licence Agreement defined 'Copyright Notice' as:

> "A Notice in the following terms - "*The OptionNet Explorer (ONE) software is a copyright work and is owned by THJ Systems Ltd".*"

120. The Defendants in their Defence admitted that the form of copyright notice stipulated in clause 15.2.4 was not displayed in:

i) videos produced by Sheridan Options TV or Sheridan Mentoring;

ii) SOM's Mentor Newsletters in so far as they contained images of the software; and

iii) Mr Sheridan's Options Safari videos for CBOE.

121. Mr Sheridan's case was:

i) In relation to categories (i) and (ii) above the short form notice produced by Mr Mitchell was displayed;

ii) Where the short form notice was displayed, it was an adequate alternative to the contractual longer form;

iii) Mr Mitchell had "accepted" that the short form notice was sufficient;

iv) In relation to the Options Safari videos produced for CBOE, Mr Sheridan had no "creative control" over the content of the videos and that Mr Mitchell had accepted this;

v) The Mentor Newsletters were not "educational material" within the meaning of clause 15.2.4.

122. As to point (v), I cannot see any good reason why SOM's Mentor Newsletters should not fall within the clause. The clause is clearly framed in such a way as to cover all training or teaching material regardless of target audience or type. The words "*relate in <u>any</u> way*", "*<u>all</u> educations material*" and "*including <u>but not</u>*

*limited to*" are all strong indications that the scope of the clause is intended to be broad. The newsletter relates to SOM's mentoring activity and was sent to 25,000 email addresses. There is no commercial reason why it should be exempted. In my judgment, if it used images of the ONE software as part of promoting or informing recipients about SOM's mentoring services, it fell within clause 15.2.4, in the same way as any other educational or training publication.

123. As to (iv), the terms of the LLP Agreement and the two Licence Agreements do not create an exemption for use of the ONE software in contexts where Mr Sheridan or SOM has little or no editorial control. If Mr Sheridan was using the software, he had to comply with the conditions of use. There is no evidence that Mr Mitchell waived compliance for the Safari videos. The most that can be said is that the email exchanges suggest that he complained in 2014 and then stopped complaining until shortly before serving the Notice of Expulsion.

124. In cross-examination Mr Sheridan said he could not remember making any positive decision about the form of the copyright notices. He simply said: "we used the copyright notice which came up automatically". Mr Seraphin when asked had no hesitation in admitting that SOM failed to display the required copyright marks as per the LLP and Licence Agreements.

125. There can be no doubt therefore that Mr Sheridan was in breach of his obligation to ensure that appropriate copyright notices as defined in the Licence Agreement were displayed. I am however not persuaded in the particular circumstances, that by the date on which the Expulsion Notice was served, the failure was a serious breach in itself or a cumulatively persistent breach which justified expulsion for these reasons:

i) From shortly after being made available to external users in May 2013, the ONE software automatically generated a clear and concise copyright notice. This communicated to any user of the software or any viewer watching the software being used that a company called THJ was asserting copyright in the software.

ii) The short form notice contained essentially the same information as the longer contractually stipulated notice. I find it fanciful to suggest that there might be a would-be copyright infringer who might be prepared to ignore the short form notice but who would have been put off by the longer form notice. The potential consequences of the breach were therefore not serious viewed from a practical and commercial perspective.

iii) The longer form notice as stipulated in the Sub-Licence Agreement is not from the point of view of UK copyright law any more effective than the shorter version. Neither notice put THJ in any better or worse legal position than if no notice whatsoever had been displayed.

iv) In email after email in which Mr Mitchell aired his grievances in the course of spring and summer 2015, he only referred once and then only very obliquely to the failure to use copyright notices in the long form. If Mr Mitchell really felt so strongly about the long form notice, it is not clear to me why he did not make the automatic copyright notice longer or bolder or why he did not raise the matter formally and set a deadline for compliance.

v) Apart from a misunderstanding amongst one group of SOM students about the potential to improve ONE, there was no suggestion that any intellectual property rights held by THJ were at risk of being infringed. There was no evidence at all of any attempted infringement.

vi) The failure to display copyright notices (given the automatic presence of the short form one created by THJ) did not deprive THJ of any material commercial benefit expected under the LLP Agreement. Its interest was in receiving a share of the profits from the sale of subscriptions by the LLP. The copyright notice referring to THJ was a back-stop provision which concerned ultimate ownership rights whereas the right to immediate commercial exploitation lay with the LLP.

vii) Although the failure was persistent, it was the sort of breach which was capable of remedy at any point before any of THJ's ownership rights were in fact infringed (which did not happen).

126. By the time the Notice of Expulsion, I accept that the failure by Mr Sheridan to use the long form notice remained an annoyance and irritation to Mr Mitchell. It may even be said to be an example of Mr Sheridan's failure to pay proper due care and attention to the detailed requirements of the LLP Agreement. However, applying the legal principles set out above and for the reasons given above, I am not satisfied that was serious enough in itself even when viewed cumulatively as a persistent breach so as to entitle the LLP to expel Mr Sheridan.

**Failure to advertise ONE (Issue 9)**

127. Clause 15.2.5 creates a conditional obligation. Mr Sheridan was obliged to ensure that SOM advertised ONE in seminars and webexes only when SOM advertised its own services. When that condition was fulfilled, Mr Sheridan was obliged to

do two things: (1) to display the ONE software logo in a prominent and visible position on such materials and (2) to provide a slide which included the details of ONE Software including a copyright notice.

128. Paragraph 13.1 of the Re-Re-Re Amended Particulars of Claim alleges that of 77 videos published by SOM, 74 did not contain a slide advertising ONE. By the end of August 2016, these videos had received 300,000 views.

129. The Re-Re-Amended Defence did not dispute that there had been a failure to advertise ONE in the manner stipulated in the LLP Agreement but rather suggested that the software was promoted orally. Paragraph 17 of the Re-Re-Amended Defence says:

> "As to sub-paragraph 13.1, whilst there was not a slide dedicated to advertising the Software, the Software was referred to repeatedly by Mr Sheridan, or the other SOM presenter, in the majority if not all of the videos and the logo for the Software appeared on the majority of slides in the presentations. More specifically, Mr Sheridan encouraged customers to purchase the Software, offering a discount to mentoring students if they did so. No complaint was raised about this prior to June 2015."

130. In relation to external Safari presentations for CBOE, paragraph 19 of the Re-Re-Amended Defence again does not dispute the failure to advertise ONE but says that Mr Sheridan had no creative control over the content of the CBOE training session materials.

131. I was asked by the Defendants to watch certain videos. These certainly did show Mr Sheridan promoting the ONE software. However, that is in my judgment no answer to the Claimants' case that the LLP Agreement required advertising in a particular form, namely by means of a separate slide and logo. This was also not

a technical matter. Virtually every presentation produced by SOM contains a slide in something like the following form:


132. The purpose of such a slide is to act as a point of reference and tempt viewers to look at what else SOM has to offer. This type of slide was referred to in cross-examination as a 'call to action'. It uses the same logo which appears throughout the slides in the footer and it gives a number of different ways of getting in touch with SOM or obtaining more information about SOM. It is particularly helpful in the context of an archive. Viewers of an archived presentation might dip in briefly to a class but the slide offers a durable and easily locatable source for further contact.

133. It is in my judgment not surprising that Mr Mitchell / THJ would want to have an equivalent 'call to action' slide. Oral promotion during the course of a training

session is *a* form of promotion but it is different to a dedicated slide which is what SOM used for itself and what the LLP Agreement required.

134. In July 2015, Mr Sheridan did start to use a separate slide in this form for SOM's own seminars:


135. The only defence ultimately pursued by the Defendants was that the admitted persistent failure to advertise by use of a slide in a form similar to that above in any seminars prior to July 2015 and for any external seminars (such as CBOE and Trade King seminars) at all times was not a "serious" or persistent breach of the LLP Agreement so as to justify expulsion.

136. In my judgment, the failure of Mr Sheridan to ensure that ONE was advertised by use of a separate slide was a sufficiently serious and persistent breach for the following reasons:

i) For ONE to receive a comparable level and type of advertising to that used by SOM went to the heart of the joint business of the LLP which was defined as (with emphasis added):

> "The sale, supply and support of the ONE Software <u>together with</u> option strategy training to end users of the ONE Software".

ii) The sale and supply of the software was half of the package and the bit THJ was most interested in. The central reason for THJ to join forces with SOM was to sell more subscriptions for ONE. That purpose would be undermined if ONE was not advertised in such a way that users were signposted to where they could find out more about the software.

iii) It was entirely conceivable that there would be people who might have little or no involvement with SOM but greater interest in ONE e.g. for monitoring their own trading for years after a mentoring course finished or after watching part of a CBOE Options Safari. To ensure that as many of those people who saw a presentation or seminar in which SOM advertised itself knew how to get hold of more information about ONE, it made commercial and practical sense to require that ONE had its own 'call to action' slide in every presentation in which SOM thought it worth advertising itself.

iv) Mr Mitchell's emails to Mr Sheridan from March to December 2015 show how genuine a concern it was for Mr Mitchell that Mr Sheridan / SOM had not been advertising ONE. Mr Sheridan's response was far from reassuring to Mr Mitchell. Even when he instructed Michelmores to respond he implausibly suggested that in the seminars about which Mr Mitchell had complained SOM had not advertised its own services when it plainly had by means of a call to action slide.

137. I do not accept that the frequent use of the Powered by Optionet logo meant that the consequences of breach was trivial. The use of the Optionnet logo went hand

in hand with the use of the equivalent SOM logo as shown in the slide above. What clause 15.2.5 obliged Mr Sheridan to do was to put the advertising of ONE on the same level as his advertising for SOM by inserting a separate slide containing relevant details. For this reason, even if it is correct as the Defendants submit that the TAR did not pick up the use of the atomic symbol or the ONE logo, their presence on every slide would not have been sufficient to remedy or significantly mitigate the breach arising from the failure to display what was stipulated in the LLP Agreement, namely a dedicated slide with details of the ONE software.

138. I reject the suggestion that Mr Sheridan was excused from complying with clause 15.2.5 where he promoted SOM in seminars for third parties such as Trade King or CBOE. The LLP Agreement made no such distinction. Clause 15.2.5 expressly applies to both "internal and external" seminars and presentations. The LLP Agreement assumed that if SOM was able to advertise itself, then it ought to be able to advertise ONE.

139. Having signed the LLP Agreement, it was up to Mr Sheridan to explain his obligations to CBOE and Trade King. If he did not advertise SOM at all then he was not obliged to advertise ONE but if he did advertise SOM, he was obliged to do the same for ONE. No evidence was put before the court from either Trade King or CBOE to support the contention that they had no objection to SOM advertising its services but refused to let SOM advertise ONE.

140. I also do not accept that Mr Mitchell agreed at some point that no slide was required. No such suggestion was made by Mr Sheridan in 2015 when Mr Mitchell complained bitterly about the lack of advertising.

141. Although, from July 2015, it appears that a 'call to action' slide for ONE was used in SOM's own presentations, in my judgment the persistent failure to advertise up to that point and the continuing failure in relation to CBOE seminars could not be remedied. If a chance to sell or market to certain viewers or users had been missed, then it could not be reclaimed later. Even if it were possible to retrospectively insert a slide in all the archived videos, this would not make up for the fact that the original viewers had not been exposed to the slide. Some viewers might never have visit the archive. As Rix LJ put it in Force India Formula One Team Ltd v Etihad Airways PJSC [2010] EWCA Civ 1051: "the [marketing] genie cannot be put back in the bottle".

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.

**Use and display of prohibited software (Issue 10)**

143. The Claimants' case is that after receiving disclosure of the Pre-Termination Videos from January 2010 – 31 January 2016, and performing the TAR analysis on them, evidence was found of 'prohibited software' as defined in the LLP Agreement being used, namely OptionVue, LiveVol and Optionentics.

144. Appendix 3 to the Re-Re-Re Amended Particulars of Claim suggested that 1,187 videos displayed at least one image of OptionVue; Appendix 4 listed 29 videos in which OptionVue's URL was displayed; Appendix 5 identified 43 videos in which LiveVol was used and Appendix 6 identified 66 videos in which Optionetics was used.

145. The response of the Defendants to this allegation in paragraph 20A of the Re-Re Amended Defence was to neither admit nor deny the allegation but to contend that if software did appear, the breach was not serious or persistent. In cross-examination it became clear that many of the examples pre-dated the signing of the LLP Agreement. Mr Sheridan also made the point in cross-examination that until ONE came along many mentors and students had become used to using OptionVue and he could not control what every student did in every student forum. I accept his evidence that he personally only ever used ONE in his classes and tried to ensure that his mentors did the same.

146. I was not persuaded that the Claimants made out their case that the use of prohibited software by Mr Sheridan or SOM was either serious or persistent for the following reasons:

i) The Claimants' case on the use of prohibited software was entirely dependent on the TAR. However, TAR could not distinguish between a student displaying an image in the course of a training seminar which used software other than ONE and a mentor.

ii) There was no discernible pattern or trend in the use of prohibited software but rather a variety of random instances in which the TAR had picked up an image.

iii) There was no tacitly approved use of rival software at any time.

iv) Almost all of the examples dated from 2010 or early 2011 around the time the LLP Agreement was signed. No-one seems to have suggested at the time that SOM should purge from its archive of old videos all images of rival software.

v) It is understandable that for some period after the LLP Agreement was signed that some SOM mentors and students might carry on using other software, particularly OptionVue which was the software used in the SOM community. What mattered most was that Mr Sheridan and the SOM mentors under Mr Sheridan's control used only ONE.

vi) Although there were isolated examples of tutors such as Jim Reggio and Mark Fenton using prohibited software as late as 2013, this did not persist into 2014 or 2015.

vii) There was no evidence of Mr Sheridan personally promoting any rival software at any time after 2011. The one presentation which was put to him in cross-examination from August 2011 looks is if it made use of old slides. That was Mr Sheridan's evidence and I accept it.

viii) The were no examples of the use of prohibited software after July 2013 when SOM started its training webexes for ONE.

ix) Mr Mitchell had not noticed or picked up on any alleged prohibited use in late 2014 or at any time in 2015 before serving the Notice of Expulsion, notwithstanding that he clearly kept a close eye on what was going on in certain SOM forums.

147. In summary, even if all the instances of prohibited use in 2010 – 2013 were treated as breaches, they were erratic and fleeting rather than persistent or serious. They had in any event petered out completely by 2014/15. Mr Sheridan and SOM were clearly fully committed to using ONE. In my judgment, at the time the Notice of Expulsion was served, there was no serious breach of clauses 15.2.3 or 15.2.3 on which the Notice of Expulsion could be (retrospectively) justified.

**Failure to keep records or provide information (Issue 11)**

148. The Claimants' case on failure to provide information is a limited one. It is that Mr Sheridan failed to provide a list of webexes in which he had advertised ONE when requested to do so by Mr Mitchell. As described in the factual background section, it is not in dispute that Mr Sheridan did not provide the requested list.

149. The Claimants' case is that this failure to provide this information put Mr Sheridan in breach of clauses 15.1.4 and 15.1.7 of the LLP Agreement and clause 2.5 (a) and 2.6 of the Sub-Licence Agreement.

150. Clause 15.1.7 provides as follows:

> "[Each Member shall at times] keep securely at his office, in legible form, proper accounts, diaries and records as the Designated Members may reasonably require and ensure that all Members have free access to them and may take copies of them as may be required".

151. Clause 15.1.4 provides as follows:

> "[Each Member shall at times] show the utmost good faith to the LLP and the other Members in all transactions relating to the Business and affairs of the LLP and give the LLP a true account of all such dealings".

152. Clause 2.5 (a) provides:

> "[SOM] shall keep keep a complete and accurate record of the Sub-Licensee's copying, disclosure and/or sub-licensing of the licensed ONE Software and its users, and produce such record to the Sub-Licensor and/or THJ on request from time to time".

153. Clause 2.6 provided as follows:

> "[SOM] shall permit the Sub-Licensor and/or THJ to inspect and have access to any premises (and to the computer equipment located there) at or on which the ONE Software is being kept or used, and have access to any records kept in connection with this sub-licence, for the purposes of ensuring that the Sub-Licensee is complying with the terms of this sub- licence, provided that the Sub-Licensor and/or THJ provides reasonable advance notice to the Sub-Licensee of such inspections, which shall take place at reasonable times."

154. In my judgment, the Defendants are right to submit that none of the above provisions give rise to an obligation to provide the list sought. The webexes were themselves available at all times for Mr Mitchell to view and the request was not for "access to accounts, diaries and records" within the meaning of clause 15.1.7.

155. Clause 15.1.7 corresponds to the default duty in reg.7(7) of the Limited Liability Partnership Regulations 2001 (which itself follows s.29(4) of the Partnership Act 1890). In the LLP Agreement, it was THJ who was given the task of managing the day to day records of the LLP and who therefore had the sorts of records being referred to.

156. The information sought by Mr Mitchell was in my judgment not anything close to the sort of record described in clause 2.5 (a) or 2.6 of the Sub-Licence Agreement.

157. The only potentially relevant provision in my judgment is clause 15.1.4. However, I accept the submission of the Defendants that this provision merely replicates the default duty under reg.7(8) of the Limited Liability Partnership Regulations 2001, which itself follows s.28 of the Partnership Act 1890. In <u>Invesiones Freira SL v</u>

Colyzeo Investors II LP [2012] EWHC 1450 (Ch); [2012] Bus. L.R. 1136 at [6] and [33] this provision was held to oblige the production of already existing documents but that it cannot oblige members *"to make up partnership books and records which do not at present in fact exist"*: What Mr Mitchell was doing was asking for Mr Sheridan to provide an analysis rather than produce an existing book or record relating to the business of the LLP.

158. The request was also far from neutral in its tone. As Mr Sheridan clearly appreciated, what he was being accused of was of failing to fulfil his obligations to advertise ONE. I have found that he had indeed failed to do so. However, he was not obliged by any provision of the LLP Agreement or either of the Licence Agreements to keep a running account of when in his view that obligation had been triggered and whether it had been complied with or not. Mr Sheridan's refusal to provide the requested information was not therefore, in my judgment, itself a breach of the provisions in LLP Agreement and the Sub-Licence Agreement relied upon by the Claimants.

**The late filing of accounts (Issue 12)**

159. The allegation that Mr Sheridan was in serious breach of the LLP Agreement justifying expulsion because he failed to arrange for them to be filed between 18 December and 31 December 2015 is completely hopeless and ought never to have been pleaded:

i) The late filing caused the LLP to incur a small fine of £150 but had no other consequences.

ii) It was THJ which had the responsibility under the LLP to carry out day to day functions such as filing accounts once approved by the members. THJ could not simply transfer this responsibility to Mr Sheridan by fiat.

iii) The initial delay in getting paperwork ready was due to a delay on Mr Mitchell's part in responding to requests from the LLP's accountant. In previous years, the paperwork had been completed earlier.

iv) Mr Mitchell's peremptory email to Mr Sheridan demanding that he file the accounts once he had agreed them was unreasonable. Mr Sheridan was perfectly entitled to ask questions about the draft accounts. His questions were reasonable.

v) Mr Sheridan approved the accounts on 22 December 2015. This left plenty of time for them to be filed on time. The only reason they were not filed on time was that Mr Mitchell had gone on holiday and no arrangements had been made by either Mr Mitchell or Mr Sheridan to do so. It was a failing by the LLP but between the members it fell to THJ to make the practical arrangements for filing.

160. The claim that Mr Sheridan was in serious breach of the LLP Agreement for failing to file the LLP's accounts by 31 December 2015 is therefore dismissed.

**The validity of the expulsion notice (Issue 13)**

161. My finding that Mr Sheridan was in serious and persistent breach of the LLP Agreement by failing to advertise ONE when SOM advertised its services means that is necessary to decide whether the Notice of Expulsion was validly served or not.

162. The Claimants' first submission is that the power to expel Mr Sheridan fell within THJ's powers of day to day running of the LLP as defined in clause 13.1. That case was rightly not advanced with any great force by Mr Eaton Turner. It is obvious that the expulsion of a member is not part of the day to day running of the LLP. As Proudman J noted in Eaton v Caulfield [2011] EWHC 173 (Ch) [2011] B.C.C. 386 at [25], a "power of expulsion [from an LLP] is expropriatory in nature".

163. The expulsion of a member is obviously not part of the day to day business of the LLP. The editors of *The Law of Limited Liability Partnerships* (5th edition, 2021) draw a distinction in para 17.16 between "ordinary matters" connected to the business of the LLP and extraordinary matters such as decisions to alter the rights of members. The matters which fall under clause 3.1 of the LLP Agreement correspond to these ordinary matters.

164. The second submission the Claimants make is that under clause 19.1, THJ was entitled to serve the Notice of Expulsion because, for the purposes of that clause, it alone was entitled to act as the LLP.

165. In each of the three expulsion clauses, the power to expel is vested in "the LLP". The Claimants' principal submission is that clause 19.1 should be read as if the following words appeared after "LLP": "(acting for this purpose by the Members other than the Member concerned)" and that clause 19.2 should be read as if it had the following words inserted after LLP: "(acting for this purpose by the Members other than Daniel Sheridan)". The Claimants submitted that to construe the clauses as requiring a member to vote for his or her own expulsion would be absurd and would render the clauses ineffective.

166. The Defendants submitted that the clause 19.1 and 19.2 should be read strictly. They submitted that what was required was for a meeting to be convened and for all the members to participate in good faith in reaching a decision. They submitted finally that the clauses were still effective because THJ as the majority partner would have the casting vote by reason of schedule 3 to the LLP Agreement. Alternatively, it was submitted that if THJ did not have a casting vote, in the absence of agreement, THJ's remedy was to seek a dissolution of the LLP.

167. I prefer the submissions of the Claimants on this issue. The suggestion in the context of an expulsion clause of a partnership deed that the consent of the partner being expelled was necessary was considered and rejected in trenchant terms by the Court of Appeal in Hitchman v CBAS Services (1983) 127 SJ 441. In that case Dillon LJ said:

> "It seems to me to be totally incredible that any other partners would have accepted a situation in which Mr Hitchman was only to be subject to expulsion if he chose to consent to it. It makes complete nonsense of the expulsion clause in relation to Mr Hitchman."

168. Dillon LJ went on to deal with the argument based on the requirement of strict construction:

> "It has often been held that an expulsion clause must be strictly construed and strictly complied with, but the function of the court in construing such a clause - as in construing any other clause - is to give effect, so far as possible, to the intention of the parties apparent from the document as a whole. In view of the particular passage which I have read in clause 9, I have no doubt that clause 14 is to be read, as Mr Ferris submitted, as providing for notice in writing to be given by Mr Hitchman and the other senior partners, and then parenthetically, "excluding any of them who is the subject of the notice."

169. The parenthetical reading approved by Dillon LJ is very close to the suggested reading in proposed by the Claimants in this case. Eveleigh LJ concurred with the result and said this:

> "Expulsion is dismissal against the will of the person being expelled and, consequently, I do not regard it as possible for a person to expel himself - certainly not within the meaning of the word "expel" or "expulsion" as it emerges in the document…Therefore, to read the words upon which such reliance has been placed by the plaintiff in clause 14 to the effect that Mr Hitchman must be one of the signatories of, or join in, the notice of his expulsion, is impossible."

170. In my judgment, this case provides strong support for the Claimants' interpretation of clause 19. The LLP Agreement could have included expulsion as being one of the matters for which unanimity is required but it did not. If it had instead envisaged that the only remedy was to seek a dissolution of the LLP it could have said so. Instead it makes express provision for expulsion in certain situations *by the LLP*.

171. It is not a mistake that the power to expel is vested in the LLP. Had the LLP in this case accepted further members, then any expulsion decision would be by means of a majority of members (other than the member whose expulsion is under consideration). If the LLP had only accepted one more member than they would both have to agree to the expulsion of the member concerned. Decision making by a majority is consistent with what is usually expected as the default position in relation to decision making by corporate bodies. There is no reason why an LLP should be any different in this respect – see *Limited Liability Partnerships* op cit. para. 17.12.

172. At the time the notice in this case was served, the only other member of the LLP was THJ. For the purposes of expelling Mr Sheridan as expressly contemplated by clause 19.2, if it is correct, as I consider it to be, to apply the same parenthetical interpretation to the expulsion clause, then the LLP could only act through THJ. That seems to me to be a perfectly sensible and commercial approach

interpretation which gives effect to the clauses. The LLP Agreement was also balanced in this regard in that clause 19.3 envisaged circumstances in which Mr Mitchell might be expelled and the same interpretation would mean that he would not be entitled to vote on (or be required to consent to) his own expulsion.

173. I reject the Defendants' submission that the Claimants' construction leads to an uncertain who shoots first situation under clause 19.1. Under all three expulsion scenarios, there are objective pre-conditions which need to be met. If those conditions are not in fact met, then validity of the Notice of Expulsion can be challenged in court (as these proceedings show).

174. I therefore reject the submission that in order for the LLP to validly expel Mr Sheridan, he had to vote in favour of that step himself or was entitled to vote on that point. The decision was validly made by a majority of the members other than the member concerned, which in this case meant THJ.

175. The alternative suggestion made by the Defendants that Schedule 3 to the LLP Agreement gave THJ a casting vote is not sustainable. Schedule 3 is solely concerned with profit shares. There is no link between it and decision-making powers.

**Rectification (Issue 15)**

176. In light of my conclusions on the correct interpretation of clauses 19.1- 3, it is not necessary to consider the Claimants' alternative case based on rectification.

**Breach of duty of good faith (Issue 14)**

177. The Defendants also challenged the validity of the Notice of Expulsion on the basis that the way in which THJ approached it and Mr Mitchell's motivation was a breach of the express duty of good faith contained in clause 15.1.4 of the LLP Agreement.

178. The Defendants made the following submissions of law, which were not challenged by Mr Eaton Turner and which I accept:

i) Clause 15.1.4 of the LLP Agreement required THJ and Mr Sheridan to "show the utmost good faith to the LLP <u>and the other Members</u>". The language of "utmost good faith" and the fact that the duty is owed by the members to each other (rather than just to the LLP) indicates that the parties intended to subject themselves to the same standard as partners in a traditional partnership.

ii) In that context, partners are expected go much further than merely acting "honestly"; their conduct towards each other falls "to be tried by the highest standard of honour": *Lindley & Banks on Partnership* (21st ed.) at 16-01.

iii) In the context of partnerships and analogous relationships, a duty of good faith requires certain minimum standards of fairness before a partner is expelled. A breach of that duty does not necessarily require dishonesty.

iv) In the context of partnerships and analogous relationships, a duty of good faith requires certain minimum standards of fairness before a partner is expelled. A breach of that duty does not necessarily require dishonesty.

v) The leading case is Blisset v Daniel (1853) 10 Hare 493, 68 E.R. 1022. In that case, one partner had persuaded his fellow partners to expel Mr Blisset without affording him the right to participate in the decision-making process.

vi) The principles in Blisset still apply in the modern era. See - Re Audas Group Ltd [2019] EWHC 2304 (Ch) at para 108 (a quasi-partnership) and Eaton v Caulfield op cit at para 25 (an LLP). In Re Audas a member had been removed “without first clarifying and investigating with [him] the substance of their concerns, exploring the range of options that might be available and providing him with at least some form of warning”. It was held that the duty of good faith had been breached.

179. Mr Greager put to Mr Mitchell very forcibly in cross-examination that he had behaved unfairly to Mr Sheridan and had decided in 2015 that he wanted to get rid of him. Having considered and observed Mr Mitchell’s response to those questions and having considered the exchanges in 2015 between the two men as set out above, I am not persuaded that THJ or Mr Mitchell acted in breach of any duty of utmost good faith for the following reasons:

i) Mr Mitchell’s concern about the fall in sales figures and the potential connection to a failure by Mr Sheridan to comply with his advertising obligations was genuine. It was not a set up to catch Mr Sheridan out and Mr Sheridan did not suggest it lacked any foundation at the time.

ii) When Mr Mitchell first raised the point he put it in the context of his own observation that the advertising was not being carried out in accordance with the LLP Agreement. He was inviting at that stage inviting Mr Sheridan to reassure him but Mr Sheridan did not do so.

iii) Mr Mitchell did not immediately escalate it to a full blown legal dispute. It was not in my judgment unreasonable for Mr Mitchell to ask for some sort of concrete response to his question before having a discussion.

iv) The tone in which Mr Mitchell raised the issue was not initially aggressive or unreasonable. He made crystal clear what his concern was and that he considered that there had been a breach of the LLP Agreement. He gave Mr Sheridan every opportunity to respond substantively to the allegation of breach.

v) Even after both men had referred to getting lawyers involved, Mr Mitchell was not refusing to communicate with Mr Sheridan.

vi) Both men can be criticised for doggedly sticking to their positions which led to an impasse. Although that rigidity was unfortunate, I do not consider either to have thereby breached their duty of utmost good faith.

vii) There came a point in November 2015 in which it seems clear that Mr Mitchell concluded that the LLP did not have a future. His request to Mr Sheridan to file the accounts because he was going on holiday was ill judged and intemperate but not malicious or dishonest.

viii) It was not unreasonable for Mr Mitchell to have formed the view that the reason why Mr Sheridan was not providing the requested information was because he had not complied with his obligations (as I have found).

ix) The fact that Mr Mitchell added other complaints by the time the Notice of Expulsion was served to the main complaint of a failure to advertise does not constitute a breach of the duty of good faith. It was clear that by October mutual trust and confidence had disappeared and that legal notices might be served by either or both Initial Members.

x) Mr Mitchell did not act from any ulterior motive. He did not have a new partner in the wings for ONE. His relationship with Mr Sheridan simply soured progressively between February 2015 and December 2015. In the context of what was in reality a two-person business venture there is little scope for further procedural steps he could have taken in the interests of fairness or transparency. The two men has set out their positions very clearly in correspondence. There was not much more that either could usefully say.

xi) It is incorrect to say that Mr Mitchell failed to consider and propose other possibilities. He floated the idea that SOM might become an affiliate and Mr Sheridan said he was open to considering it but then the discussion went no further in that direction.

180. Ultimately, Mr Mitchell came to the conclusion (justifiably as I have found) that Mr Sheridan had committed a serious and persistent breach of the LLP Agreement in relation to that part of the LLP's business which THJ was most interested in, namely the promotion and sale of ONE and that the LLP had reached a point where it could not continue with Mr Sheridan. I am not persuaded that at any point in reaching that conclusion or that anything he said or did between February 2015

and 23 December 2015 was done in bad faith or otherwise in breach of his duty of good faith to Mr Sheridan or the LLP.

**Termination Dates (Issues 16-20)**

181. In light of my finding that Mr Sheridan's failure to advertise the ONE software constituted a serious and irredeemable breach and that the Notice of Expulsion was valid, it follows that the LLP Agreement was validly terminated on 7 January 2016.

182. Although there are arguments in favour of an automatic termination of at least the Sub-Licence Agreement at an earlier date, it appears to be common ground that nothing turns on this. I therefore hold as I am invited to by the Claimants that the Ancillary Agreement, the Licence Agreement and the Sub-Licence were all validly terminated by no later than 25 January 2016 when Browne Jacobson served formal notice of termination.

**Passing off (Issues 21 – 23)**

183. In a traditional passing off case, what is alleged is that a Defendant has misrepresented that goods or services of the Defendant are misrepresented as being those of the Claimant. The Defendant has in on other words traded off the Claimant's reputation and goodwill.

184. It is trite law that there are three requirements for a passing off: goodwill, misrepresentation and damage (see per Lord Oliver, with whom the other members of the House agreed, in Reckitt & Colman Products Ltd v Borden Inc [1990] RPC 341 at 499). Further:

i) It is not enough to show that purchasers were merely confused as to the provenance of the defendant's goods.

ii) The misrepresentation must be more than transitory: it is not sufficient that a purchaser is misled initially but his misunderstanding is dispelled before any material step is taken (see Cadbury-Schweppes Pty Ltd v Pub Squash [1981] 1 WLR 193, PC).

iii) The misrepresentation must operate to mislead a substantial number of members of the public. Substantiality is not a question of counting heads. It is relative to the product and market in question.

185. By the time the Claimants served their Closing Submissions in Reply, it became clear that the type of passing off being alleged was not the traditional type but is what is usually called reverse passing off. The Claimants in this case allege that the Defendants misrepresented the ONE software as being their own, principally by failing to display copyright notices identifying THJ as the owner.

186. The Claimants referred me to the following passage in Orvec International Limited v Linfoots Limited [2014] EWHC 1970 (IPEC) where HHJ Hacon said at [36]:

> "Orvec based its allegation of a misrepresentation by Intex on *Bristol Conservatories Ltd v Conservatories Custom Built Ltd* [1989] RPC 455 and in particular on the following passage from the judgment of Ralph Gibson LJ:
>
> > "In this case the substance of the misrepresentation by the defendants, as alleged by the plaintiffs, is fairly capable of being expressed thus: 'If you order a conservatory from us you will be getting a conservatory designed, manufactured and constructed by the people who have earned the goodwill and reputation that properly belongs to the party which secured the orders and designed, manufactured and constructed the conservatories shown in these photographs. The

> conservatories shown in the photographs indicate the skill, the experience and the reputation of the party who designed and made them. That party is Custom Built.' But, of course, it was not."

> The President (Sir Stephen Brown) and Butler-Sloss LJ agreed with the judgment of Ralph Gibson LJ. The application in Bristol Conservatories was to strike out the Statement of Claim as disclosing no cause of action, so strictly it establishes only that the plaintiff's case was arguable. But courts have not since disagreed with the principle expressed in Bristol Conservatories and it has become accepted that where a defendant represents the claimant's article as being the product of his own efforts and skill, this may be an actionable misrepresentation."

187. However, in Woolley v Ultimate Products Ltd [2012] EWCA Civ 1038, Arden LJ with whom Black and Pill LJJ agreed doubted whether reverse passing off is actionable:

> "Misrepresentation must be "the right way round", that is to say, members of the public must be confused into believing that the goods of the defendant are goods of the claimant. It is not enough for them to be misled into thinking that goods of the claimant are goods of the defendant. This is "the wrong way round", or "reverse misrepresentation", as I shall call it. It may suffice for trade mark infringement but not for passing off"

188. The Defendants did not rely on *Wolley* or submit that reverse passing off could not amount to actionable passing off. The Defendants instead submitted that on the evidence, the Claimants could not prove any of the elements.

189. As to goodwill, the Claimants' pleaded case was that:

i) The ONE software was clearly recognisable from its product name "OptionNET Explorer", its logo and its distinctive images, typeface and user interface.

ii) The logo and the product name were displayed on three windows and the product name is displayed continuously during use of the software at the top right of the software header ribbon.

iii) The software and its logo and product name have been promoted and advertised to potential users in the UK.

190. I had no difficulty in accepting point (i). Whenever the software appeared in a slide or presentation it was very clearly distinct and recognisible. The colour, font and general appearance was very different to the surrounding SOM materials.

191. Point (ii) was admitted by the Defendants. The continuous display of the logo and product name reinforced the first point.

192. Point (iii) was not well supported by evidence. Paragraphs 101 – 105 of Mr Mitchell's witness statement contained the entirety of his oral evidence in relation to the passing off case. It was focussed on misrepresentation and said nothing all about goodwill. There was no documentary evidence as to the money generated by THJ from licence fees or even how many subscribers were located in the UK. The only evidence about the extent of use subscription sales in the UK came from Mr Sheridan who said that the number was no more than "perhaps 30" or so at any one time.

193. In their submissions, the Defendants submitted that THJ did not trade because from 2010 onwards it was contractually prohibited from licensing the software to end users and instead it was the LLP which held the exclusive licence. Whilst is it correct as a general proposition that goodwill is acquired through trading and that the owner of the goodwill will be the person the market identifies the character or quality of the goods with – see *Clerk & Lindsell on Torts* (23rd ed. 2020) at 25-08 and 25-09 – the case law does not require trading in the narrow sense. I therefore do not accept the Defendants' submission. The ability to generate income via a licencing or sub-licencing arrangement is itself a means to generate

goodwill: see Fine & Country v Okotoks Ltd [2013] EWCA Civ 672 [2014] FSR 11 at [56]– [58] and Dawnay Day & Co Ltd v Cantor Fitzgerald International [2000] RPC 669. Furthermore, joint ownership of goodwill is possible. It may be that most viewers or users of the ONE software thought they were dealing with a product provided by the LLP but the automatic watermark might have suggested to at least some that it was THJ who was ultimately the owner.

194. Whilst the lack of evidence on the goodwill generated by THJ was surprising, I remind myself that it need not be extensive. A small business in a niche market is as much entitled to protection as a large business – see *Clerk & Lindsell on Torts* (23rd ed. 2020) at 25-05. Although it might be somewhat generous, I am prepared to accept that the ONE indicia were sufficiently distinctive and where associated at least in part with THJ (in addition to the LLP) had generated sufficient goodwill with a small number of users in the UK sufficient to maintain a claim for passing off.

195. As to the alleged misrepresentations, they fall into two groups. The first three pleaded in paragraphs 24.1 – 3 all refer to the display of the ONE software without accrediting it to THJ using the form of copyright notice stipulated in the LLP Agreement and Licence Agreements. I am not persuaded that this amounted to a misrepresentation that ONE belonged to or had been created by SOM so as to amount to a reverse passing off for the following reasons:

i) The software's logo, images, typeface and user interface strongly distinguished it from the SOM materials.

ii) The name OptionNET Explorer was prominently displayed on the splash window and log in window.

iii) The combination of (i) and (ii) would lead almost all users and viewers to conclude that SOM was making use of proprietary software of another company, called Optionnet (which was in fact the position). Nothing in the way ONE was displayed positively indicated that it was owned by SOM.

iv) At virtually all times when the software was in use the short form copyright notice was displayed which clearly stated in relation to ONE that THJ held the copyright in a conventional and concise fashion: “© THJ System Ltd”.

v) The mere absence of the longer form copyright notice even when combined with the absence of the automatic shorter form of notice did not in itself in any event amount to a positive representation of ownership by SOM.

vi) There was no evidence adduced that anyone was every actually misled.

196. The other two alleged representations, pleaded in paragraphs 24.4 and 24.5 of the Re-Re-Re Amended Particulars of Claim, relate to adverts by SOM where ONE was referred to as “our proprietary software” or was advertised for sale without referring to THJ. As to these:

i) These statements have to be seen in the context of the Licence and Sub-Licence Agreement. “Our” is capable of meaning in this context the software we are licenced to use.

ii) Mr Sheridan and SOM were supposed to be trying to promote and sell ONE. If a viewer was interested in purchasing the software, he or she would have realised that it was the LLP with whom he was dealing and not

SOM. The statements relied upon were transitory and merely a means of generating interest in the product which would then be sold by the LLP.

iii) No evidence was actually adduced of anyone in fact being misled by any advert into believing that SOM owned the software.

197. Finally, it is suggested that there may have misrepresentations by display of the software in videos available on the SOM website since the termination of the Licence Agreements. Mr Sheridan’s unchallenged evidence was that after the termination of the Licence arrangement, he reverted to using another software (‘Think or Swim’). The allegations were therefore confined to archived videos. Although it is suggested that in some of these displays the shorter form copyright notice is obscured or illegible, I am not persuaded that these displays amounted to misrepresentations constituting passing off for the reasons given in paragraph 195 (i) – (iii), (v) and (vi).

198. The Claimants also failed to produce any evidence to suggest that THJ had suffered any loss or damage to its goodwill. SOM’s business was the provision of training and mentoring in options trading. It was not offering to sell its own alternative product. I accept the Defendants’ submission that anyone seeing images from ONE in use who was interested in purchasing a subscription would have ended up purchasing it from the LLP both during the period before and after Mr Sheridan’s expulsion. In cases of reverse passing off it is all the more important to present concrete evidence of damage to goodwill. In standard cases the court may well be willing to assume that purchasers of the passed off items would have purchased the genuine item but that does not apply to reverse passing off.

199. I could not make any sense of the Claimants submissions in reply on the no damage point. I do not accept that SOM represented that it owned or had created OptionVue or LiveVOL any more that it represented that it owned or had created ONE. All three types of software were in my judgment simply used by SOM as part of its training and mentoring process.

200. I also do not accept the submission that SOM's own charges for its mentoring or training acted as a significant entry barrier for potential customers of the ONE software. SOM's customers were there because they wanted training and mentoring in options trading.

**Breach of copyright (Issues 24 – 29)**

201. The breach of copyright case as pleaded was that:

i) The ONE Software was a literary work within section 3 of the UK Copyright Designs and Patents Act 1988 (**'the 1988 Act'**).

ii) The ONE Software produces images including but not limited to risk and price charts and each such image is an artistic work within section 4 of the 1988 Act.

iii) The source code of software and images (together '**the Works**') are protected under both UK and US copyright law.

iv) Mr Mitchell is the author of the Works and THJ is the owner of the Works.

202. The allegations based on US copyright law were not pursued at trial.

203. The pleaded alleged acts of infringements were extremely limited in scope. It was alleged that the ONE software was used in a presentation on YouTube on 27

January 2016 and an Earnings Class hosted on Mr Sheridan's website on the same day.

204. The Re-Re-Re Amended Particulars of Claim go on to refer to a letter dated 1 May 2019 from Browne Jacobson saying that the "Claimants reserve the right to plead further instances following the provision of disclosure by the Defendants". However, no further instances were pleaded whether by voluntary further and better particulars, or otherwise and no further instances were referred to at trial.

205. The alleged act of infringement relied upon by the Claimants was the communication of images contrary to section 20 of the 1988 Act. It was also pleaded that copyright in the source code itself was infringed.

206. Section 20 of the 1988 Act provides:

> "(1) The communication to the public of the work is an act restricted by the copyright in—
>
> (a) a literary, dramatic, musical or artistic work,
>
> (b) a sound recording or film, or
>
> (c) a broadcast.
>
> (2) References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include—
>
> (a) the broadcasting of the work;
>
> (b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.

207. The Defendants pleaded case on the facts was that the Defendants did make limited use of the ONE software between 25 and 27 January 2016 including in the two presentations on 27 January 2016 before being 'locked out' of the software

later on 27 January 2016. Mr Sheridan said he did so because he did not accept that he had been validly expelled or that the Licence Agreements had been validly terminated.

208. The Defendants submitted that the Claimants have failed to distinguish between three different types of potentially protected work, namely:

i) The software source code.

ii) The graphic user interface. This is the interface which enables communication between a computer program and a user. It comprises many individual “frames” stored in the user’s computer memory.

iii) Screenshots. This means all and any screenshot taken by users using their devices of their screens whilst the software is in use (i.e. when a user creates an image file which shows what is shown on the user’s screen while they are using the software, including, graphs that are displayed to the user).

209. As to (i), the Defendants do not dispute that copyright subsists in the source code for the software as a literary work under s.3 of the 1988 Act or that Mr Mitchell is the author of the source code; and that THJ owns the copyright in the source code.

210. However, the Defendants submit that the scope of protection provided by s. 3 is quite limited. In particular, they referred me to *Copinger on Copyright* (18th edn.) at 3-94 which states (with emphasis added):

> “The [Software] Directive is concerned only with the protection of computer programs as literary works, and therefore has no impact on literary, artistic or other works that may be associated with them. <u>Beyond this, however,</u>

> the copyright in a computer program does not protect "interfaces". These are described in the Software Directive as the parts of the program which provide for the "logical and, where appropriate, physical interconnection and interaction … required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways they are intended to function"; they enable communication between the computer program and the user. The reason why interfaces are not protected is that such elements do not enable the reproduction of a computer program but merely constitute one element of a program by means of which users make use of the features of the program; an interface does not constitute a form of expression of a computer program." (emphases added)

211. Mr Eaton Turner did not seek to persuade me that this submission was wrong and I accept it. Accordingly, the protection afforded by s.3 does not extend to cover the graphic interface of ONE or any display generated by it and a user.

212. In relation to (ii) the Defendants did not dispute that individual frames of graphic user interfaces are capable *in principle* of constituting artistic works. However, they submitted that graphic user interfaces do not qualify for protection as artistic works automatically: they only qualify if they would otherwise meet the requirements for copyright protection as an artistic work.

213. In Nova Productions Ltd v Mazooma Games Ltd & Ors Rev 1 [2006] EWHC 24 (Ch) the author had designed the individual graphical components from scratch "*using various computer tools such as notional brushes and pencils and the screen colour palette*", which had "*created a visual effect which is very similar to that of a painting of drawing*" (see paras 98 – 106 of the judgment of Kitchin J).

214. In this case, the evidence as to the creation of the graphic interface was rather limited. At trial, Mr Mitchell's evidence was that he had obtained the components that are displayed on the End User's screen when the Software is in use from a third party library, but that he was responsible for the "*overall look and feel*" of

the display. I am satisfied that the work of creating the look and functionality of interface including the arrangements of the tables and graphs did involve the exercise of sufficient skill and labour for the result to amount to an artistic work. The analogy with the GUI screens in issue in Navitaire Inc v Easy Jet [2006] RPC 3 Ch at [98] is in my judgment apposite.

215. As to (iii) whilst the Defendants are right to point out that any particular screenshot of an image produced by the software in use is the combined product of the user and the programme, the image in each case is predominantly the result of the computer algorithms written by Mr Mitchell. The ONE logo for example is automatically generated by the software when in use regardless of what trading data the user wants to analyse. The same is true of the overall look, framing and lay out of the graphics and tables regardless of the shape of the graph or the numbers displayed.

216. I therefore accept the graphic interface, the graphic displays produced when the software is in use and the ONE logo were all artistic works in which copyright subsisted, that Mr Mitchell was the author and THJ the owner.

217. As to infringement, Mr Eaton Turner did not seek to explain either in his closing submissions or in his submissions in reply how the copyright in the source code was infringed on 27 January 2016. There was no suggestion that Mr Sheridan or SOM sought to copy the source code.

218. The Defendants submitted that using the program is not an infringement of the copyright in the source code. They referred me to the following passage in *Copinger* at 3-98:

> "It follows that a person who reproduces the functionality of another's program by means of observing, studying and testing the behaviour of that program does not therefore make use of the protected subject-matter of the program."

219. Mr Eaton Turner had no answer to this point in his Closing Submissions in Reply and I accept the Defendants' submission that no infringement of the source code has been proved.

220. As to the display of the images at the two events on 27 January 2016, Mr Eaton Turners' submissions did not engage with the requirements of s.20. To prove an infringement he had to prove that the Works had been "communicated to the public". He had therefore to satisfy the court that they had been either "broadcast" to the public under s. 20(2)(a) or "made available to the public" by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them".

221. Paragraph 7-237 of *Copinger* op cit lists eight factors to bear in mind when assessing with the second stage of the test under s.20 has been met. However, it is impossible to begin to apply them in a complete evidential vacuum. There was no evidence as to who the audience was for either of the infringing events.

222. Even if internet based live streaming is likely to fall within "electronic transmission", if the programme is not being accessed by the audience, there is no infringement under s.20 – see *Copinger* para. 7-231:

> "Hence, where during the television broadcasting of a programme, a graphic user interface is displayed, that graphic user interface is only being communicated to the viewing public in a passive manner. The public could not use the essential feature characterising that interface which is its enabling the interaction between the computer program and the user. The broadcast does not, therefore, amount to a communication of an essential element of the work and, therefore, is not a communication to the work for these purposes"

To prove an infringement under s.20 requires proper particularisation and evidence as to what actually occurred. The Claimants' case had neither.

223. It is possible that both of the events complained of may have constituted a broadcast to the public or an electronic transmission during which the work was made accessible. However, I have no evidence one way or the other.

224. Although the Defendants did not plead any jurisdictional objection, in their closing submission the Defendants submitted that the Claimants had not shown that the relevant communication to the public took place in the UK or was targeted at a UK audience so as to engage UK copyright law.

225. The position is summarised as follows in *Copinger* at 7-249:

> "Copyright being a territorial right and the 1988 Act being a territorial Act, it seems clear that in order to infringe the communication to the public right, the relevant communication to the public must have taken place in the UK.1070 This raises the question whether a communication is made at a place where it is initiated, at the place where it is received or, at least, where it is capable of being received. As set out below, the position differs depending on whether the act of communication in issue is the act of broadcasting a work within s.20(2)(a) of the 1988 Act or is the act of making the work available to the public within s.20(2)(b)."

226. Generally speaking, the UK has applied the emission theory to wireless broadcasts of all kinds. Thus, for section 20(2)(a) the broadcast occurs at the place where the signals originate regardless of the type of transmission.

227. In cases where the act of communication to the public in issue is the act of making the work available for on-demand access within s.20(2)(b) of the 1988 Act, then for such an act to infringe copyright it must be shown to have occurred in the UK.

228. It is possible for a person to be liable where a communication originates outside the UK but targets the public in the UK. As noted in *Copinger* at 7-257, this is of

particular relevance to cases involving the internet where users in the UK can access works on websites from all over the world. The sorts of factors the court will take account of are broad and very fact specific: see Warner Music UK Ltd v TuneIn Inc [2021] EWCA Civ 441 and Football Association Premier League v BT PLC [2017] EWHC 480 at [38].

229. Both events appear to have physically to have taken place in the US and therefore any communication originated there. The Claimants did not identify any factors which might support a targeting case and offered no evidence that the communications complained of had reached the UK.

230. For the reasons set out above, I am persuaded that the Claimants failed to prove a claim for infringement of copyright. I will make declarations as to the copyright in the Works but the claim for damages and the claim for an inquiry as to damages are dismissed.

## Conclusions

231. In summary:

i) Mr Sheridan was not in serious breach of the LLP Agreement by failing to ensure that copyright notices were displayed.

ii) Mr Sheridan was not in breach of the LLP Agreement by failing to provide webex seminars of sufficient length or number of by displaying prohibited software or by failing to keep records or provide information or by a failure to file the LLP accounts on time.

iii) Mr Sheridan was in serious and persistent breach of clause 15.2.5 of the LLP Agreement by failing to advertise the ONE software as required.

iv) Mr Sheridan was validly expelled from the LLP.

v) The Licence Agreements and Ancillary Agreements terminated no later than 25 January 2016.

vi) The claims for passing off and breach of copyright are dismissed.

# APPENDIX

## APPROVED LIST OF ISSUES FOR TRIAL

### Alleged breaches

1. Did the allegations referred to below in issues 3 – 12 and grouped together under headings A-F amount to breaches of the LLP Agreement?

2. If so, were any such breaches serious and/or persistent within the meaning of the LLP Agreement?

### A. Failure to provide webexes

3. Did Mr Mitchell request that Mr Sheridan give webexes exactly two weeks apart, without any catch-up webexes?

4. Was clause 15.2.1 of the LLP Agreement breached by:

    a. not giving the requisite number of webexes;

    b. giving a webex or webexes that were less than one hour in duration; and/or

    c. failing to give webexes every other week?

### B. Failure to display copyright notice

5. Do Mentor Newsletters fall within the definition of '*educational material*' and/or '*webex / seminars / presentations*'?

6. Does the THJ Notice differ materially from the Copyright Notice?

7. Was Mr Sheridan able to control the content of training sessions produced or published online by CBOE?

8. Were clauses 15.2.4 of the LLP Agreement and 2.2(g) and 3.3 of the SOM Software Sub-Licence Agreement breached by:

    a. failing to display the appropriate THJ copyright notice in videos posted on the YouTube channels, Sheridan Options TV and Sheridan Mentoring;

    b. failing to display the appropriate THJ copyright notice in Mentor Newsletters;

c. failing to display the appropriate THJ Copyright Notice in a 'number' of "Options Safari" training sessions given by Mr Sheridan to or for CBOE; and/or

d. did Mr Sheridan and/or SOM attempt to rectify this when notified and if so, how?

**C. Failure to advertise the Software**

9. Were clauses 15.2.5 of the LLP Agreement and 3.4 of the SOM Software Sub-Licence Agreement breached by:

a. failing to include a slide promoting the Software in any videos where SOM advertised itself;

b. including a slide promoting the Software in any of the videos referred to at paragraph 8(a) above but failing to display the appropriate copyright notice on that slide;

c. failing to include a slide promoting the Software in the Trade King webinar on 22 June 2015;

d. failing to include the appropriate THJ copyright notice in slides promoting the Software in webinars from July 2015 onwards;

e. failing to display a slide promoting the Software in a "Options Safari" training sessions given by Mr Sheridan to or for CBOE and/or failing to display the THJ Notice or the Copyright Notice in the same; and/or

f. did Mr Sheridan and/or SOM attempt to rectify this when notified and if so, how?

**D. Use and display by Defendants of Prohibited Software**

10. Were Ds in breach of clauses 15.2.2 and 15.2.3 of the Agreement by using / displaying Prohibited Software?

**E. Failure to keep records and/or provide information**

11. Were clauses 15.1.4 and 15.1.7 of the LLP Agreement and 2.5(a) and 2.6 of the SOM Software Sub-Licence Agreement breached by Mr Sheridan failing to keep and/or provide a list of webexes and/or links to material where he had advertised the Software?

## F. Failure to file the LLP accounts

12. Was clause 8.9 of the LLP Agreement breached by Mr Sheridan failing to file accounts for the LLP with Companies House by 31 December 2015?

### Expulsion of Mr Sheridan from the LLP

13. Did THJ have authority to serve the Notice on Mr Sheridan on behalf of the LLP?

14. If so, was Mr Sheridan validly excluded from the LLP on 7 January 2016 or was his expulsion wrongful for the reasons set out in paragraphs 40A – 40C of the Re-Re-Amended Defence and Counterclaim and responded to in paragraph 15A of the Re-Amended Reply and Defence to Counterclaim?

### Rectification of the LLP Agreement

15. If THJ did not have authority under clauses 19.1.1 and/or 19.2.1 to serve the Notice on Mr Sheridan on behalf of the LLP, should those clauses be rectified to give it authority to do so because of:

    a. a common mistake;

    b. a unilateral mistake;

    c. it being inequitable for Mr Sheridan to contend otherwise; and/or

    d. estoppel?

### Did the THJ Software Licence Agreements terminate automatically?

16. Did the THJ Software Licence Agreement terminate automatically by reason of the Ds breaches?

### Termination of the SOM Software Sub-Licence Agreement and the Ancillary Agreement

17. Were any breaches of the SOM Software Sub-Licence serious or persistent?

18. If so, was it automatically terminated under clause 9.1(b) or, alternatively, under clauses 9.2(a) and/or 9.2(b) by reason of the letter from Browne Jacobson LLP dated 25 January 2016?

### Did the Ancillary Agreement terminate automatically?

19. Was the Ancillary Agreement automatically terminated on 7 January 2016 under clause 5.1(b) by reason of the exclusion of Mr Sheridan from the LLP?

20. Alternatively, was the Ancillary Agreement terminated under clause 5.1(a) by reason of the letter from Browne Jacobson LLP dated 25 January 2016?

**Passing off**

21. Does THJ own goodwill in the United Kingdom for the Software in respect of any of the following on their own:

    a. the Product Name, namely 'OptionNET Explorer';

    b. the Logo, namely:

    ;

    c. the appearance of the Software, including:

        i. the side-by-side display of option chain and risk charts; and/or

        ii. images generated by the Software;

    d. the typeface used in the Software; and/or

    e. the user interface of the Software.

22. Were the following acts of Mr Sheridan or SOM misrepresentations capable of damaging that goodwill:

    a. the matters at paragraphs 8(a) and 9(a) above;

    b. the matter at paragraph 8(b) above;

    c. the matter at paragraph 8(c) above; and/or

    d. placing an advert on TastyTrade promoting a '$600 tastytrade Voucher' which referred to the Product Name but did not expressly refer to THJ?

23. In particular, was the advert at paragraph 22(d) above targeted at the United Kingdom?

## Breach of UK and US copyright

24. Are the risk and price charts generated by the Software capable of protection as artistic works under section 3 of the Copyright, Designs and Patents Act 1988 (the "**1988 Act**")?

25. If so, who is the author of those works under section 9(3) of the 1988 Act?

26. If Mr Mitchell is the author of such works, have they been infringed by Mr Sheridan and/or SOM by the use of images generated by the Software in:

    a. a presentation published on YouTube on 27 January 2016; or

    b. an earnings class hosted on the website operated by Mr Sheridan on 27 January 2016?

27. Have Mr Sheridan and/or SOM made any use of the Software since the expulsion of Mr Sheridan from the LLP?

28. In particular did Mr Sheridan and/or SOM use the Software after the expulsion of Mr Sheridan from the LLP to generate the images referred to at paragraph 26 above or any of them?

29. If so, have they infringed the literary copyright subsisting in the source code of the Software?