



Neutral Citation Number: [2023] EWHC 852 (Ch)

Case No: CR-2021-BRS-000104  
CR-2022-BRS-000017  
CR-2022-BRS-000045

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN BRISTOL**  
**INSOLVENCY AND COMPANIES LIST (ChD)**

Date: 19 April 2023

**Before:**

**MR JUSTICE ZACAROLI**

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**Between:**

**First Petition**

**TOSI LIMITED**

**Petitioner**

**- and -**

**(1) 99 HIPPOS LIMITED**

**Respondents**

**(2) EMMA LOUISE FAIRCLOUGH**

**Second Petition**

**EMMA LOUISE FAIRCLOUGH**

**Petitioner**

**- and -**

**(1) TOSI LIMITED**

**Respondents**

**(2) 99 HIPPOS LIMITED**

**Third Petition**

**EMMA LOUISE FAIRCLOUGH**

**Petitioner**

**- and -**

**(1) ROBERT EDWARD TILLET**

**Respondents**

**(2) FINSBURY CO LIMITED**

**(3) JUSHO LIMITED**

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**Simon Perhar** (instructed on a direct access basis) for the **Petitioner** in the First Petition, the **First Respondent** in the Second Petition and the **First Respondent** in the Third Petition

**James Wibberley** (instructed by JMW Solicitors LLP) for the **Second Respondent** in the First Petition and the **Petitioner** in the Second and Third Petitions

Hearing dates: 7, 8, 9 and 10 March 2023

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**JUDGMENT**

## **Mr Justice Zacaroli:**

### Introduction

1. This case is about the corporate consequences of the breakdown in the relationship between Ms Emma Fairclough (“Ms Fairclough”) and Mr Robert Tillett (“Mr Tillett”).
2. Prior to the breakdown, which occurred in 2020-2021, they were involved together for many years in the running of a number of companies loosely referred to as the “Jambo Group”, all of which are, or were, involved in the educational recruitment sector. The companies principally involved in this dispute are:
  - (1) 99 Hippos Limited (“99H”), 50% of the shares in which are owned by Ms Fairclough and the other 50% are owned by Tosi Limited (“Tosi”), a company that is wholly owned by Mr Tillett;
  - (2) Jambo Limited (“Jambo”), which is solely owned (according to his witness statement) by Mr Tillett;
  - (3) Jusho Limited (“Jusho”), which is owned 50/50 by Ms Fairclough and Mr Tillett; and
  - (4) Finsbury Co Limited (“Finsbury”), which is also owned 50/50 by Ms Fairclough and Mr Tillett.
3. Mr Tillett owns a further company, Brolly Lolly Limited (“Brolly”), and owns 50% of three other companies, Dakota6 Limited (“Dakota6”) (jointly with a Ms Anna McGregor), Mai Recruitment Limited (now Vamos, jointly with a Ms Julie Ellis) and Hoops Connect Limited (now ORFI Sports Group, jointly with a Mr Jonas Urbonas).
4. Ms Fairclough also owns another company, Group Eleven Limited (“Group Eleven”), formerly 99 Group Limited (“99G”).
5. Ms Fairclough and Mr Tillett are the only directors of 99H, Finsbury and Jusho.
6. Tosi commenced proceedings with the presentation of a petition under s.994 of the Companies Act 2006 (the “2006 Act”) on 12 November 2021 (the “first petition”). The relief sought was that Ms Fairclough sell her shares in 99H to Mr Tillett, that she step down as director and/or that the court makes such order as it thinks fit to break the deadlock between the parties.
7. On 11 February 2022 Ms Fairclough presented her own petition in relation to 99H (the “second petition”). The relief sought was that Mr Tillett stand down as a director and that Tosi be ordered to sell its shares to Ms Fairclough at £1 or a fair value, alternatively that 99H be wound up. Ms Fairclough also sought an order that Tosi pay: compensation to 99H or Ms Fairclough to remedy sums wrongly paid from 99H to Jambo; and/or the debts Ms Fairclough had to pay from her own funds as a result of money being transferred from 99H; and/or the diminution in the value of her shareholding.

8. On 6 May 2022, Ms Fairclough presented a further petition in relation to Jusho and Finsbury (the “third petition”) seeking relief which mirrored that sought in the second petition.
9. It is common ground that of the three companies to which the petitions relate, 99H was the principal trading company. Neither Finsbury nor Jusho had significant business or made material profits.

### Background

10. Mr Tillett and Ms Fairclough first met when Ms Fairclough was employed by Jambo in 2008. They soon afterwards began a personal relationship, but that ended in around May 2009. Ms Fairclough proved to be good at what she did, and she went on to play a pivotal role in the development of the business of the Jambo group.
11. 99H was incorporated on 21 May 2013, with Tosi as sole shareholder, and Mr Tillett as sole director. Ms Fairclough was given 50% of the shares in 99H on 19 July 2016, and was appointed a director of 99H on 17 August 2016.
12. Finsbury was incorporated on 3 December 2014. Ms Fairclough originally acquired only a few shares, but subsequently she and Mr Tillett became the only shareholders, each holding 50%, from 4 April 2018.
13. Jusho was incorporated on 7 May 2015, with Ms Fairclough and Mr Tillett holding 50% of the shares each from the beginning.
14. Jambo provides management and back office support services to the other companies in the group, for which it is remunerated via inter-company charges. The manner in which it does so is a particular bone of contention in this dispute.
15. Each of the companies in the Jambo group operated on the basis of competition between them. Both Ms Fairclough and Mr Tillett said that they regarded this as a good way to maximise performance across the companies in the group. From the outset, therefore, this meant that companies in which Ms Fairclough was a 50% shareholder with Mr Tillett were effectively in competition with companies owned by Mr Tillett, either alone or with someone else. No-one seems to have appreciated the potential for serious conflict between companies with different stakeholders, particularly if the main protagonists fell out.
16. Initially, Ms Fairclough was paid a salary. In 2016, however, this was changed to a profit share arrangement. 99H charged Jambo for her services, at a rate of 40% of Jambo’s profits. As she was a 50% shareholder of 99H, she was entitled to receive 50% of the dividends from 99H. In that way, provided each of 99H and Jambo was sufficiently profitable, she would receive (in addition to whatever dividend was otherwise payable by 99H) 20% of the profits of Jambo. Again, no-one seems to have appreciated the potential for conflict, particularly if the parties fell out, in Ms Fairclough’s remuneration depending to a significant extent upon the profits of a company over which Mr Tillett had sole control.
17. In 2015, Mr Tillett took an extended sabbatical, and Ms Fairclough assumed de facto control of the business of the whole group. This continued when Mr Tillett returned

in about 2016, with him focussing on other businesses, and Ms Fairclough assuming the position of managing director of the group.

18. One of the features of Ms Fairclough's conduct of which Mr Tillett complains (although this does not form the basis of any of the grounds of unfair prejudice contained in the first petition) is her habit of charging lavish expenses to the companies. The matters of which he complains occurred prior to the breakdown in their relationship. They were often for purely business purposes, such as expensive events for staff, but sometimes were for personal matters. Ms Fairclough admitted that this was the case, but said that she was merely doing what Mr Tillett himself had done.
19. In one case (the refurbishment of a kitchen in her flat) she admitted charging this to 99H and said that this was because Mr Tillett told her she should do it that way. Mr Tillett denies this and said that he told her merely that she could order through the company to obtain the benefit of a corporate discount.
20. Since these matters do not form the basis of allegations of unfairly prejudicial conduct, I need not determine the extent to which either was putting purely personal expenditure through the companies without the knowledge and approval of the other. It was clear, however, that when times were good and 99H was generating substantial profits, Ms Fairclough was in the habit of requesting payments as and when she needed funds, which the accounting staff would process without question. These were either treated as additions to her director's loan account or advances in respect of dividends.
21. As the petitions only concern the affairs of 99H, Jusho and Finsbury, there has been no investigation of the way in which Mr Tillett ran Jambo and the other companies under his (but not Ms Fairclough's control). I did not understand him to deny, however, that he was also in the habit, when the money was there, of spending lavishly on staff events, such as trips to Las Vegas.
22. One thing that was clear from their evidence as a whole was their lack of real oversight into the financial affairs of the group. Until 2019, these were under the day to day control of the financial controller, Nicky Lee Retallick. As I describe in more detail below, decisions as to the creation of inter-company charges and the movement of cash between companies were largely taken at a group level. The lack of oversight by Ms Fairclough and Mr Tillett is demonstrated in particular by the fact that from 2015 to early 2019 Mr Retallick managed secretly to defraud the group of around £1.5 million. This was only appreciated in 2019. Mr Retallick was subsequently convicted and sentenced to six years in prison.
23. The personal relationship between Ms Fairclough and Mr Tillett had been extremely difficult for a while before 2020. Ms Fairclough had for some time refused to speak to Mr Tillett on anything other than business matters and it is clear that Mr Tillett found this increasingly frustrating. It is common ground that the relationship between them had broken down completely by the beginning of 2020.
24. In January 2020 Ms Fairclough made it clear that she wanted to end their business relationship. At the suggestion of Tom Kirk, the financial controller for the group appointed after the departure of Mr Retallick, she engaged the services of an

accountant, Graham Higgins, to assist her in negotiating an exit. On 9 January 2020 she emailed Mr Kirk, stating the clear desire for a split, saying “I ultimately want my freedom in whatever form it looks like”. She canvassed options including buying Mr Tillett’s shares in the companies, or selling hers. She said:

“For me, I don’t care about any of the brand names, the buildings or the “stuff”.

For me it’s the people. I want to be honest I want them, and they want me. We are prepared if it comes to it to resign. I know that I personally would still have liability with the above companies. We are also aware that each “employee” will have a 6 month none [sic] compete clause to honour.

Ultimately for myself and the people, we see our futures together in whatever form that may look like, I do not wish to therefore sign anything to say I cannot work with XY or Z because they categorically do not want to be here without me and they are people at the end of the day, no one “owns” them.”

25. The email then set out a list of employees that Ms Fairclough wanted, and continued:

“I have not promised them or offered anything to them in order for them to leave. They have expressed that without me here they would not want to stay so then our only option would be to essentially start again in 6 months.”

26. In the witness box, she said that she had not actually agreed with any of the staff that they would leave with her, although she believed that they would do so. She described her email as a hot-headed response to being told by Mr Tillett that she could just leave.

27. It took a while, not surprisingly perhaps given the lack of good will between them, for negotiations to get going. In contemporaneous emails to Ms Fairclough, Mr Higgins complained that Mr Tillett was impossible to deal with, accusing him of manipulative and aggressive behaviour. By early August 2020, however, they had reached a position where heads of terms were agreed.

28. Pursuant to these heads of terms, Ms Fairclough was to acquire the shares in 99H in return for a cash consideration of £300,000 and her shares in Finsbury and Jusho. Five members of staff would transfer from Jambo to 99H and another staff member would transfer from Finsbury to 99H. In return, three members of 99H’s staff would transfer to Jambo. 99H would take on the leases of premises in Manchester and Bristol. The heads of terms also included provisions for the interim period, prior to any deal being concluded, as follows:

“- Emma Fairclough will become the main contact and ultimate line manager for all staff that are agreed to transfer to 99 Hippos Limited. Robert Tillett, and his representatives, will not communicate [with] them except for administrative/practical purposes.

- Robert Tillett will become the main contact and ultimate line manager for all staff that are agreed to transfer to the Jambo Group. Emma Fairclough, and her representatives, will not communicate with them except for administrative/practical purposes.
  - Emma Fairclough will not be replaced in her role as Managing Director of the Jambo Group. An 'Interim' Managing Director may be appointed, but it will be made clear that Emma will be reinstated to her role if the deal falls through. Emma will continue to accrue any bonus and other remuneration owed to her until completion.”
29. In the event of the abortion of the deal, it was agreed Ms Fairclough would be reinstated as managing director, and all staff would revert to their previous reporting lines.
30. Ms Fairclough and Mr Tillett effected a *de facto* split in accordance with the heads of terms in about September 2020. From that time onwards, Ms Fairclough assumed effective control of 99H and Mr Tillett assumed effective control of the remainder of the Jambo group, including Finsbury and Jusho. Unfortunately, they were never able to reach a final agreement. By early 2021 the negotiations had broken down altogether, but there was never any formal abortion of the deal: Ms Fairclough never resumed her position as managing director of the group, and the *de facto* split simply continued until, by the early summer 99H ceased trading altogether. All activity in Jusho and Finsbury ceased by around the same time.
31. In September 2021, Ms Fairclough began trading through 99G. Mr Tillett continued to trade through Jambo and the other companies he owned (alone or with others). Both of them said that they are currently successfully running educational recruitment businesses independently, via their own companies. None of 99H, Jusho or Finsbury appears to have any continuing business or assets, other than potential claims against one or other of Ms Fairclough and Mr Tillett or (potentially) third parties.

### The witnesses

32. I heard evidence (on Tosi/Mr Tillett's side) from Mr Tillett, Mr Kirk and a Ms Jenni Tew, the office manager of the Jambo group. For Ms Fairclough, in addition to her own evidence, I heard from Mr Higgins.
33. Neither Mr Tillett nor Ms Fairclough was an entirely satisfactory witness, but I consider that both were doing their best to give honest evidence. Mr Tillett had a tendency to avoid answering uncomfortable questions by giving prolix answers on tangential matters, but when a direct question was put to him, particularly by me, he gave in my view a direct and honest answer. An example of that is in relation to his evidence as to his knowledge of the CBILS Loan to which I refer in more detail below. For her part, Ms Fairclough was clearly well versed in the details of the case, and had a tendency to answer by reference to the fact that there were documents which supported what she was saying. On occasion (noticeably in connection with her evidence that Mr Tillett knew of the CBILS Loan) when pressed about her answer it was clear that she was in fact giving a conclusion based on documents she had only seen recently, rather than giving her recollection of what happened at the time. Her

honesty was demonstrated, however, by the fact that she was quick to acknowledge this, and by giving straight answers to other questions against her interest.

34. Neither Mr Kirk nor Mr Higgins was wholly independent from the parties. Mr Kirk is still employed by the Jambo group and Mr Higgins works for some of Ms Fairclough's companies. Mr Higgins was at one point in his evidence initially reluctant to accept the proposition that Ms Fairclough may have been seeking the CBILS Loan in part at least to fund the purchase of Mr Tillett's shares. In the end (since the loan was not used for that purpose) this issue did not go anywhere, and I do not need to address it further in this judgment. I nevertheless find that both he and Mr Kirk were doing their best to assist the court with their honest recollections. The same goes for Ms Tew.

### The Issues

35. The issues canvassed in the evidence ranged far and wide over the personal and business relationship between Ms Fairclough and Mr Tillett. The pleaded issues, however, are contained within a much narrower compass. The parties rightly accepted that the trial of this action must proceed on the basis of the pleaded issues.
36. At the start of the hearing, Counsel agreed that the following were the essential issues:

#### *The first petition (Tosi's petition in relation to the affairs of 99H)*

- (1) Whether Mr Tillett was excluded from 99H (principally from about September 2020 onwards).
- (2) Whether Ms Fairclough acted in breach of duty by causing 99H to enter into a coronavirus business interruption loan scheme loan with Iwoca (the "CBILS Loan") in September 2020, without Mr Tillett's knowledge.
- (3) Whether Ms Fairclough misappropriated the proceeds of the CBILS Loan.
- (4) Whether Ms Fairclough traded her new company, Group Eleven from about November 2020 without making it clear that it was not 99H.
- (5) Whether Ms Fairclough failed to enforce restrictive covenants of employees who left 99H.
- (6) Whether Ms Fairclough diverted income from 99H to Group Eleven.
- (7) Whether Ms Fairclough used company money to fund litigation.
- (8) Whether Ms Fairclough was in breach of duty by conspiring to operate a new business.

#### *The second petition (Ms Fairclough's petition in relation to the affairs of 99H)*

- (1) Whether profits were wrongly diverted to Jambo through the system of inter-company charges.



- (2) Whether Mr Tillett caused funds to be misappropriated by 99H in favour of Jambo.
- (3) Whether Mr Tillett sought to sabotage 99H's financial interests, by attempting to get Iwoca to call in the CBILS Loan.
- (4) Whether Mr Tillett sought to prevent 99H trading by interrupting support services and supplier sabotage.
- (5) Whether Mr Tillett wrongly refused to sign 99H's accounts.
- (6) Whether it was Mr Tillett's behaviour that caused the breakdown in trust and confidence between him and Ms Fairclough, thus leading to deadlock.

*The third petition (Ms Fairclough's petition in relation to the affairs of Finsbury and Jusho)*

37. The issues on the third petition largely reflect the issues on the second petition, the key issues being
  - (1) Whether profits were wrongly diverted to Jambo through the system of inter-company charges.
  - (2) Whether Mr Tillett caused funds to be misappropriated from Jusho and/or Finsbury in favour of Jambo.
  - (3) Whether Mr Tillett deliberately caused Finsbury to cease trading, thereby damaging the value of Ms Fairclough's shares.

The law

38. In order to obtain any remedy under s.996 of the 2006 Act, it is necessary to establish that "the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or some part of its members (including at least [the petitioner])", or that some actual or proposed act or omission of the company would be so prejudicial: s.994(1)(a).
39. Both parties described the law applicable to this case as straightforward and uncontroversial, citing the well-known case of *O'Neill v Phillips* [1999] 1 WLR 1092 for the guiding principles.
40. I need do no more than refer to the summary of these principles by Patten J in *Grace v Biagioli* [2005] EWCA Civ 1222, at §61:
  - “(1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable;

(2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, 'consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith' (see [1999] 2 BCLC 1 at 8, [1999] 1 WLR 1092 at 1099); the conduct need not therefore be unlawful, but it must be inequitable;

(3) Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;

(4) To be unfair, the conduct complained of need not be such as would have justified the making of a winding-up order on just and equitable grounds as formerly required under s 210 of the Companies Act 1948;

(5) A useful test is always to ask whether the exercise of the power or rights in question would involve a breach of an agreement or understanding between the parties which it would be unfair to allow a member to ignore. Such agreements do not have to be contractually binding in order to found the equity;

(6) It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder.”

41. It is an essential pre-requisite of establishing liability under s.994 that the conduct found to be unfairly prejudicial is in respect of the affairs of the company: see, for example, *Re a Company (No 001761 of 1987)* [1987] BCLC 141. That is particularly relevant here in circumstances where – as I have already noted – the Jambo group comprised companies under different ownership, but whose financial affairs were managed largely on a group basis, and where there was inherent risk of conflicts between the different entities.
42. I will address each of the alleged incidents of conduct said to constitute unfair prejudice in the petitions in turn.

### The first petition

#### *Exclusion of Mr Tillett from the business*

43. Tosi claims that Mr Tillett was wrongly excluded from involvement in the management of 99H. This claim is in my judgment hopeless. Aside from the fact that there is no pleaded basis (such as quasi-partnership) for the assertion that Mr Tillett had any legitimate expectation to be involved in the management of 99H, it fails for the simple reason that Mr Tillett had for many years prior to the presentation of the first petition not sought to be involved in its management.
44. As I have noted above, Mr Tillett left Ms Fairclough in control of the whole group when he left for a sabbatical in 2015 and, on his return, was content to leave her running 99H while he focussed on other matters. He said in evidence that his role during that time was to be there if needed. Accordingly, his lack of involvement in management was due to his own choice, and not because he was excluded by Ms Fairclough.
45. While he said that he began to feel marginalised after his return from his sabbatical year, I am satisfied that this was a reference to his personal relationship with Ms Fairclough, and the fact that she refused to have any conversation with him on personal matters, limiting her communications to strictly business matters. He said that this began when Ms Fairclough met Jack Walsh, whom she later married. It was clear from various asides from Mr Tillett during the course of his evidence that he has no liking for Mr Walsh. This reinforced his choice not to be involved in the management of 99H, but did not in my judgment constitute exclusion of him.
46. From the summer of 2020 onwards, his lack of any involvement in the running of 99H was pursuant to the *de facto* split of the group pursuant to the interim arrangements (which, as I have noted, never in fact came to an end) agreed in the heads of terms.
47. When it was put to Mr Tillett in cross examination that as part of this *de facto* division the intention was that they would each have responsibility for the finances of their respective separate parts of the business, he suggested he was not involved in the “nitty gritty” but did not dispute the proposition. In fact, it appears that each of them chose to have no real involvement in the finances of the other’s part of the business from September 2020 onwards.
48. Mr Tillett accepted in evidence that the first time that any intimation was given to Ms Fairclough that he wished to be involved again in the management of 99H was in his solicitor’s email of 20 October 2022, which informed Ms Fairclough’s solicitors “as a matter of courtesy ... that Mr Tillett, in his capacity as a Director, is going to rejuvenate 99 Hippos Ltd as a trading entity and a brand.” This was a year after the first petition had been presented, and at a time when 99H had long ceased trading and had no business or assets to manage.
49. Accordingly, I reject the contention that Mr Tillett was ever excluded from the management of 99H.

### *The CBILS Loan*

50. It is Tosi’s contention that Ms Fairclough caused 99H to borrow £350,000 via the CBILS Loan without any knowledge or approval of Mr Tillett. It was also asserted in the first petition that Ms Fairclough had caused 99H to open a bank account for 99H without Mr Tillett’s knowledge or approval.

51. The latter contention is not pursued, rightly in the face of clear documentation showing that Mr Tillett and Mr Kirk (who Mr Tillett described as “my man” in the negotiations for the split with Ms Fairclough) were well aware that a new bank account was to be opened by 99H in about September 2020.
52. Ms Fairclough maintained that Mr Tillett was aware of the CBILS Loan at the time it was taken out, but accepted in cross-examination that this was based only on her analysis with hindsight of the documents in the case. She not only accepted that she was not aware at the time whether Mr Tillett knew about the CBILS Loan but that she actively wanted him *not* to know about it (because she was concerned that he would cause any funds received by 99H to be transferred to his companies).
53. This complaint needs to be seen in the context that pursuant to the *de facto* split in responsibilities under the heads of terms, each side of the business would be financially independent from the other. Accordingly, 99H would no longer have the benefit of the support services provided by Jambo and would cease to be entitled to share in Jambo’s profits. It was obvious that 99H would therefore need its own source of funding.
54. Despite the fact that Ms Fairclough sought to keep the CBILS Loan secret from Mr Tillett, I am satisfied that Mr Tillett did in fact know that 99H intended to borrow a substantial amount of funds via a CBILS loan. The most compelling evidence of this is an email from Mr Higgins to Mr Tillett dated 3 September 2020, shortly before the CBILS Loan was entered into.
55. The first part of this email refers to a discussion between Mr Higgins and Mr Tillett earlier that week about the need for 99H to be in control of its own bank account “which you didn’t have any complaints about and I am grateful for your offer to provide your ID documents...”. The second part of the email is headed “Bank loan”, and starts with the following sentence: “Tom [Kirk] raised the issue of Emma running off with the £250k loan once received”, and provides reasons why he should not be concerned about this. Mr Higgins then explained that although, if Mr Tillett was still not satisfied, it might be possible to hold some of the loan money in an account until the deal was done, this would create its own problems; “Firstly, the CBILS money is really meant for working capital. If the loan becomes a sticking point we can re-visit it later in the process. However, I can tell you that if I thought someone was going to do a runner I would not even be acting for them. For another thing I am relying on that £250k to pay my fees.”
56. Mr Higgins explained that the reference to “£250k” was because that was the amount of money which was being sought by way of a CBILS Loan. The sum was later raised to £350,000 because on receipt of the application the larger sum was offered by Iwoca.
57. In closing argument, Mr Perhar (who appeared for Tosi and Mr Tillett) suggested variously that this email was referring to a loan to Ms Fairclough personally, or that Mr Higgins was seeking *permission* for a loan to be taken out by 99H and that no permission was ever granted, or that the reference to “the CBILS money” was to something other than the £250,000 bank loan referenced in the email.

58. He submitted that given that Ms Fairclough admitted that she did not want Mr Tillett to know about the CBILS Loan I should prefer Mr Tillett's evidence that he did not know about it to that of Ms Fairclough. The problem with that submission is that in cross-examination, while Mr Tillett could not remember the conversation with Mr Higgins that clearly preceded this email, and while he was initially reluctant to give a clear acknowledgment of this, he accepted that he *did* know that Ms Fairclough was looking to obtain a loan for 99H; that Mr Higgins' email was clearly referring to a loan to 99H, not to Ms Fairclough personally; and that he did in fact understand at the time that she was looking to do this via a CBILS Loan. This is consistent with the obvious fact, as I have pointed out above, that 99H would need an alternative source of funding once the *de facto* split was implemented.
59. For the above reasons, I find that Mr Tillett was aware that Ms Fairclough was looking to obtain a CBILS Loan for 99H, and was content for her to do so. I accept that this does not necessarily mean that he knew of the amount being borrowed (the only evidence being that he was told it would be for the lesser sum of £250,000), or that it had in fact been obtained. Given, however, the separation of the financial affairs of 99H, and his lack of involvement in them from September 2020 because of the interim arrangements under the heads of terms, I do not consider there is anything sinister in that.
60. In fact, in closing Mr Perhar accepted that, even if entering into the CBILS Loan constituted a breach of duty, it was not unfairly prejudicial conduct in itself and that what was alleged to be prejudicial conduct was the misuse of the proceeds (which I address under the next heading).
61. I also note that Mr Tillett said that he does not in fact have a problem with the fact that 99H was looking to borrow money, and that his complaint was that his personal details were used without his knowledge to enable 99H to obtain the CBILS Loan. Although (as the first part of the email from Mr Higgins made clear) Mr Tillett had agreed to provide his ID documents to enable a bank account to be opened, he said that he did not know that they were to be used to obtain a CBILS Loan.
62. In view of Mr Perhar's acceptance that entering into the CBILS Loan, even if done without Mr Tillett's knowledge, was not itself unfairly prejudicial conduct, I need not determine whether – as Mr Tillett alleges – his personal details were used in an underhand manner. In the event, no prejudice would have been caused to Tosi as shareholder of 99H even if they been so used.

#### *Misappropriation of the proceeds of the CBILS Loan*

63. The CBILS Loan was paid into the new bank account which Ms Fairclough set up for 99H, with Coconut Bank. Shortly afterwards, Ms Fairclough transferred the proceeds (in tranches of £9,999) into her personal bank account. Unsurprisingly, when Mr Tillett discovered this, it excited his suspicions.
64. Ms Fairclough has, however, disclosed her bank statements for the following months showing payments from her personal account to 99H's Coconut account, and from her personal account to fund business expenses of 99H. These payments are reflected in a new directors' loan account, detailing debits and credits between Ms Fairclough and 99H as from September 2020. I was not taken through these in detail at the hearing,

because Mr Perhar accepted that they demonstrate that the full amount of the CBILS Loan was applied for 99H's benefit over the course of the following months. In light of this, Mr Perhar did not pursue the allegation as to misappropriation of the proceeds of the CBILS Loan, and I need not consider it further.

*Trading Group Eleven without making it clear that it was not 99H*

65. In the first petition, it is pleaded that Ms Fairclough passed off the goodwill and reputation of 99H to her own company, 99G. Mr Perhar acknowledged, however, that no formal claim in passing off is made. Rather, the complaint is that Ms Fairclough traded her new company without making it clear that it was not 99H.
66. Mr Perhar pointed to the fact that invoices were submitted to third parties from September 2020 onwards with "99 Hippos" in the top right hand corner and "99 Group" in the top left hand corner. These were, however, invoices issued by 99H, not 99G, and payments made pursuant to them were paid into 99H's bank account. Accordingly, this does not constitute any evidence of Ms Fairclough trading 99G and passing it off as 99H: on the contrary, it evidences 99H trading, albeit under a new branding which included the name 99 Group.
67. Ms Fairclough's evidence is that although she incorporated 99G in September 2020, this was initially done so as to create a new holding company intended to sit above 99H when the purchase of Mr Tillett's shares was finalised, with a view to rebranding the business as 99 Group. In the meantime, she implemented a partial rebranding of 99H so as to include reference to 99 Group. She said that she did not trade through her new company until a year later, by which point 99H had ceased trading and the name of her new company had been changed to Group Eleven. I accept this evidence, which is corroborated by the evidence of 99H trading throughout that period (see above) and by the fact that it was her unchallenged evidence that 99G did not have a bank account until September 2021.
68. Accordingly, this ground of complaint also fails.

*Failure to enforce restrictive covenants of employees who left 99H.*

69. This ground was not seriously pursued at trial. Ms Fairclough was not cross-examined about it. In closing argument, Mr Perhar accepted that the point went nowhere because, although Ms Fairclough admitted that she had done nothing to stop staff leaving, it related to staff members who resigned at around the point that 99H ceased trading. There was accordingly no business that remained to protect by the enforcement of restrictive covenants of departing staff members.

*Diversion of income from 99H to 99G and conspiring to operate a new business*

70. The broad argument developed in Tosi's skeleton argument for trial, so far as the first petition is concerned, is that Ms Fairclough conspired from the beginning of 2020 to start a new business through her own company (which, in the event, was 99G) and that this was accomplished by secretly obtaining the CBILS Loan, without Mr Tillett's knowledge, and using the proceeds for that new business.

71. This broad argument fails in light of my conclusion that Mr Tillett knew that 99H was seeking funding via a CBILS loan and that 99G did not start trading until September 2021, and in light of Tosi's acceptance that the proceeds of the CBILS Loan were not misappropriated.
72. In closing argument, therefore, Mr Perhar focused on these two aspects of allegedly unfairly prejudicial conduct. He submitted that, although Ms Fairclough may initially have genuinely intended to reach a negotiated agreement with Mr Tillett, by around June or July 2020 she knew she could not raise the money to purchase Mr Tillett's shares and that, from that point onwards, she was not genuinely negotiating to purchase his shares but was planning to set up on her own. He further submitted, while accepting that the proceeds of the CBILS Loan were not misappropriated, but were either repaid into 99H's account, or used to discharge 99H's obligations, she nevertheless used that funding in order to benefit her new business.
73. As to the first point, Tosi points to numerous emails between Ms Fairclough and Mr Higgins, in which the possibility of setting up on her own, instead of pursuing a negotiated settlement with Mr Tillett, was discussed. Email exchanges between them in February 2020 show that they were indeed discussing a variety of options, and that Ms Fairclough had taken at least some preparatory steps in this direction. These options included Ms Fairclough setting up her own business, incorporating a company in the name of a friend to keep it hidden from Mr Tillett and taking staff who wanted to leave 99H with her.
74. It was Ms Fairclough's evidence that she was only exploring options and did not implement plans to trade on her own separately from 99H until the summer of 2021.
75. In assessing her evidence on this point, it is important to note the context of these email exchanges. They followed an offer having been put to Mr Tillett to buy him out of 99H, and communications from Mr Tillett which suggested that he might make life difficult in negotiations.
76. In an email of 10 February 2020, for example, Mr Higgins referred to Mr Tillett's aggressive behaviour with him, and to his belief that "Rob has quite clearly shown that he is not willing to engage with anyone ... Rob's view seems to be that he has the offer and now he will take as much time as he wants to consider it. It is the classic behaviour pattern of a control freak, whereby, he wants everything to be on his terms and to his timetable. I suspect Rob's plan is to just try and last this out for as long as possible." Mr Higgins then said that he thought Ms Fairclough was "exactly right. We should set about starting you up again with another recruitment company. This takes the timetable back into our own hands and as you say, it might incentivise Rob to come to an agreement."
77. In her response dated 12 February 2020, Ms Fairclough referred to "a plan B", which she described as a "safety net on the side at least if all else fails I can just give the shares back and be free." She also referred to a discussion she had had with Mr Kirk in which Mr Kirk had said that Mr Tillett had nothing to come back with to the offer she had made to him, and he was simply saying he would take as long as he wanted.
78. Mr Higgins then advised her as to the pros and cons of taking such steps, reminding her in the process of her duty as a director to do everything in her power for the

success of 99H, and suggesting that the better option might be to resign from 99H first.

79. Importantly, at the end of this email chain, Ms Fairclough referred to something having happened on the previous Friday that may speed the whole thing up, so that she would not be required to follow through with the other options, but instead “just sorting out the purchase of 99hippos”.
80. Reading these email exchanges as a whole, I find that they show only that Ms Fairclough was exploring options in case Mr Tillett refused to negotiate a purchase of the shares in 99H and that, in the end, she chose to negotiate with Mr Tillett so that she could acquire 99H. In cross-examination, Mr Higgins said that he had been happy to talk these points through with Ms Fairclough but that on questions such as whether it was consistent with her duties as a director of 99H to set up in business on her own he was not equipped to advise, so that she would need to take her own legal advice. The rights and wrongs of doing so were not clear cut in circumstances where her co-shareholder and co-director was already the sole or part owner of businesses (including Jambo and Dakota6) that carried on in direct competition with 99H.
81. There was a dispute between Ms Fairclough and Mr Tillett as to whether, as he claimed in cross-examination, she had agreed with any of the staff that they would leave with her at this point (January 2020), or whether, as she claimed, that while she had had discussions with them, no such agreement had been reached. On balance, I consider it more likely than not that Ms Fairclough had at least received informal indications from some of the staff that they would leave with her. I nevertheless find that this was only part of her contingency plans, which were not in fact implemented.
82. Tosi then points to further email exchanges between Ms Fairclough and Mr Higgins in August 2020. On 5 August 2020, for example, she set out some of her thoughts to Mr Higgins. She said: “I know you said don’t stress it’s just really annoying and I feel the number is going up and up again. I am trying to do the right thing in terms of take on two of the offices (cost) so he is not left with an office and no one in it. However we are so far gone – everyone is fed up. I am at the point where I’m like I could set up in Jack’s name, I could start over, the main people would leave anyway and we can hire new.” On 13 August 2020 Mr Higgins emailed her to say that he had been very frank with Mr Kirk the day before: “I told him I was trying to persuade you to walk away and leave the deal. I said, 10 weeks of this isn’t worth it”. He also told her what he would do: get Mr Tillett to put some or all of the money back; pay the staff and his bills and draw the rest out herself; quit as a director; start a new company and “sail off into the sunset”.
83. Again, I find that in these emails Ms Fairclough and Mr Higgins were discussing alternative options, borne of frustration with the negotiations with Mr Tillett, but that nothing then came of these options. As I have already noted, Ms Fairclough – having agreed heads of terms – did in fact trade 99H until the early summer of 2021.
84. Accordingly, I reject the allegations that Ms Fairclough had already determined to set up on her own, independently of 99H, in the summer of 2020 and that she took steps from then on to do so.



85. As to the second point, while it is no longer alleged that the proceeds of the CBILS Loan were misappropriated, it is said that Ms Fairclough used those proceeds as a “springboard” for her new business. As I understood this argument, it was that the contractor payments made by 99H after September 2020 (made with the proceeds of the CBILS Loan) would have attracted a margin, and it was this margin that was diverted to her new business.
86. Ms Fairclough has disclosed invoices issued by 99H from September 2020 onwards. These directed payment to be made to 99H’s account with Coconut. She has also disclosed the Coconut bank statements which identify payments in from third parties.
87. If, as Tosi alleges, Ms Fairclough was diverting income that should have been paid to 99H into her new business, then I would expect, as a starting point, there to be some analysis of the value of the work undertaken by 99H by reference to the disclosed invoices and the payments into 99H’s account, in order to identify any gaps. Tosi has made no attempt to do this, however.
88. Nor has Tosi sought to demonstrate that the nature and level of work undertaken by 99H, as disclosed by the invoices, falls short of the level of work it might have been expected to undertake at the time (so as to suggest that other work was done, and other payments received, beyond that which has been disclosed).
89. Moreover, as I have already mentioned, it was Ms Fairclough’s unchallenged evidence that 99G did not have a bank account until September 2021.
90. In all these circumstances, the claim that Ms Fairclough was diverting income away from 99H is mere assertion without supporting evidence, and I reject it.
91. Tosi suggests that there must have been a diversion of income because notwithstanding the receipt of a substantial sum of money pursuant to the CBILS Loan in September 2020, within nine months 99H was insolvent and unable to continue trading.
92. That is not sufficient, in my judgment, to demonstrate a diversion of funds. Until 2020, 99H had benefitted from being a part of the Jambo group. That ceased in September 2020, from when 99H stood alone, financially. I deal in detail with the intercompany position below in the context of the second petition, but I note here that while in previous years 99H had received substantial sums by way of profit share from Jambo it had received nothing in this respect in 2020, and any entitlement ceased after the *de facto* split. Its bank accounts having been emptied by the time of the split, the CBILS Loan was 99H’s only source of funding (apart from Ms Fairclough’s own funds, which she had used in order to enable the September payroll to be met). From then on, the monthly payroll bill would alone have eaten substantially into the CBILS Loan within nine months. Moreover, the Covid pandemic was still causing serious disruption in the education sector, creating a very challenging business environment for 99H for the remainder of 2020 and into 2021. Finally, as I discuss below in the context of the second petition, the immediate cause of 99H ceasing to trade was the loss of staff, most of whom resigned in around May or June 2021.

93. In closing argument, Mr Perhar submitted that it was “believed” by Mr Tillett that Ms Fairclough was the controlling mind behind Otto Associates, a business set up by Jack Walsh in September 2020. He accepted, however, that there was no evidence for this, save perhaps for the fact that Mr Higgins now provided some accounting services for Otto Associates and for some other companies that Ms Fairclough owns (whereas he does not do so for another company belonging to Jack Walsh, Henry Blue). This proves nothing. Accordingly, in the absence of any evidence to support it, I also reject the claim that Ms Fairclough had effectively set up in business, through Jack Walsh’s company, in September 2020.

*Use of company money to fund litigation*

94. Ms Fairclough acknowledges that she used 99H’s money to fund her solicitors’ costs in respect of proceedings commenced by Mr Tillett/Tosi in early 2021 relating to a proposed derivative action. She subsequently accounted for these, however, within her directors’ loan account which (as I have already noted) was in credit by early 2022. Any initial breach of duty was therefore remedied. No unfairly prejudicial conduct is made out on this ground.

*Conclusions on the first petition*

95. For the above reasons, I find that none of the grounds of unfairly prejudicial conduct pleaded in the first petition have been made out. I turn to consider Ms Fairclough’s allegations against Tosi in relation to 99H, in the second petition.

The second petition

*Whether profits were wrongly diverted to Jambo through the system of inter-company charges*

96. This allegation arises out of the system of inter-company charges that operated within the Jambo group, and the profit sharing relationship between Jambo and 99H. It is common ground that Jambo provided back office services to the other companies, including 99H, and that it was reimbursed for doing so via a system of inter-company charges. This did not continue, however, after the *de facto* split which occurred in September 2020. From that point, 99H operated independently from Jambo (as evidenced by the fact that Ms Fairclough sought new funding – the CBILS Loan – and arranged at her own cost new phone and IT systems). It is also common ground that – at least until the *de facto* split in September 2020 – Jambo was obliged to pay 99H 40% of its profits (so as to enable Ms Fairclough to be remunerated).
97. There are two parts to the allegation. The first, as pleaded in paras 15 to 17 of the second petition, is that the intercompany charges were greatly in excess of the market rate for the services in fact provided by Jambo (with 99H being given no discretion whether or not to purchase the services from Jambo) and that the invoicing and payment of intercompany charges were simply a way of Mr Tillett controlling the allocation of profits within the Jambo group to his benefit and at the expense of the other companies in the group, including 99H. On this basis it is alleged that the raising and payment of intercompany charges by Mr Tillett amounted to misappropriation of 99H’s funds, and thus constituted unfairly prejudicial conduct.

98. The second part of the allegation, as pleaded at paras 18 to 20 of the second petition, is that Mr Tillett caused Jambo to cease making payments to 99H pursuant to the profit sharing arrangement, with the intention (it is to be inferred) of causing 99H financial difficulties.
99. I reject the first part of the allegation. No evidence was led by Ms Fairclough as to the value of the services provided by Jambo or the amounts which 99H might reasonably have been charged. Without such evidence, it is simply not possible to conclude that 99H was being charged more than a reasonable market rate for the services which Jambo provided.
100. Mr Wibberley, on behalf of Ms Fairclough, pointed to a number of unexplained features in the documents recording the various inter-company charges, which he said justified ordering an account so that the position could be properly investigated. An account might be an appropriate remedy where a breach of duty has been established, in order to assess the extent and financial consequences of that breach of duty. I do not accept, however, that the various matters to which Mr Wibberley pointed in the documents sufficiently establish that there was a breach of duty giving rise to unfairly prejudicial conduct in the first place.
101. Ms Fairclough also alleges in the second petition that she regularly asked for an explanation of the inter-company charges, but that no explanation has ever been provided. That is not pleaded as a matter which is itself unfairly prejudicial, however, as opposed to being something relied on in support of the essential complaint as to overcharging. For the following reasons, I do not think that she can in any event establish unfairly prejudicial behaviour on the part of the company on this basis.
102. I consider that the claim that she repeatedly sought, but was denied, explanations is overstated. While the impression given in her witness statement was that this was a longstanding issue, in argument at trial it was said that she started asking questions in 2019. The fact that she would have raised concerns at this time is not surprising, as it coincides with Mr Retallick's departure. The only contemporaneous examples of her making enquiries post-date Mr Retallick's departure. The first, an email exchange with Ms Tew in October 2019, shows that there was clearly some difficulty among the accounting staff in deciphering Mr Retallick's processes.
103. The second, an email exchange with Mr Tillett in January 2020, does not take matters much further forward. It refers to Ms Fairclough having tried, a year earlier, to have a discussion about remuneration for "Boss" (the back office team) and what plans there were for shares.
104. While it is true that Ms Fairclough did not invent this system of inter-company charges, since it existed before she became involved as director and shareholder of any of the companies, it was nevertheless something that existed for many years before the breakdown in relations with Mr Tillett. For much of that time she was the managing director of the whole group and, during most of 2015-2016, Mr Tillett was not involved at all, but was on extended sabbatical. If the system of inter-company charges was something that was of concern to her, then she had every opportunity prior to 2020 to carry out a thorough investigation, but there is no evidence that she did so. Neither is there any evidence that, had she done so, she would have been denied any answers.

105. In this respect, I note that on a related complaint that she never saw bank statements, she accepted in cross examination that she had never actually asked any of the accounting staff (who reported to her) to see them.
106. Ms Fairclough's lack of interest in, and oversight of, day to day financial matters is demonstrated by the fact that Mr Retallick was able to defraud the group of £1.5 million during her tenure as managing director. I find that she was content, while the business was doing well and her requests for money were processed without question, to leave Mr Retallick and the other accounting staff to do their job without any serious oversight from her.
107. Accordingly, even if causing 99H to participate in an inter-company charging system that Ms Fairclough did not understand (as it is put in Ms Fairclough's skeleton for trial) was properly pleaded as unfairly prejudicial conduct, I do not accept that it in fact constituted such conduct.
108. As to the second part of this allegation, it is based on the fact that payments from Jambo to 99H in settlement of the profit share obligation ceased to be made in 2019. In Ms Fairclough's skeleton for trial, it was contended that, on Mr Tillett's own figures (being a resume of the financial situation he prepared in August 2020 in the context of the negotiation of the heads of terms), he was simply allowing hundreds of thousands of pounds of debt to accrue in favour of 99H without every paying the same.
109. The document relied on does indeed identify an amount in respect of profit share due to 99H, but yet to be paid, in the sum of £308,000. In the same section of the document, headed "intercompany position", however, it also identifies intercompany charges due from 99H to Jambo in a greater sum, leaving a balance due to Jambo of £78,600. On Mr Tillett's figures, therefore, there was no net payment due from Jambo to 99H at all. Furthermore, in the heads of terms, to which Ms Fairclough agreed in August 2020, the cash consideration which she was due to pay Mr Tillett (totalling £300,000) included an amount of £180,000 (subject to being reviewed for tax purposes) "to repay intercompany balance to Jambo Limited". I note this amount is close to the combination of the net amount due to Jambo according to Mr Tillett's assessment of the intercompany position referred to above, plus an amount of £96,000 said to have been understated in the management charge in an email from Mr Kirk to Mr Higgins of 17 August 2020.
110. This in my judgment sufficiently answers the allegation in the second petition that Mr Tillett failed to procure that Jambo made payments that were due to 99H. It also answers the related complaint that no explanation has been given for that failure. The contention that there was a considerable balance due to Jambo was clearly discussed in the negotiations in August between Mr Higgins and Mr Kirk, and it was reflected in the amount that Ms Fairclough agreed to pay for Tosi's shares in 99H in the heads of terms.
111. While Ms Fairclough now does not accept the accuracy of the figures presented to her in August 2020, the evidence does not enable me to conclude that they are wrong, and more importantly known to be wrong by Mr Tillett at the time, so that it could be said that Mr Tillett was knowingly causing Jambo to withhold payments due to 99H. I bear in mind in this respect that by the summer of 2020 two major events had recently

had a major negative impact on the Jambo group. The first was the discovery of a £1.5 million hole in the accounts as a result of Mr Retallick's fraud, and the second was the Covid pandemic, which caused the long-term closure of most schools with a knock-on effect on the educational recruitment sector. In those circumstances, I cannot assume that just because the financial position in August 2020 was very different from previous years (particularly in terms of the amounts 99H could expect under the profit share arrangement) the figures must have been wrong, and known to Mr Tillett to be wrong.

112. In closing argument, Mr Wibberley sought to demonstrate, by reference to what Mr Kirk claimed was 99H's profit share for 2017 and 2018, the schedules of management charges in evidence and the payments to/from Jambo revealed in 99H's current account statements, that there had been significant overpayments to Jambo in those years. Because, however (as I explain in the next section below), the practice was to move funds around the different entities' accounts depending on immediate cash needs, it is not possible, without a full reconciliation of all bank transfers (both those identified as payments to/from another of the Jambo group entities and those payments into the 99H account from another AIB account) to know whether the conclusion that 99H overpaid Jambo in prior years is justified.

*Whether Mr Tillett caused funds to be misappropriated by 99H in favour of Jambo.*

113. This allegation relates to a particular incident that occurred on 31 July 2020, when £60,000 was transferred from 99H's account to Jambo. In the previous months, the bank statements for 99H's account with AIB show that the account was maintained in credit with a balance of a few thousand pounds, with transfers in from another AIB account (ranging from £5,000 to £25,000) in order to meet expenses as they arose. On 24 July 2020, £60,658.82 was received into the account from HMRC under the Covid furlough scheme. It was this amount (approximately) that was transferred to Jambo a week later.
114. Tosi seeks to justify this payment on the basis that it was paid on account of management charges due from 99H to Jambo, as per an invoice dated 30 June 2020 referring to "Management Charges 2019 – Interim Charge".
115. Given the role of Jambo in providing back office services to the other companies in the Jambo group, the inter-company financial position was complex, and made more so by Mr Retallick's fraud.
116. Mr Kirk's evidence (which I accept as being broadly consistent with the contemporaneous documents that I was shown) is that there were two different aspects to keep in mind when considering the inter-company position as between Jambo and 99H. The first was the accounting position, based on the management charges due from 99H to Jambo and the profit share due from Jambo to 99H. The second was the movement of cash. There was no necessary correlation between the two. 99H did not actually pay Jambo for management charges as and when incurred, and Jambo did not actually make regular payments due in respect of profit share to 99H. Instead these were generally offset against each other, resulting in a net sum due for the year in one direction or the other. As to cash transfers, the practice was to move cash between entities in the group depending on which entity needed it most at the time. Sometimes the transfer would respond to a particular invoice, but

sometimes it would simply be treated as a payment on account, pending reconciliation of the inter-company position.

117. Prior to March 2020, 99H's bank statements show significant payments to Jambo each month, as well as payments to Brolly (which was in charge of payroll for employees other than the recruitment staff working for 99H). The statements also show occasional payments going the other way, albeit in smaller amounts, as well as numerous payments to/from Jusho and Finsbury. From March 2020, however, payments to Jambo ceased, as did the other inter-company payments, apart from payments to Brolly.
118. The explanation for this is as follows. On 5 March 2020, Ms Fairclough emailed the finance team at Jambo, copying in Mr Kirk, referring to various inter-company transfers that occurred in January 2020, which she described as "all a bit strange", saying:
- "With that being said, I no longer authorise any transfers of cash from Finsbury, Jusho or Hippos to each other, if one needs money, please let me know why and I will liaise with Tom [Kirk] where best this to come from. To be clear no money is to be transferred from any of the 3 above companies to each other or anywhere else" (emphasis added).
119. On the same day, Ms Tew emailed Ms Fairclough and Mr Tillett, to seek clarification as to payments to be made to Brolly in respect of payroll. She noted that:
- "With Brolly, we pay them via an account transfer from each company, whereas the other umbrella companies we pay by a file. Are you happy for us to authorise these account transfers? We only ask as it will show as an account transfer on the bank and you have asked us not to do account transfers from the companies below. But this is not just to transferring cash to Brolly, it is for payroll."
120. Ms Fairclough responded:
- "Future happy to pay Brolly when cash is available with invoice so yes you don't need to check again for Brolly. It's basically paying an invoice, so a supplier, not a bank transfer of cash for no reason."
121. Both Ms Tew and Mr Kirk said that they understood this embargo on bank transfers to have been intended to relate only to the inter-company bank transfers that had previously occurred so as to ensure that cash was moved to the particular entity that needed it from time to time, as explained by Mr Kirk (as I set out above). It did not apply, therefore, to a payment other than an account transfer, such as a payment in response to a specific invoice. The email exchange from 5 March 2020 was put to Ms Tew in order to show that she cannot have understood there to have been such a distinction, on the basis that if she had, she would not have been asking Ms Fairclough's and Mr Tillett's permission to transfer cash to Brolly in order to pay an invoice.
122. In my view, that email exchange supports Ms Tew's and Mr Kirk's evidence on this point. Ms Tew made it clear in her email that she was only asking about the payment

to Brolly because it would appear as an account transfer on the 99H bank account, even though it was a payment specifically required in order for Brolly to meet the payroll.

123. Following that clarification, as I have noted, the only inter-company payments out of 99H's bank account thereafter, until 31 July 2020, were to Brolly.
124. Ms Fairclough's case in relation to the transfer to Jambo on 31 July 2020 is, first, that it was contrary to the embargo placed on inter-company transfers and, second, it caused 99H to have insufficient funds to pay the September payroll, which she was required to fund herself.
125. As to the first point, when Ms Fairclough discovered, in early August, that the payment had been made, she complained and sought an explanation. In an email dated 12 August 2020, asking Ms Tew for an explanation, she noted that Mr Kirk had said he knew nothing about it. Mr Kirk accepted that, although he did not remember the conversation, he probably said that to her, and he accepted that it was not true, as he was fully aware of the payment and the reasons for it. He also accepted that he knew that Ms Fairclough, given the embargo on transfers, would probably not have agreed to it.
126. Mr Tillett himself sought to distance himself from the payment, saying that it was something done by Mr Kirk, Ms Tew and others responsible for the financial functions within the business. While I accept that Mr Kirk was generally authorised to carry out inter-company transactions, I do not accept that Mr Tillett was unaware of this payment. In circumstances where all payments to Jambo had ceased since March 2020, it was clearly an unusual payment, and one of which (as Mr Kirk accepted) Ms Fairclough was unlikely to approve. Mr Tillett's knowledge of the payment, and reasons for it, is evidenced by an email from Mr Kirk to Ms Fairclough dated 17 August 2020, headed "Rob thoughts". Although ostensibly written by Mr Kirk, the language of the email is clearly that of Mr Tillett. There are various references to "I" or "me" which can only refer to Mr Tillett. The second bullet point reads:

"You'll note before this I also required the intercompany balances to be paid, as I do with all companies where they owe Jambo monies for services given at cost. With 99 Hippos Limited specifically, £183,000 was already owed and there was more to be invoiced up to 30 June 2020, albeit there were amounts still to be invoiced by 99 Hippos to Jambo too (known as the "profit share"). On the basis 99 Hippos Limited paid £60,000 to Jambo, the matter is at a satisfactory close for me, but does not impact the value I have put on the business above. The valuation is in respect of the expenses you owe, my Directors Loan Account and the goodwill you'd be acquiring – it is not my intention to sell you my shares and you take surplus Net Assets with you, else you'll need to add 50% of that as well. Without this we would not have accelerated toward a deal in principle, as the parties were too far apart, and I'd have instead issued a Statutory Demand and I'm no longer prepared for you, on behalf of 99 Hippos Limited, to demand services and goodwill from Jambo and not pay the associated costs."

127. The next day, Mr Tillett emailed Ms Fairclough directly, again justifying the payment of £60,000 to Jambo:
- “I haven’t randomly taken £60k. The previous cash transfers were only to part-cover incurred costs on behalf of those businesses. The £60k is against a cost owing of £180k yet we’re not talking about the remaining £120k. I don’t think it’s fair and reasonable to bury heads in the and pretend that Jambo doesn’t pay for the 95% of services received by Hippos.”
128. Against that background, Mr Kirk’s evidence was that the payment of £60,000 made on 31<sup>st</sup> July was: (1) believed to be due to Jambo on account of management charges which were by then due to Jambo; (2) needed by Jambo to fund ongoing costs which it had been paying on behalf of 99H; and (3) outside the embargo on inter-company transfers, because it was paid pursuant to an invoice.
129. I accept that the first point is correct. It accords with the conclusion I have reached above as to the net inter-company position between Jambo and 99H, as understood by Mr Tillett and Mr Kirk at the time, and as (at least in principle) agreed between Ms Fairclough and Mr Tillett in the heads of terms.
130. As to the second point, Ms Fairclough’s solicitors had sought disclosure from Jambo, shortly before trial, of its bank statements in order to test Tosi’s case that Jambo was indeed in need of funds. In response, Tosi provided heavily redacted bank statements for Jambo’s current account with AIB. In the course of the cross-examination of Mr Kirk, however, it became evident that these statements were of no use at all, since Jambo would draw down on a different account (the invoice discounting account) to fund the current account, but no bank statements for the invoice discounting account had been produced. Tosi’s disclosure in this respect was, as Mr Wibberley submitted, clearly deficient. As against that, however, I consider that it is inherently likely, in view of the extremely difficult trading conditions facing the group in the second quarter of 2020 (the first national lockdown having commenced on 23 March 2020), that the cessation of any inter-company payments from 99H to Jambo since March 2020 had left Jambo with insufficient funds to meet its ongoing costs.
131. As to the third point, while I accept the evidence as to the distinction drawn between account transfers and other payments out of 99H’s account, and while the payment to Jambo of £60,000 could technically be defended as a payment pursuant to an invoice, I consider that such a payment was clearly against the spirit of the embargo put in place by Ms Fairclough in March 2020. Moreover, I find that Mr Kirk and Mr Tillett were aware that it was against the spirit of that embargo (as demonstrated in particular by Mr Kirk’s lack of candour with Ms Fairclough over the payment), and that the invoice issued by Jambo, while genuine, was created in order to comply with the letter, but not the spirit, of the embargo.
132. As to Ms Fairclough’s second complaint, that this prevented 99H being able to make the payroll payments in September 2020, while it is true that, had the money not been transferred to Jambo, it is likely that it would have been available for 99H’s payroll in September, that is not a complete answer.



133. First, as I have already noted, the previous practice had been to keep a relatively small balance in 99H's current account with AIB, transferring funds in (from another AIB account, which I take to be the invoice discounting account from which Mr Kirk said he would draw down funds) where necessary to meet expenses, including its own payroll.
134. Second, that is precisely what happened in August 2020, nearly £20,000 being paid into 99H's account before the payroll was due on 14 August.
135. Third, further sums were paid in (also from the AIB account) in early September to enable payments to suppliers to be met, including payment for Mr Higgins's fees (for which Mr Higgins thanked Mr Tillett in an email dated 3 September 2020).
136. Thereafter, the de facto split between 99H and the other companies came into effect. That was why 99H needed its own bank accounts and bank loan, and why Ms Fairclough herself had to provide funds to pay for things which were previously supplied by Jambo. This also meant that 99H now had to find the funds to meet the next payroll, due in mid September.
137. In my judgment, therefore, the immediate cause of the lack of funds for payroll in September 2020 was the fact that by then Ms Fairclough and 99H were "on their own". While Ms Fairclough was required to fund the payroll personally, this was for a matter of only a few days before the CBILS loan proceeds were received.
138. While I have found that the payment of £60,000 breached the spirit of the embargo placed by Ms Fairclough on inter-company funds, the fact remains that according to the figures that were shared between the parties at the time, Jambo was owed substantially more than that. Jambo had been incurring the cost of back office expenses on behalf of 99H, with no payment having been made for some months.
139. Once the transfer came to light, these points were aired in email communications involving Mr Tillett, Mr Kirk, Ms Fairclough and Mr Higgins. Ultimately, it was Ms Fairclough's position that – notwithstanding that she could have sought to renegotiate the purchase price for Mr Tillett's shares on the basis that there was £60,000 less cash in the business – she was prepared to maintain the price at £300,000. In effect, therefore, Ms Fairclough decided to accept that the payment had been made and move on so that she could get on with running 99H without Mr Tillett's involvement as soon as possible.
140. In my judgment, taking all these factors into consideration, I do not think that the payment of £60,000 to Jambo on 31 July 2020 was conduct that in fact prejudiced Ms Fairclough, or did so unfairly.
141. The second petition also contains an allegation that, thereafter, Mr Tillett caused payments from customers into 99H's account to be immediately paid out to Jambo. In fact, there is only one further payment to Jambo identified in 99H's current account statement, and this followed a payment into the account, not from a customer, but by way of transfer from the AIB account. As such, it appears to be a rare example of 99H being included within the inter-company group transfer process notwithstanding the de facto split. Without more, I am not prepared to infer that this isolated incident was instigated by Mr Tillett with a view to denuding 99H of funds. Even if it was, by

this time 99H was under the sole effective control of Ms Fairclough, who could have taken – but did not take – steps to protect 99H’s interests and, as such, it would be difficult to regard this as unfairly prejudicial conduct of the company.

*Whether Mr Tillett sought to sabotage 99H’s financial interests, by attempting to get Iwoca to call in the CBILS Loan.*

142. Ms Fairclough pleads in the second petition that Mr Tillett – when he discovered that the CBILS loan had not been paid into 99H’s account with AIB bank – telephoned Iwoca claiming that 99H was insolvent and would be unable to repay the loan. Iwoca then contacted Ms Fairclough. In an email dated 17 May 2021, Iwoca sought information from 99H’s accountants, including bank statements, latest accounts, management accounts and a response to the statement that the agreement with AIB was in breach.
143. This is pleaded as an alleged *attempt* to sabotage 99H, which failed because Ms Fairclough managed to persuade Iwoca not to call in the loan. In those circumstances, I do not consider that this caused Ms Fairclough to suffer any prejudice in her capacity as member of 99H.
144. Mr Tillett admits that he contacted Iwoca, and says that it was because the CBILS loan had been taken out without his knowledge or agreement, and he was concerned that 99H, of which he was still a 50% shareholder and (in law at least) a director, had been burdened with £350,000 of debt without his knowledge or agreement and, worse, the money had been transferred out of the company.
145. For reasons which I have set out above, in dealing with the first petition, I have rejected Mr Tillett’s claim that he was unaware that Ms Fairclough was intending to enter into a CBILS loan, but concluded that he was nevertheless not aware that a CBILS loan had in fact been acquired and that it was in the sum of £350,000. Moreover, Ms Fairclough accepts (and indeed avers in the second petition) that Mr Tillett only became aware shortly before he contacted Iwoca that the proceeds of the CBILS Loan had been paid into her personal account. Although *de facto* control of 99H had by this time been in the hands of Ms Fairclough for some nine months, he remained a *de jure* director and was entitled to be concerned at what (at least on the face of it) appeared to be misappropriation of the proceeds of the CBILS Loan.
146. Moreover, while I was not taken to any response from Ms Fairclough to Iwoca’s email, she would clearly have faced significant difficulties in complying with their requests. It would have been difficult to provide bank statements, given the unorthodox way she had transferred the proceeds of the CBILS Loan into her personal bank account (irrespective of the fact that, as Tosi now accepts, the proceeds were ultimately applied for 99H’s benefit). As to the position of AIB, I note that, according to a letter from AIB on 9 June 2021, they had already – in February 2021 – indicated an intention to terminate 99H’s facility with them, and did then terminate it in June. They did so on the basis that no trading/invoicing had been processed through the facility since November 2020, and no reconciliations or financials had been supplied and no audits allowed. Irrespective of Mr Tillett’s actions in contacting Iwoca, it is Ms Fairclough’s evidence that the CBILS Loan proceeds had indeed been exhausted by this time, that most of the staff resigned then or shortly afterwards, and that without funding and staff 99H had no alternative but to cease trading. Subject to the

possibility of there being claims against one or other of Ms Fairclough or Mr Tillett, or against third parties, I understand it to be common ground that 99H was indeed insolvent.

147. In light of these matters, even if this conduct caused prejudice to Ms Fairclough I consider that it was neither unfair nor conduct to be attributed to the company itself for the purposes of s.994.

*Whether Mr Tillett sought to prevent 99H trading by interrupting support services and supplier sabotage.*

148. This allegation rests on certain specific instances. First, on various dates in August 2020 and September 2020, it is alleged that Mr Tillett caused Jambo's IT suppliers to cut 99H off from its IT access, which prevented 99H's employees from being able to access their emails.
149. In Tosi's reply in respect of the first petition, it was claimed that IT services – supplied by Jambo – were withdrawn in about September 2020 because 99H owed substantial sums and was not paying for them. In the defence to the second petition, it is similarly claimed that Ms Fairclough refused to pay for these IT services, but then averred that Jambo stopped providing them at Ms Fairclough's request. In his witness statement, Mr Tillett agreed that he temporarily suspended 99H's access to emails on 10 August 2020 and said that Ms Fairclough was already refusing to pay for them. He added, however, that this was in response to Ms Fairclough's actions in deleting email accounts for staff who were transferring to Jambo.
150. The second incident involved Ms Tew, who contacted the group's telephony supplier, Pescado, in September 2020. This was shortly after 99H had separately contracted with Pescado. Ms Fairclough contends that Ms Tew told Pescado that if they continued to contract with 99H then Jambo would cease trading with it. Ms Tew admits that she spoke to Pescado, and admits telling them that if they entered into a contract with 99H then Jambo would not renew its contract with Pescado. She says that she felt she had put in a lot of work to create a good relationship with Pescado, which had earned Jambo a discount with them, and did not want 99H to benefit from that discount.
151. Ms Fairclough contends that Ms Tew did this at the instigation of Mr Tillett, which Ms Tew denies.
152. Mr Tillett's actions in causing Jambo to cease providing, even temporarily, IT services to 99H can be seen as petty, but so to some extent can Ms Fairclough's, in simply deleting accounts of employees transferring to Jambo rather than working collaboratively to ensure that email accounts were transferred across. The same is true (if it was instigated by Mr Tillett) in relation to the incident regarding Pescado.
153. None of these incidents amounts, in my view however, to the affairs of the company, 99H, being conducted in a manner which was unfairly prejudicial to Ms Fairclough. They were actions taken by Mr Tillett and others acting on behalf of Jambo, at around the time the *de facto* split was being implemented. Ms Fairclough was focusing on getting 99H running independently from the rest of the group, and without any input from Mr Tillett. Mr Tillett was doing the same with Jambo and the other companies

he retained *de facto* control over. Further, although this caused short term inconvenience to 99H, I do not consider that any actual prejudice was suffered by Ms Fairclough as shareholder.

154. I do not need to resolve, therefore, whether Ms Tew is right to say that she contacted Pescado of her own initiative. For the avoidance of doubt, however, I accept her evidence, maintained under cross-examination, that she did so. In addition to it being supported by the timing of contemporaneous emails, it is consistent with the fact, as was clear from her evidence overall, that she herself had developed an animosity to Ms Fairclough by the middle of 2020 (referring to her conclusion that “[Ms Fairclough] was no longer a friend to me”).

*Whether Mr Tillett wrongly refused to sign 99H’s accounts.*

155. Mr Tillett accepts that he has not signed 99H’s accounts. In his defence, it is pleaded that he could not do so without sight of the bank accounts and other company data upon which they were based, and that he had advice from the company’s accountants that if he doubted the veracity of them or the trading position of 99H, it was a legitimate reason not to sign off on the accounts.
156. Mr Wibberley submitted that these were manifestly bad reasons and that Mr Tillett was simply failing in his duties as a director, because he had available to him the bank accounts and other records relating to the year (2019) to which the accounts related.
157. I do not accept that matters are as straightforward as this. A director signing off on accounts needs to be satisfied as to the state of the company at the date the accounts are signed, to ensure that there are no post-balance sheet events that impact on the financial statements. While the pleading could have been clearer, I do not accept that the need to see records “relating to” the 2019 year end was limited to the bank statements and other records dated before that year end. A director would be entitled to be cautious in this respect where, as here, the company has become insolvent since the year end, and he has had no sight of the up to date information for the company.
158. Accordingly, this ground of unfairly prejudicial conduct is not made out. In any event, no actual prejudice is alleged to have resulted and I do not consider that the conduct, if unfairly prejudicial at all, constituted conduct of 99H.

*Whether it was Mr Tillett’s behaviour that caused the breakdown in trust and confidence between him and Ms Fairclough, thus leading to deadlock.*

159. It is clear that whatever relationship there was between Mr Tillett and Ms Fairclough has long since ceased to exist. There cannot be many clearer cases of deadlock. Moreover, 99H does not have (and has not had for nearly two years) any business or assets, other than potential claims against other group companies, or against Mr Tillett or Ms Fairclough.
160. Mr Wibberley correctly acknowledged, however, that showing deadlock, or cessation of business, is not enough to establish that the company’s conduct is unfairly prejudicial to either Ms Fairclough or Mr Tillett. While these would be enough to justify winding-up the company on the just and equitable ground (as to which, see further below), there is no such thing as no-fault corporate divorce within s.994.

161. In light of this, in the second petition Ms Fairclough pleads that it was Mr Tillett's behaviour which was the cause of the breakdown of their relationship in 2020. She points to occasions when she says that Mr Tillett used rude and abusive language to her, or became aggressive.
162. I am satisfied, on the basis of the references in contemporaneous email correspondence, that Mr Tillett did on occasion lose his temper and, in the process, use offensive language towards Ms Fairclough, and that on at least one occasion he kicked a bag and a chair in frustration at the situation with Ms Fairclough. I am also satisfied (as corroborated by Mr Higgins) that Mr Tillett's behaviour caused difficulties in the negotiations that started at the beginning of 2020.
163. While both parties referred to the long and complex personal history between Ms Fairclough and Mr Tillett, they did so by way of background. These proceedings are not the forum to decide what the nature of that relationship was (e.g. where, as Ms Fairclough contends, Mr Tillett emotionally and psychologically controlled her after the end of their personal relationship in 2009).
164. The short answer to this allegation in my judgment, however, is that these matters are insufficient to establish that the company's affairs were being conducted in a manner which was unfairly prejudicial to Ms Fairclough. In extreme cases, the personal behaviour of one director/shareholder towards another might be sufficient to cause the breakdown in trust and confidence necessary to enable the proper management of the company (such as where one director viciously attacked the other with a hammer: *Re Home and Office Fire Extinguishers Ltd* [2021] EWHC 917 (Ch)), but the conduct in this case does not meet that threshold.
165. Moreover, Mr Tillett's behaviour needs to be seen in the context that Ms Fairclough had excluded him altogether from her personal life for some years, and taken umbrage if he ever began to discuss anything that was not strictly work-related. It also needs to be seen in the context of an aggressive stance taken by Ms Fairclough in early January 2020, in threatening to walk off with the most important staff members, which would effectively have put an end to the business of the group.
166. Alternatively, Ms Fairclough contends that it was Mr Tillett's behaviour that led to 99H being unable to trade from about May 2021. I do not accept this. The reality is that from September 2020 each of Mr Tillett and Ms Fairclough ran the respective parts of the group assigned to them under the interim arrangements, as if each was his or hers alone. Although these were indeed intended to be interim measures, there was no prospect of them being able to recommence running any of 99H, Jusho or Finsbury together.
167. Ms Fairclough contends that Mr Tillett was the cause of the mass resignations of staff. The only evidence called from any of the former employees of the group was that of Zoe Richards (whose evidence was not challenged). She, however, had been employed by Jambo, and had left much earlier. She decided to leave in the summer of 2019, verbally told Mr Tillett of her intention to leave in January 2020 and formally resigned in August 2020. She said that while she and Mr Tillett had always been cordial, there were things that he said to her that, in hindsight, were inappropriate.

168. The resignation letters of certain other former employees were provided in evidence. Of these, only Toby Owen, who resigned in February 2021, and Ben Warren (who appears to have resigned in about May 2021) cited Mr Tillett's behaviour as reasons for resigning. Mr Owen referred to the impossibility of being in the middle of the split between Ms Fairclough and Mr Tillett and, while he cited some angry behaviour of Mr Tillett, he said "This information is not intended to shift blame on Rob in any way..." Mr Warren's email of 6 May indicated that he would resign if Mr Tillett resumed the running of 99H, citing Mr Tillett's inappropriate behaviour towards female members of staff. Ben Smith resigned on 10 May 2021, without giving a reason. Grace Hewitt resigned on 9 June 2021, simply citing problems over the past few months with all of the changes. Darrell Redmond resigned on 10 June 2021, saying "this has nothing to do with you guys. I am just looking to move on and start fresh."
169. Taken together, this evidence does not establish, in my view, that it was Mr Tillett that caused 99H to cease trading in 2021.

*Conclusion on the second petition*

170. For the above reasons, I do not find that the allegations of unfairly prejudicial conduct set out in the second petition are made out.

The third petition

171. There was much less focus on the third petition at trial, reflecting the relative unimportance of Jusho and Finsbury to either of the parties. Neither company appears to have been profitable before the *de facto* split in September 2020. Mr Perhar said in closing, and I did not understand this to be challenged, that there are no accounts for either company and that they never declared dividends.
172. In his defence, Mr Tillett offered to sell his shares in each company to Ms Fairclough for £1. In closing argument on his behalf, Mr Perhar repeated that offer. He did so on the basis that the transfer of the shares would be the only relief obtained by Ms Fairclough in respect of the third petition. Ms Fairclough, however, is not content with that, and wishes the court to order an account against Mr Tillett in respect of the sums wrongfully said to have been paid to Jambo by each of Finsbury and Jambo.
173. Although the third petition contains a variety of allegations as to unfairly prejudicial conduct, in closing argument, the only matters relied on were: first, that Mr Tillett procured any payments received into the bank accounts of Jusho and Finsbury to be paid out in favour of Jambo; and, second, that he damaged Ms Fairclough's interests in Jusho by deliberately causing it to cease trading.
174. As to the first point, the most compelling evidence relates to payments said to be on account of management charges, from each of Finsbury and Jusho to Jambo on 31 July 2020, the same date as the payment of £60,000 on account of management charges was transferred from 99H to Jambo (see above).
175. In Finsbury's case, the amount paid was £84,000, pursuant to an invoice dated 30 June 2020 for "Management Charges 2019 – Interim Charge" in the sum of £70,000 plus VAT. Mr Tillett was shown a spreadsheet identifying the "management charges"

and “recharges” for Finsbury in 2019, showing a total sum for the year of £39,642.39, of which £25,354.38 related to management charges. He was also shown earlier invoices which covered recharges for each quarter of 2019 and a management charge for the first quarter of 2019 (in the sum of £6,304.72 plus VAT). On the face of these documents, a sum less than £20,000 remained due to Jambo from Finsbury in respect of management charges for 2019. When this was put to Mr Tillett he could provide no explanation for the large discrepancy between the amount due in respect of management charges for 2019 and the amount paid in July 2020. He said he had never looked at these invoices. No other evidence was led, and no adequate explanation was provided at any point in the trial, on Mr Tillett’s behalf.

176. In Jusho’s case, the amount paid was £36,000. The equivalent spreadsheet for management charges and recharges indicates that a total of £54,801.04 was due for 2019, of which only £6,791.81 related to management charges. Again, no evidence was led, or explanation given, on Mr Tillett’s behalf to justify what, on the face of the documents, appears to be a substantial overcharge.
177. I have dealt above at length with the question whether the transfer of funds from 99H to Jambo on 31 July 2020 was contrary to the letter or the spirit of the embargo placed on inter-company transfers in March 2020. In the case of the transfers of funds from Jusho and Finsbury to Jambo on the same date, in the absence of any adequate explanation for the discrepancy between the amount paid and the amount owing in respect of management charges according to the documents I have referred to, I infer not only that there was no proper consideration for these payments but also that they were in breach of the embargo.
178. I have dealt above with Mr Tillett’s knowledge of the payment from 99H on 31 July 2020. I infer for similar reasons that Mr Tillett was aware of these payments from Jusho and Finsbury. In my judgment, these payments did constitute the affairs of each of those companies being conducted in a manner that was unfairly prejudicial to Ms Fairclough as 50% shareholder in them.
179. Mr Wibberley also referred me to bank statements for Finsbury which, he submitted, showed that from August 2020 onwards, Mr Tillett caused Finsbury to make numerous payments to Jambo, himself or other entities controlled by him. In fact, these statements evidence constant circling of funds between group entities including: payments to and from Jambo; payments in from the AIB invoice discounting account and payments out to Brolly. This is consistent with the practice Mr Kirk described of simply moving funds between different entities within the group depending on their cash requirements.
180. It is important to remember that from about August 2020, when the heads of terms were agreed, just as 99H was under the *de facto* control of Ms Fairclough from about August 2020 onwards, Finsbury and Jusho were under the *de facto* control of Mr Tillett. Although Ms Fairclough, in the third petition, complains that Mr Tillett was treating Finsbury and Jusho as if they were his own companies, ignoring her shareholding, that is essentially what she was doing in relation to 99H.
181. The bank statements for Jusho tell a slightly different story. From about September 2020, payments in from customers were followed shortly afterwards by payments out to Jambo. There were also, however, numerous payments back into the account from

Jambo, whenever money was required to pay Brolly. It is again important to recognise that by this stage, Jusho was effectively under Mr Tillett's control and remained part of the Jambo group, and thus remained subject to the system of inter-company cash movements described by Mr Kirk.

182. For these reasons, and without a more extensive investigation into the inter-company accounting position as between Jusho, Finsbury and the other companies in the Jambo group, I am not satisfied that the practice of transferring cash out of their accounts from September 2020 onwards constituted conduct in the affairs of those companies that was unfairly prejudicial to Ms Fairclough.
183. The final point relates to the cessation of trading in Finsbury. Mr Tillett explained in his witness statement that, following the division of staff in September 2020 pursuant to the interim arrangements with Ms Fairclough, there were only two members of staff left working for Finsbury. One of those (Lachlan Brace) left to work for one of Mr Walsh's companies shortly afterwards. That left just Simon Press as the sole employee of Finsbury. Mr Tillett explained that his decision to move Mr Press in about September 2021 was taken predominantly in the interests of Mr Press himself, but also because Finsbury was by then in a protracted dispute and had no manager in place, and it would be difficult to hire others to work alongside the sole remaining member of staff.
184. Mr Wibberley contends, on the basis of this evidence from Mr Tillett, that he chose to cause Finsbury to cease trading, rather than hiring further staff, and that this was unfairly prejudicial to Ms Fairclough. I do not accept this. There is no evidence that Finsbury had any material business by this point. The complaint that Mr Tillett was treating it as his own, and ignoring the fact that it was half-owned by Ms Fairclough, rings hollow in light of the fact that this was precisely what Ms Fairclough did in relation to 99H: both parties acting as if the interim arrangements were permanent. In these circumstances, I do not think that Mr Tillett's behaviour in allowing Finsbury's business to cease rather than take steps to build it up by hiring further staff was conduct which was unfairly prejudicial to Ms Fairclough.

*Relief under the third petition*

185. My conclusion that there was at least some unfairly prejudicial conduct in relation to the affairs of Jusho and Finsbury means that I need to consider what, if any, relief it is appropriate to order. This necessitates having regard to all of the circumstances.
186. Those circumstances include, of particular importance in my view, the following.
187. First, both Ms Fairclough and Mr Tillett operated, from September 2020, on the basis that they were in sole *de facto* control of the companies respectively assigned to them pursuant to the interim arrangements. Until after the first petition was presented, neither sought to become involved in the affairs of the company under the *de facto* control of the other. The third petition was filed many months after the first petition. I strongly suspect that if it had not been for the first petition, the third petition would not have been presented.
188. Second, neither Finsbury nor Jusho has any business or assets, save for potential claims against others. It is also relevant, standing back from the detail of the third



petition, that the same is true for 99H.

189. Third, in practice Mr Tillett and Ms Fairclough have achieved the separation of their business interests that they intended to accomplish via the deal they were seeking to negotiate (albeit in different companies and without payment from Ms Fairclough for the shares in 99H).
190. Fourth, while I have found that unfair prejudice is made out in respect of one aspect of the third petition, the transfers which caused that unfair prejudice were within companies that it was then envisaged would shortly be under the sole control of Mr Tillett, and would pass to him under the heads of terms if a deal was ever finalised.
191. Fifth, although I have not found that other instances of payments between group companies amounted to unfairly prejudicial conduct, the inter-company financial position – as between the companies at the heart of these petitions and the remainder of the Jambo group – remains unclear. That is true for 99H as well as for Jusho and Finsbury.
192. Sixth, however, as I have pointed out, the relationship between Mr Tillett and Ms Fairclough is such that they are incapable of working together at all, whether in order to run a business or to wind down the affairs of the companies. Insofar as there is scope for further investigation of the financial affairs of Finsbury or Jusho (or for that matter 99H), and the possibility of claims against Jambo or other companies in the group, or against Mr Tillett (in relation to the third petition) or against either him or Ms Fairclough (in relation to the affairs of 99H), I consider that it would not be in the interests of either of them, or of the companies themselves (taking into account also the interests of any creditors of the companies) that such investigations and claims should be under the control of either Mr Tillett or Ms Fairclough.
193. In these circumstances, I consider that the appropriate relief under the third petition is to make a winding-up order in respect of Finsbury and Jusho. Such a remedy is rarely awarded under s.996 of the 2006 Act: see *Apex Global Management Ltd v FI Call Ltd* [2015] EWHC 3269 (Ch), but Mr Perhar did not suggest that it was not open to the Court to make a winding-up order in this case. As in the *Apex Global* case (see per Hildyard J at §58), a winding-up order would be “...little more than legal confirmation of the reality that [Jusho and Finsbury have] no viable business nor any remaining purpose.” It is far better, in my judgment, given the lack of any workable relationship between Ms Fairclough and Mr Tillett, that any investigation which it may be financially worthwhile to undertake is done by an independent third party liquidator.
194. I propose to delay making any final order consequent upon this judgment until the parties have had the chance to consider it. I have already noted the (qualified) agreement by Mr Tillett to his shares being purchased by Ms Fairclough for £1. If, notwithstanding my conclusion that a winding-up order would be in the best interests of all, the parties still wish to pursue that purchase, then I do not think it would be right to force a winding-up order upon them. In the absence of such agreement, however, I remain of the view that it is the most appropriate relief to grant in all the circumstances of this case.

Postscript: what should happen to 99H?

195. The same points apply with equal force to 99H. Since I have not found any of the unfair prejudice allegations made out in relation to 99H (either under the first or second petition), I cannot go on to impose any remedy. It seems to me, however, that for precisely the same reasons as I have just mentioned in relation to Jusho and Finsbury, a winding-up order is the obviously right course in relation to 99H. It, too, reflects the reality that 99H has no viable business or purpose.
196. Mr Tillett gave two reasons for wanting to acquire Ms Fairclough's shares in 99H. The first was because he now believes there may be some value in the name. That, however, is easily catered for since Ms Fairclough has no interest in preventing Mr Tillett using the name, which could in any event be easily acquired by him from a liquidator of 99H.
197. The second was because he wished to pursue claims he believes that 99H has against Ms Fairclough. For the same reasons as I have given in relation to the third petition, however, any investigation of potential claims, if and to the extent it is financially worthwhile to do so, is best undertaken by an independent third party. The complete deadlock, and lack of any business, in 99H would seem to provide clear grounds for a winding up on the just and equitable ground.
198. Mr Wibberley indicated that if I concluded that no relief could be granted on the first or second petition, then Ms Fairclough would want time to amend the second petition to seek a winding-up order on the just and equitable ground in the alternative. I propose, therefore, to delay making a final order on the first and second petitions until the parties have had the chance to consider this judgment, and Ms Fairclough has the opportunity to apply to amend the petition in order to seek a winding-up order on the just and equitable ground.