Judgment 24 of 1978

IN THE PRIVY COUNCIL No.17 of 1977

O N A P P E A L

FROM THE FULL COURT OF THE SUPREME COURT OF WESTERN AUSTRALIA

B E T W E E N :

1. CARATTI HOLDING CO. PTY. LTD.

- and -

2. SERGIO CARATTI — Appellants (Respondents)

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- AND -

BERNARDO ZAMPATTI — Respondent (Petitioner)

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal as of right from an order of the Full Court of the Supreme Court of Western Australia (Jackson C.J., Wickham and Brinsden J.J.) made on 7th November 1976 dismissing the Appellants' appeal from the orders of the Honourable Mr. Justice Burt made the 19th September 1975 on a petition by the Respondent under the Companies Act 1961 (W.A.) (hereinafter called "the Act") for orders inter alia that the Appellant Caratti Holding Co. Pty. Ltd. (hereinafter called "the Company") be wound up or alternatively that the Appellant Sergio Caratti (hereinafter called "Mr. Caratti") be ordered to purchase the Repondent's shares in the Company.

p.258
pp.225-229
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pp.1-16

2. By his Petition dated 3rd December 1974 as amended the Respondent claimed orders as set out in paragraph 70 thereof that:

pp.1-16
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p.15 ll.27-p.16 ll.28

(1) The Company be wound up by the Court under the provisions of the Companies Act 1961

p.15 ll.28-30

(2) That it be declared that Article 32 of the Articles of Association is void and of no effect or

p.15 l.31-p.16 l.4

Record

alternatively that the Company by itself its directors its servants and agents be restrained from registering or purporting to register any transfer or transfers of shares held by the Respondent in the capital of the Company pursuant to Article 32.

p.16 ll.16-27 (3) Alternatively to the first order sought that Mr. Caratti be ordered to purchase the shares held by the Respondent in the capital of the Company

p.16 ll.21-26 (4) Alternatively that the capital of the Company be reduced by the payment to the Respondent of an amount equal to 1,500 out of 15,002 part of its shareholders funds by way of consideration for the cancellation of the Respondent's shares in the Company or that it be declared that Article 32 of the Articles of Association did not grant to Mr. Caratti the right to obtain the transfer of the Respondent's shares unless Mr. Caratti shall first have caused the Company to declare, distribute and pay by way of dividend the whole of its distributable reserves on the date of exercise.

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p.16 ll.27-28 (5) Such further or other order as may seem just.

p.204, ll. 16-27

3. In his reasons for judgment dated 4th September 1975 Burt J. summarised the Respondent's claims as follows:

"In general terms these claims are based upon the assertion that

(i) Caratti as the governing director and sole director of the Company has at all times conducted the affairs of the company for his own benefit and not for the benefit of the members as a whole - Section 222(1)(f) of the Act;

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(ii) it is just and equitable that the company be wound up - Section 222(1)(h) of the Act, and

(iii) the affairs of the company are being conducted in a manner oppressive to the petitioner - Section 186 of the Act."

p.205 ll.1-3
p.205 ll.18-28
p.2 ll.13-21
p.210 ll.30-41
p.4 ll.19-35

4. The Company was incorporated on 6th June 1960 with a nominal capital of $200,000 divided into 100,000 shares of $2.00 each. Mr. Caratti was the Founder of the Company its Governing Director and at all material times the holder of the Life Governor's share. The issued capital of the Company was 15,002 shares of $2.00 each. The Respondent held 1,500 shares which was allotted to him on 22nd August 1961. Article 32 of the Articles of Association of the Company provided in part that:

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Record

"During the lifetime of the Founder and whilst he is the registered holder the Life Governor's share, any other member of the Company shall be bound upon the request in writing of the Founder to sell and transfer his share to the Founder or his nominee consideration of the payment of the sum equal to the capital paid upon his said shares. The said sale shall be carried into effect at the Registered Office of the Company on a day appointed by the Founder and if the member makes default the Company may receive the consideration monies on his behalf and the Directors may authorise some Director or officer of the Company on behalf of such member to transfer the said shares to the Founder or his nominee and such transfer shall be effective for all purposes and may be registered by the Company notwithstanding it may not be accompanied by the certificate or certificates for such shares." (The last sentence is hereinafter referred as the self-enforcement provision under Article 32).

5. On 27th November 1974 the Respondent was served with a notice by Mr. Caratti dated 26th November 1974 under Article 32 whereby Mr. Caratti requested the Respondent to sell and transfer his 1,500 shares in the Company to Mr. Caratti as Founder in consideration of the sum of $3,000.00 being a sum equal to the capital paid upon such shares. The notice fixed 10th December 1974 as the date on which the sale and transfer would be effected. On 5th December 1974 the Supreme Court (Jones J.) made an order on the ex parte application of the Respondent restraining Mr. Caratti and the Company from taking any steps to effect the sale and transfer. On 6th December 1974 the Supreme Court (Wallace J.) made an order on the inter partes application of the Respondent the effect of which was to continue the injunction against Mr. Caratti and the Company until the hearing and determination and the Petition.

p.38 ll.25-30

pp.262-263

p.262 ll.11-12
Documents not transmitted

Document not transmitted

6. On 19th May 1975 the Full Court of the Supreme Court (Jackson C.J., Burt and Lavan J.J.,) dismissed an appeal by the Company from the order of Wallace J. but discharged the injunction as against Mr. Caratti on the ground that he was not a party to the petition: Caratti Holding Co. Pty. Ltd. & Anor v. Zampatti (1975) W.A.R. 183.

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Record

pp.203-224 | 7. The Petition was heard by Burt J. who gave judgment on 4th September 1975. The learned judge concluded that the Respondent had established a ground for winding up under both Section 222(1)(f) and 222(1)(h) of the Act and also "that the affairs of the Company are being conducted in a manner oppressive to himself within the meaning of S.186(1) of the Act, that I think being made out in the particular and peculiar circumstances of this case by the giving of the notice of 27th November." After hearing further argument on ancillary matters including the ultimate form of order, the formal order was made on 19th September 1975.

p.223, ll.33-35

p.223, l.35- p.229, l.3

pp.225-229

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8. The Appellants appealed from this order to the Full Court in terms of Notice of Appeal dated 8th October 1976. By Notice dated 9th October 1976 pursuant to Order 63 Rule 9(12) of the Rules of the Supreme Court the Respondent gave notice the while seeking to uphold the order of Burt J. on the grounds on which it was made would contend on the hearing of the appeal that the order should be affirmed on the additional grounds set out therein. The reasons for judgment of the Full Court (Jackson C.J., Wickham and Brinsden J.J.) were delivered by Wickham J. with whom the other members of the Court concurred. The Full Court affirmed the decision of Burt J.

pp.230-244

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pp.245-246

pp.247-257

9. The principal issues raised by this Appeal are:-

(a) Whether in the circumstances the Respondent had an equity to restrain the Appellants and in particular Mr. Caratti from completing the contract for the sale and transfer by the Respondent of his share to Mr. Caratti in terms of Article 32 following the giving of notice thereunder on 27th November 1974, particularly having regard to the self-enforcement provision under Article 32.

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(b) Whether in the circumstances the effect of Mr. Caratti giving the notice under Article 32 (and so constituting a contract between himself and the Respondent for the sale and transfer by the Respondent of his shares to Mr. Caratti in terms of Article 32) was that Mr. Caratti became the owner in equity of the shares with the result that the Respondent had no tangible interest to support a petition to wind up the Company.

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(c) Whether in any event the giving by Mr. Caratti of the notice under Article 32 in the circumstances of this case constituted conduct of "the affairs of

the company" for the purposes of Section 186 of the Companies Act and if so, whether by reason of the giving of such notice in the circumstances the affairs of the company were being conducted "in a manner oppressive" to the Respondent for the purposes of that Section.

10 (d) Whether upon the proper construction of Section 186(2) of the Act the power of the Court to make an order under the Section not only when "otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up", but also if "for any other reason it is just and equitable to make an order (other than a winding up order) under this Section" means that the Court may make an order under the
20 Section (other than a winding up order) in circumstances which would not justify the making of a winding up order on the just and equitable ground.

(e) Whether in the exercise of the discretion of the Court under Section 186 (2)(b) of the Companies Act to "make such order as it thinks fit whether for regulating the conduct of the company's affairs in future or for the purchase of the shares of any members by other
30 members or by the company . . . " the Court was empowered to make or its discretion extended to the making of an order for the purchase by Mr. Caratti of the shares of the Respondent in the Company at a price and upon terms and conditions other than those the subject of the contract constituted in terms of Article 32 and the giving by Mr. Caratti of the notice to the Respondent dated the 27th November 1974.

40 10. The issues arising on this Appeal depend in part upon the following provisions of the Companies Act 1961:-

Section 14(1):

"14. (1) Subject to this Act any five or more persons or, where the company to be formed will be a proprietary company, any two or more persons associated for any lawful purpose may by subscribing their names to a memorandum and complying with the requirements as to
50 registration form an incorporated company."

Record

Section 15(1):

"15. (1) A company having a share capital (other than a no-liability company) may be incorporated as a proprietary company if its memorandum or articles -

(a) restricts the right to transfer its shares;

(b) limits to not more than fifty the number of its members (counting joint holders of shares as one person and not counting any person in the employment of the company or of its subsidiary or any person who while previously in the employment of the company or its subsidiary was and thereafter has continued to be a member of the company); 10

(c) prohibits any invitation to the public to subscribe for any shares in or debentures of the company; and

(d) prohibits any invitation to the public to deposit money with the company for fixed periods or payable at call, whether bearing or not bearing interest." 20

Section 16(5):

"16. (5) The subscribers to the memorandum shall be deemed to have agreed to become members of the company and on the incorporation of the company shall be entered as members in its register of members, and every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company." 30

Section 33(1):

"33. (1) Subject to this Act, the memorandum and articles when registered, bind the company and its members to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles."

Section 148(2): 40

"148. (2) Any minute so entered that purports to be signed as provided in subsection (1) of this section is evidence of the proceedings to which it relates."

Section 148(3):

"148. (3) Where minutes have been so entered and signed then until the contrary is proved -

(a) the meeting shall be deemed to have been duly held and convened;

(b) all proceedings had thereat shall be deemed to have been duly had; and

10 (c) all appointments of officers or liquidators made thereat shall be deemed to be valid."

Section 186:

"186. (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to one or more of the members (including himself) may, or, following on a report of an inspector under this Act, the
20 Minister may apply to the Court for an order under this Section.

(2) If the Court is of opinion that the company's affairs are being so conducted the Court may, with a view to bringing to an end the matters complained of -

(a) except where paragraph (b) of this sub-section applies - make an order that the company be wound up; or

30 (b) where the Court is of opinion that to wind up the company would unfairly prejudice the member or the members referred to in subsection (1) of this section, but otherwise the facts would justify the making of a winding up order on the grounds that it is just and equitable that the company be wound up, or that, for any other reason it is just and equitable to make an
40 order (other than a winding up order) under this section - make such order as it thinks fit whether for regulating the conduct of the company's affairs in future or for the purchase of the shares of any members by other members or by

Record

the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

(3) Where an order that the company be wound up is made pursuant to paragraph (a) of subsection (2) of this section the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company. 10

(4) Where an order under this section makes any alteration in or addition to a company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the provisions of the order, the company concerned has not the power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; 20 but subject to the foregoing provisions of this subsection the alterations or additions made by the order are of the same effect as if duly made by resolution of the company.

(5) An office copy of an order made under this section shall be lodged by the applicant with the Commissioner within fourteen days after the making of the order.

(6) If default is made in complying with subsection (5) of this section the company and 30 every officer of the company who is in default is guilty of an offence against this Act.

Penalty: One hundred dollars. Default penalty."

Section 222(1)(f) and (h):

"222.(1) The Court may order the winding up if -

(f) directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other 40 members;

(h) the Court is of opinion that it is just and equitable that the company be wound up."

11. The Company was incorporated on 6th July 1960.

		Record
	The nominal capital of the Company is $200,000.00 divided into 100,000 shares of $2.00 each. The	p.2, 1.5.
	issued capital of the Company consists of	p.340, 1.10
	15,002 shares of $2.00 each fully paid. Mr. Caratti subscribed the Memorandum of Association for one Life Governor's share and one Frederick Lawley Edwards subscribed for one	p.2, 11.12-13
	ordinary share. Prior to the incorporation of	p.341
10	the Company Mr. Caratti had from about 1953 to 30th June 1960 carried on a business of Bulldozing and Earthmoving Contractor in partnership with his wife Maddeleine Caratti	
	trading as "S. & M. Caratti" and "W.A.	p.153, 11.10-14
	Bulldozing Co." Mr. & Mrs Caratti had two sons John Michael Caratti and Allen Bruce Caratti. From 1st July 1960 to 30th June 1961 the said business was carried on by Mr. Caratti in partnership with his wife and himself as trustee	p.152, 11.16-18
20	for his two sons pursuant to a Deed of	
	Partnership dated 29th July 1960. Mr. Caratti	p.153, 11.15-20
	was the managing partner of the partnership	p.8, 11.5-9
	of which the Respondent was an employee. On the 30th June 1961 the fixed assets of the partnership comprising land plant and buildings were sold by the partners to the Company on the basis that the assets would be leased back to the partnership. The	p.153, 11.22-25
	transaction was recorded in the minutes of	p.8, 11.10-24
30	proceedings of the Company on 30th June and	p.153, 11.26-
	2nd August 1961.	p.154, 1.3 pp.372-374
	12. In late 1960 or early 1961 Mr. Caratti discussed with the Respondent the acquisition	
	by him of a 10% interest in the bulldozing and	p.154, 11.20-34
	earthmoving business. The Respondent was then the manager of the Mt. Barker branch of the business. The Respondent indicated his willingness to do so but no concluded agreement was reached. Mr. Caratti's evidence was that a	
40	verbal agreement was concluded at a meeting held at the offices of the accountant of the partnership and the company in Perth on 2nd August 1961 at which both he and the	
	Respondent were present. The effect of the	p.155, 1.3 - 27
	verbal agreement was that the Respondent would become a 10% partner in the partnership trading as "S. & M. Caratti" and "W.A. Bulldozing Co." as from 1st July 1961 and a 10% shareholder in the Company. Mr. Caratti said that the minutes	
50	of the meeting of the Company on 2nd August 1961 correctly recorded what was agreed to by	
	the Respondent. The minutes record that the	pp.155, 11.5-7 and pp.373-374

Record

Company was indebted to the Respondent in a sum slightly in excess of $3,000.00 of which $3,000.00 would be satisfied by the issue to the Respondent of 1,500 ordinary shares in the capital of the Company. At the same time it was agreed that 13,500 shares would be issued to the "Caratti Family" as the partners in part consideration for the sale of partnership assets to the Company. By an application dated 21st August 1961 the Respondent applied for 1,500 ordinary shares in the Company. The signed application form contained the following:-

p.9, ll.16-19
p.463

> "I agree to accept the said shares and to be bound by the Memorandum and Articles of Association of the Company."

p.342

By a resolution of Mr. Caratti as Governing Director dated 22nd August 1961 the following shares in the Company were allotted "in order to carry out the Resolution carried at the meeting on 2nd August 1961":

3375 ordinary shares	-	Mr. Caratti
3375 ordinary shares	-	Mrs Caratti
3375 ordinary shares	-	Mr. Caratti as trustee for John Michael Caratti
3375 ordinary shares	-	Mr. Caratti as trustee for Alan Bruce Caratti
1500 ordinary shares	-	the Respondent

p.39, ll.12-19
p.174, ll.3-11
pp.343-358
p.248, ll. 6-12
p.356, l.23-p.357, l.12.

So far as the admission of the Respondent to the partnership was concerned, no formal partnership agreement was signed. A Deed of Partnership was prepared by the partnership's solicitors late in 1961 but was never signed. It was common ground that the unsigned Deed correctly set out the relationship between the partners. Clause 19 of the Deed of Partnership provided for Mr. Caratti to be the Managing Partner and gave him absolute control of its affairs.

p.8, ll.10-24
p.153, ll.26-p.154, l.4
p.248, ll. 13-22
p.158, ll. 5-20

13. The partnership to which the Respondent was admitted carried on the bulldozing and earthmoving contracting business from 1st July 1961 to 30th June 1964. In this respect it is submitted that in delivering the Judgment of the Full Court, Wickham J. in error in stating that the "initial assets" of the new partnership comprised plant, land and buildings which were sold to the Company soon "after the start of the new partnership" (i.e. after 30th June 1961). On 30th June 1964 the remaining assets of the partnership were sold to the Company for a price equivalent to the difference between debtors and creditors. The Company carried on the former partnership business from 1st July 1964 to 30th June

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1965. From 1st July 1965 to 31st July 1967 the
business was carried on by a wholly owned
subsidiary of the Company called Caratti — p.158, 1.21 -
Bulldozing Co. Pty. Ltd. using land, plant and — p.159, 1.5
equipment leased to it by the Company.
Pursuant to a Deed dated 31st July 1967 between — p.159, 1.5 -
the Company and Latec Investments Limited — p.160, 1.11
(hereinafter called "Latec") and others the
10 Company sold to a newly formed company called
Caratti Consolidated Pty. Ltd. (hereinafter
called "Consolidated") certain assets
including land, buildings, plant, shares in
Caratti Bulldozing Co. Pty. Ltd. to
Consolidated. The purchase price payable by
Colsolidated was $5,230,000.00. Consolidated
was owned 50% by the Company and 50% by Latec.
From 1st August 1967 the bulldozing and earth-
moving business was carried on by a partnership
20 known as Caratti Bulldozing (1967) the partners
of which were Consolidated, Carbul 1 Pty. Ltd.,
Carbul 2 Pty. Ltd., Carbul 3 Pty. Ltd and
Carbul 4 Pty. Ltd. On 1st October 1969
certain land and buildings together with shares
in subsidiaries of Consolidated and certain
plant and equipment representing portion of the
assets of the bulldozing and earthmoving
business were sold by Consolidated to its — p.162, 11.6-14
wholly owned subsidiary Caratti Australia Pty.
30 Ltd. (hereinafter called "Caratti Australia")
for $3,517,574.00. On 30th June 1970 the whole — p.162, 1.23-
of the issued capital of Caratti Australia — p.163, 1.42
was sold to Landall Holdings Limite (hereinafter
called "Landall"). The agreement for sale made — p.163, 11.7-36
provision for the financing of the purchase
price payable by Caratti Australia to
Consolidated for the assets previously sold.
Early in 1971 Landall appointed a Receiver and
Manager of the assets of Caratti Australia and
40 also commenced legal proceedings against — p.172, 1.30-
Consolidated and Mr. Caratti arising out of the — p.173, 1.6.
agreement for sale. This litigation was settled
in September 1971 on the basis that certain
assets comprising, land, plant, debenture stock
and cash were "returned" to the Company. — p.216, 11.17-26

14. In the meantime the Respondent had continued
to work as an employee of one or other of the
various companies by which the bulldozing and
earthmoving business was conducted after the
50 partnership of S. & M. Caratti and W.A.
Bulldozing Co. ceased to trade on 30th June 1964.
Early in 1971 his employment by Caratti
Australia was terminated by the Receiver and
Manager appointed by Landall. In March 1973 the

Record

p.217, ll. 11-19 — Respondent issued a Writ against Mr. & Mrs. Caratti seeking dissolution of the partnership and accounts. The action was heard in the Supreme Court and judgment upon it was reserved on 26th November 1974. On the following day Mr. Caratti gave notice to the Respondent pursuant to Article 32 of the Articles of Association of the Company requiring the Respondent to transfer his 1500 shares in the Company to him (Mr. Caratti) for $3,000.00 being the par value of such shares. The Petition the subject of this appeal was issued on 3rd December 1974. On the same day the Respondent obtained an interlocutory injunction restraining Mr. Caratti and the Company from registering any transfer of the Respondent's shares. The injunction against Mr. Caratti was subsequently discharged on Appeal to the Full Court. On 3rd June 1975 pursuant to Article 32 of the Articles of Association of the Company Mr. Caratti paid the sum of $3,000.00 to the Company which received the same for and on behalf of the Respondent and a form of transfer of the Respondent's shares was also executed by Mr. Caratti on behalf of the Respondent.

pp.262-263

p.249, ll. 11-17

pp.397-398

15. The Respondent's Petition was heard by Burt J. on 24th-27th June and 21st July 1975. The Respondent and one of his witnesses one Aubrey Shepherd were cross-examined on their affidavits by Counsel for the Company and Mr. Caratti. Neither Mr. Caratti nor any of his witnesses were cross-examined on their affidavits by Counsel for the Respondent. Burt J. delivered a reserved judgment on 4th September 1975. After hearing further argument on the question of relief on 19th September 1975 Burt J. ordered inter alia that the Court "being of the opinion that an order should be made under Section 186(2)(b) of the Companies Act 1961 doth order that all further proceedings on the petition be stayed upon condition that the orders set forth in paragraphs 2 and 5 of this order be implemented". Paragraph 2 of the order required Mr. Caratti to purchase the 1,500 shares held by the Respondent in the Company for a sum being the value of such shares as ascertained by the Master. For the purposes of such valuation it was directed that:

pp.203-224

p.225, ll.10-15

p.225, ll.16-21

> "Article 32 of the Articles of Association of the Company shall be disregarded."

p.226, ll. 5-6

Paragraph 5 of the order required the Company and Mr. Caratti to pay the Respondent's costs of the Petition.

p.229, ll. 10-15

16. The Grounds of Appeal relied upon by the Company and Mr. Caratti in the appeal before the Full Court are set out in the Notice of Appeal dated 9th October 1975.

p.237, l.7 -

Record

The Appeal was heard by the Full Court (Jackson J., Wickham and Lavan J.J.) on 26th-28th October 1976 and a reserved judgment was delivered on 17th November 1976. The judgment of the Full Court was delivered by Wickham J. with whom the other members of the Court concurred. Wickham J. set out the history of the litigation involving Mr. Caratti and the Respondent and then summarised the effect of the basic findings by Burt J. that the Respondent had established a ground for winding up both under Section 222(1)(f) of the Companies Act and that he had also established oppression within the meaning of Section 186(1) of the Act. Wickham J. then stated the "basic primary facts". Apart from the error noted in paragraph 13 there is no dispute as to the way in which Wickham J. summarised the conclusions of fact reached by Burt J. as follows:

p.249

pp.247-257

p.247, ll.1-27
p.247, l.28-
p.249, l.17

"(i) The option provisions in Article 32 of the company were inserted by Caratti for reasons which would be peculiar to members of his family and it was not then contemplated that Zampatti would become a shareholder;

p.249, l.18-
p.250, l.20

(ii) Zampatti was a key man in Caratti's business and Caratti's idea in offering him a 10% interest was to lock him in;

(iii) Final agreement was reached on 2nd August 1961;

(iv) At that date the central matter discussed was not the issue of shares to Zampatti but the admission of him as a partner in the partnership;

(v) The agreement was that Zampatti would acquire a 10% interest in Caratti's business;

(vi) Neither was concerned as to the legal structures under which this business was to be carried on;

(vii) Zampatti was not a party to a decision to sell the tangible assets of the partnership to the company;

Record

(viii) Zampatti was issued with 1,500 shares in the company so that he would stand in the company in the same position relative to the other shareholders as he did in the partnership namely a 10% interest;

(ix) Zampatti applied in writing for the shares but did not then understand that he was becoming a shareholder in a limited liability company. He understood only that he had acquired a 10% interest in Caratti's business, and Caratti had that same understanding; 10

(x) Whatever was done was done by Caratti on the advice of an accountant Pearce;

(xi) Caratti treated the company and the company's business as if it was his own without any regard being had to the rights of shareholders and at all times and whatever the legal structure he simply regarded the business as his, and over which he had absolute control; 20

(xii) When Caratti gave notice to repurchase the shares he did so in order to destroy Zampatti's standing to present the petition, and to solve a difference which had arisen with Zampatti as to the value of the shares.

Wickham J. also summarised the conclusions of law reached by Burt J. as follows:-

(a) as between himself and the company Zampatti was bound by Article 32 even although he was not aware of it; 30

(b) that there was no basis for an implication that Article 32 could not be operated until after all profits earned by the company had been distrubuted to its members or that there was any effective collateral agreement that Article 32 should not apply to Zampatti's shares;

(c) that the Article was valid;

(d) that the Article conferred rights between the members themselves and that the rights were conferred upon Caratti as a shareholder; 40

(e) that it was not the case that by reason of the notice Zampatti had no tangible interest in the liquidation for the reason that Caratti had acquired the equitable interest in the shares.

p.251, ll. 1-3 Wickham J. noted that the conclusions of law were not

Record

attacked by the Company and Mr. Caratti, except the last which Wickham J. described as "the real nerve of the case". The learned Judge also noted that subject to the effect of Article 32 and related matters, it was not contested by the Company and Mr. Caratti that the facts of the case were such as would justify the making of a winding up order although it was denied that the giving of the "notice of acquisition" by Mr. Caratti when added to these circumstances justified an order under Section 186. It was submitted on behalf of the Company and Mr. Caratti that while the facts, (particularly having regard to the conduct of the affairs of the Company in the making of loans to other companies controlled by Mr. Caratti) would otherwise justify the making of a winding up order, the Respondent would not be entitled to such an order because he had no tangible interest in the winding up. Wickham J. also noted that the findings of fact were generally accepted by the Company and Mr. Caratti except findings (iv), (vi), (vii) and the "understanding" in (ix). Wickham J. held that there was "no sufficient reason to conclude that any of his Honour's findings of fact were in error .." The learned Judge further held that the subject matter of the agreement between Mr. Caratti and the Respondent was "the business" which comprised its "goodwill, plant, land, buildings and other assets." The effect of the sale of the assets to the Company was that the Respondent "having become the holder of 10% of the shares in the Company maintained indirectly a 10% interest in these tangible assets." Wickham J. also found that Mr. Caratti was under an "obligation not to erode for his own benefit Zampatti's 10% interest in the 'business'". The learned Judge appears to have regarded the inclusion of Article 32 in the Articles of Association of the Company as attracting the principles applicable to a case of unilateral mistake, so as to make it unreasonable to hold the Respondent to his bargain in terms of Article 32 Wickham J. was also of the view that had Mr. Caratti given a notice under Article 32 in 1964, "a court of equity would not have ordered Zampatti to be dispossessed by specifically performing the legal obligations attached, unknown to him, to his shares. Ten years later the position in equity was the same and his Honour so held citing <u>Blomley v. Ryan</u>

p.251, ll.4-9
p.251, ll.10-34
p.251, l.35 - p.252, l.10
p.252, ll.10-20
p.252, ll.30-34
p.252, l.35 - p.253, l.35
p.254, ll.14-24

Record

(1956) 99 C.L.R. 362 per Fullagar J. at pp.401-402.

17. It is respectfully submitted that both Burt J. and the Full Court erred in finding that when "final agreement" was reached on 2nd August 1961, the central matter discussed was not the issue of shares to the Respondent in the Company but his admission as a partner in the partnership; that the "agreement" was that the Respondent would acquire a 10% interest in the "business" however it was carried on; that when the Respondent applied in writing for the shares in the Company did not understand that he was becoming a shareholder in the Company but understood only that he was acquiring a 10% interest in the "business" and that Mr. Caratti had the same understanding. The reasons for this submission are set out in paragraph (1) of the Grounds of Appeal to the Full Court. Counsel for the Respondent conceded the correctness of the minutes in terms of Section 148 of the Companies Act and admitted the authenticity of the applications for shares and the return of allottment. It is respectfully submitted that the evidence concerning the meeting on 2nd August 1961 established that:

pp.237, 1.10-
p.239,1.18
p.107, 11.1-25

(a) it was agreed that the Respondent be admitted as a partner in the partnership with a 10% share as from 1st July 1961; and

(b) it was also agreed that he would apply for 1,500 shares in the Company in consideration of the sum of $3,000.00.

Mr. Caratti's evidence was corroborated a file memorandum dated 2nd August 1961 on the file of the accountant Mr. A.B. Pearce (who died in September 1972). The evidence of the Respondent was not sufficient to displace the minutes of the meeting on 2nd August 1961 in the light of Section 148(2)(3) of the Companies Act: see also In re Indian Zoedone Company (1884) 26 Ch.D. 70 at p.77 per Lord Selborne L.C. There was no evidence of any collateral agreement or understanding which engrafted any qualifications on the terms of the partnership or the Articles of Association of the Company and, in particular, Article 32. The Memorandum and Articles of Association were public documents the contents of which the Respondent had constructive notice: Ernest v. Nicholls (1857) 6 H.L.C. 401; Brownett v. Newton (1941) 64 C.L.R. 439 at p.445 per Starke J.; see also 7 Halsbury's Laws of England (4th Edition) 121; Paterson and Ednie, Australian Company Law pp.174-176. A member or potential member of a company is not only deemed to have constructive knowledge of the Memorandum and Articles, but is also deemed to

p.466

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Record

have understood their meaning: Griffith v. Paget (1877) 6.Ch.D. 511 per Jessell M.R. at pp.516-517. In Oakbank Oil Co. v. Crum (1882-83) 8 App.Cas. 65, Lord Selborne L.C. said at pp. 70-71 that, "the member who does not specifically go and look at the articles and attempt to read them and understand them before becoming a member
10 cannot later be heard to complain if he decides that the articles do not suit him." It has been held that a prospective member of a company is under a duty to investigate and satisfy himself as to the Memorandum and Articles before taking shares in a company: Peel's Case (1866-67) 2 L.R. Ch.App. 674 per Lord Canns L.C. at p.684 and see Section 33(1) of the Companies Act. It was not suggested in the Petition or in any submission on the
20 Respondent's behalf before the West Australian Courts that there was a basis for a plea of mistake or non est factum or any similar plea. The Respondent relied on the fact that he was a shareholder. If he did not "understand" that he was becoming a shareholder in August 1961 the fact that he had become a shareholder was confirmed to him by letter dated 29th November 1961 from A.B. Pearce & Co. — p.467

30 18. The submissions set out in paragraph 17 hereof are also relevant to the Full Court's rejection of the grounds set out in paragraphs (3) and (4) of the Grounds of Appeal to the Full Court. It is further respectfully submitted that if there was an "understanding" that the total effect of the admission of the Respondent to the partnership and his application and allotment of shares in the company gave him 10% interest in "the
40 business" and placed Mr. Caratti under an obligation not to dispossess him of that interest, that arrangement would be inconsistent with the express terms evidenced by Article 32 and could not itself be enforced: Hoyts Pty. Ltd. v. Spencer (1919) C.L.R. 133. The finding of Burt J. as upheld by the Full Court was that although as between the Respondent and the Company the Respondent was bound by Article 32, "As between Zampatti and
50 Caratti personally the position was different. As betwen them the agreement simply was that Zampatti was admitted into the family business without any regard to the manner in which it — p.239, 1.19- p.243, 1.24

Record

was to be conducted, that is to say, as a partnership or by means of an incorporated company or otherwise and he was to be admitted with a 10 per cent share." However, Burt J. held Article 32 was binding as between Mr. Caratti and the Respondent at law:

p.218, ll. 27-3

> "In my opinion the article in question does at law confer upon Caratti the right compulsorily to acquire the shares of any other member in the manner set out . ."

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p.221, ll. 21-2

Notwithstanding this opinion, Burt J. held that the exercise of the right was "contrary to a clear understanding which as between Zampatti and Caratti had existed from the beginning, that understanding being that Zampatti would have a 10 per cent interest in the business . ." This factor together with the learned judge's view that the par value of $3,000.00 was a "gross under value" was sufficient to prevent the contract constituted by Article 32 and the notice under it, resulting in Mr. Caratti becoming the beneficial owner of the shares. This was because the breach of the understanding raised an equity on the part of the Respondent to resist specific performance, on the authority of Blomley v. Ryan (1956) 99 C.L.R. 362 at pp. 401-402 per Fullagar J. The Full Court took a similar approach. In addition Wickham J. went further in holding that because Mr. Caratti was a partner of the Respondent, his obligation was not to take advantage of Article 32 "for his own benefit by in effect buying Zampatti's shares in 'the business' for himself." Wickham J. held that Mr. Caratti stood in a fiduciary relationship to the Respondent as his partner and agent and was under a duty not to profit from this position: Parker v. McKenna (1874) 10 Ch.App. Cas at pp. 124-5 per James L.J. and p.125 per Millish L.J.; Clegg v. Edmondson (1857) 8 De.G.M. & G. at p.806 per Turner L.J.; and Birtchell v. Equity Trustees Executors and Agency Co. Ltd. (1928) 42 C.L.R. at p.398 per Isaacs J. It is respectfully submitted that the reasoning of both Burt J. and the Full Court was in error and that cases such as Blomley v. Ryan and the cases cited by Wickham J. have no application.

p.223, ll. 9-14

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p.252, l.31 - p.253, l.24

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p.255, ll.10 -30

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19. The suggestion underlying the reasoning of Burt J. and made explicit in the judgment of Wickham J. is that it is possible to disregard the formalities and incidents of the corporate structure because in whatever form the agreement between Mr. Caratti and the Respondent was institutionalised it remained in

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Record

substance a partnership. The formal relationship between the parties as members of the Company and the legal relationship in terms of the contract constituted by Article 32 and the acquisition notice could be disregarded and the whole relationship governed by their relationship as partners in terms of the unexecuted Deed of Partnership. This approach would seem to view the Company as merely an instrument of the partnership and implies that the parties held their shares in the Company in some way in trust for the partnership or at least subject to the express or implied terms of the partnership agreement which engrafted an equity to restrain Mr. Caratti from exercising his legal right of acquisition under Article 32. It is respectfully submitted that in this respect Burt J. and the Full Court were in error. The Respondent by his Petition came before the Court asserting rights not as a partner in a paramount or super-imposed partnership, but as a member of the Company. It is conceded that in the present case, subject to Mr. Caratti's exercise of rights under Article 32 and the consequent absence of any tangible interest by the Respondent in a winding up, the facts were such as would have otherwise justified the making of a winding up order under Section 222(1)(f) or (h) of the Companies Act. It was conceded before Burt J. and the Full Court by Counsel for Mr. Caratti and the Company that the conduct of Mr. Caratti as the Life Governing Director in the management of the Company, the withdrawing of funds from the Company and the withholding of dividends were matters falling within Section 222(1) (f) of the Act. However, it was submitted that the giving of the notice of acquisition on 27th November 1974 was not an action by Mr. Caratti as a director for the purposes of Section 222(1)(f). That provision is primarily concerned with conduct in breach of the director's fiduciary duty to the Company and all the members of the Company: Re. William Brooks & Co. Limited (1962) 2 N.S.W.R. 142 at pp. 159-160 per Hardie J. The giving of the notice by Mr. Caratti could not constitute conduct in his capacity as a director in his own interests and not in the interests of the members as a whole for the purposes of Section 222(1)(f). The notice was given in his capacity as "the Founder" i.e. the holder of the Life Governor's Share. Similarly, the giving of the notice did not of itself make it just and

Record

equitable for the Company to be wound up under Section 222(1)(h). A consequence of the giving of the notice was that the Respondent ceased to have a tangible interest in the winding up: Re. Bellador v. Silk Ltd. (1965) 1AllE.R. 667; and see Re. Chesterfield Catering Co. Ltd. (1976) 3 AllE.R. 294. As a result of receiving the notice, the Respondent became contractually bound to sell and transfer his shares to Mr. Caratti in consideration of the payment of $3,000.00. From 27th November 1974 Mr. Caratti became the beneficial owner of the shares. Had not the Company been restrained by the interlocutory injunction he would have become the registered holder of the shares. There was no suggestion in Ebrahimi v. Westbourne Galleries (1972) 2 All.E.R. 492 that there was an equity to prevent the exercise of a valid and lawful right or power under the Articles of Association: Bentley-Stevens v. Jones and Others (1974) 2 All E.R. 653 at p. 655 per Plowman J. The basis of the decision in Ebrahimi v. Westbourne Galleries was that considerations which may entitle the Court to wind up on the just and equitable ground include the exercise of a legal right under the Articles in a manner which, on equitable principles, is regarded as unjust or unfair to the party affected. The application of equitable principles to a private company could involve recourse to the partnership analogy. However, recourse to equitable principles and the partnership analogy would not alter the legal result of the exercise of the legal rights in question: see Ebrahimi v. Westbourne Galleries (Supra) at pp. 495-496 per Lord Wilberforce. Neither the directors nor the Company can be bound by a collateral agreement between particular members: Shirlaw v. Southern Foundaries (1926) Ltd (1940) A.C. 701 at p.740 per Lord Porter; Palmers Company Precedents (17th Edition) at p.400 and pp. 373-373. All members of a company must be parties to such a collateral agreement. Mrs Caratti was not a party to any alleged pre-membership negotiations with the Respondent or any collateral agreement or understanding.

20. The consequence of giving the notice under Article 32 was to constitute a contract of sale between the Respondent as vendor and Mr. Caratti as purchaser for the sale of the shares at par. Thereafter, the Respondent became in equity a trustee of the shares for Mr. Caratti: Lysaght v. Edwards (1876) 2Ch.D. 499 at p.506 per Jessell M.R.; Societe General de de Paris re. Tramways Union Co. Ltd. (1884) 14 Q.B.D. 424 per Lindley L.J.

at p. 451 (affirmed) (1885) 11 App.Cas. 20. The beneficial ownership passed independently of the registration of the transfer: Peet v. Clayton (1906) 1 Ch.659; Re. Wimbuch (1940) 92 per Morton J. at p. 99; London Founders Association v. Clarke (1888) 20 Q.B.D. 576 at pp. 579-580. An executory contract for the sale of shares may be the subject of a decree for specific performance after a
10 supervening winding up order, even though the transfer may not be registered: 7 Halsbury's Laws of England (4th Edition) pp. 214-215 paras. 391-393; Paine v. Hutchison (1868) L.R. 3 Ch.App. Cas 388; Mussel White v. Mussel White & Son Ltd. (1962) Ch.964. The apparent decisions to the contrary in Re. Wiltshire Iron Co. (1868) L.R. 3 Ch. App.Cas. 443 and Sullivan v. Henderson (1973) 1 AllE.R. 48 per Megany J. at p. 50 cannot stand with the decisions in the Societe General Case or
20 the London Founders Association Case (Supra). Furthermore the self-enforcement provision under Article 32 would be effective to transfer the shares to Caratti without any necessity for him to apply to the Court for a decree of specific performance and accordingly the principles relating to the circumstances in which the Court will exercise its power to grant specific performance were not applicable to the present case. The effect of Section 227 (1) of the Companies Act is simply that
30 the registration of a transfer registered after the commencement of a winding up order is void if and when a winding up order is made. As between the parties the validity of any executory contract or transfer executed pursuant thereto is not affected: Chapman v. Shepherd (1867) L.R. 2 C.P. 228 per Bovill C.J. at pp. 237-238; per Willes J. at p.238; Rudge v. Bowman (1868) L.R. 3 Q.B. 659 per Blackburn J. at pp. 696-697; Barges' Case (1868) L.R. 5 Eq. 420; see also Re. Onward Building
40 Society (1891) 2 Q.B. 463 at p. 475 and pp. 477-478 per Lord Esher M.R.; at p. 479 per Bowen L.J. and at p. 483 per Kay L.J.; and Re. A.I. Levy (Holdings) Ltd. (1964) Ch. 19 at pp. 28-29 per Buckley J. It is submitted that the result of all these cases is that at all material times after 27th November 1974 or alternatively after 23rd June 1975, while the Respondent remained a "contributory" for the purposes of Section 218 of the Companies Act, he had no beneficial interest in the shares. His sole
50 right was to receive the purchase money for the shares. The Respondent could not therefore show a tangible interest in the winding up so as to justify the making of a winding up order under Section 222(1)(f) or Section 222(1)(h): Re. Chesterfield Catering Co. Ltd. (Supra); and see Re. Rica Gold Washing Co. (1879) 11 Ch.D. 43.

Record

21. It is respectfully submitted that the Full Court was in error in deciding that despite the execution of a transfer of the Respondent's shares and the payment of the purchase price to the Company, the Respondent "was entitled to the aid of a court of equity both in resisting specific performance (or relief of that nature) and, at least in the context of a winding up, in preventing such performance." (p.257, ll. 25-27) The Full Court was also in error in deciding that while registration of the transfer was only delayed by the injunction against the Company, even if Mr. Caratti "had successfully reduced the legal title to the shares to himself he would remain an accounting party and hold the shares and their fruits as a constructive trustee for Zampatti. This is so whether his exercise of the option is classified as a fraud on the power or whether as a breach of the compelling fiduciary relationship arising at its source out of the agency of partnership." (p.257, ll. 14-22) It is respectfully submitted that for the reasons already mentioned Mr. Caratti's contractual rights under Article 32 were not qualified by the fact that the Respondent had agreed to become a partner in S. & M. Caratti and W.A. Bulldozing Co. at the same time as he agreed to become a member of the Company. The exercise of the contractual rights conferred on Mr. Caratti by Article 32 in the circumstances did not attract the application of any principle relevant to the concept of fraud on a power. Neither Mr. Caratti's motives for the exercise of his right of purchase nor the financial consequences for Mr. Zampatti were relevant: Borlands Trustee v. Steel Bros & Co. Ltd. (1901) 1 Ch.279 per Farwell J. at p.290; Rayfield v. Hands (1960) Ch.1 per Vaisey J. at p.9; Stuart v. Kingston (1923) 32 C.L.R. 309 per Higgins J. at p.345; Phillips v. The Manufacturers Securities Ltd. (1917) 86 L.J. Ch. 305; 116 L.T. 290 per Lord Cozens-Hardy M.R. at pp. 295, 297; and Re. Wondoflex Textiles Pty. Ltd. (1951) V.L.R. 458 per Smith J. at pp. 465-469. If there was a question as to whether the bargain was harsh and unconscionable, that question fell to be answered with reference to the circumstances at the time it was made, rather than with respect to the circumstances prevailing at the time for performance. There was nothing unusual about a provision for the acquisition of the shares at par: c.f. Jarvis Motors (Harrow) Ltd. v. Carabott (1964) 3 All E.R. 89. Provisions such as Article 32 are quite common in Western Australia in the case of family proprietory companies controlled by a Life Governing Director. In O'Donnell v. Thor Industries Pty. Ltd. (1977) (to be reported in 51 A.L.J.R.) the High Court of Australia was called upon to determine the effect of an Article of a company which provided for the issue

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of "E" Class shares with voting and dividend rights equal to those of certain other shareholders. The Article was subject to the proviso "that such shares may only be issued to and held by employees of the Company so long as such holder remains in the employ of the Company and upon termination of such employment for any reason whatsoever such shares shall be transferred to such other employees in part or in whole as the Governing Director shall direct, and in the event of no such employee or employees being nominated or directed by the Governing Director, then such shares shall be transferred to the Governing Director." The High Court (Barwick C.J., Stephen, Mason and Aickin J.J. (Jacobs J. Dissenting))held that a holder of "E" Class shares was not entitled upon termination of his employment with the Company, to payment for his shares upon transferring them, either by reason of the possession of a power to contract for the sale of his shares, or by implication in the Article of an obligation on the part of a transferee to pay him the fair market value of his shares. The judgment of Barwick C.J. was based upon the principle that it is in the nature of a share in the capital of a limited liability company that the rights it confers are determined by the Memorandum and Articles of Association to the extent that they specify those rights and are not inconsistent with any relevant statutory provision. It is submitted on behalf of Mr. Caratti and the Company that the same principle applies in the present case. One consequence of its application is that the Respondent had no equity to restrain Mr. Caratti or the Company in carrying out the contract constituted by Article 32 and the notice dated 27th November 1974. Borland's Trustee v. Steel Bros. & Co. (Supra.); Stewart v. Stock Exchange of Victoria (1914) S.A.S.R. 10 and Re Hobson Houghton Co. Ltd. (1929) 1 Ch. 300 were all cases in which it was held that a power of compulsory acquisition of shares was held not to be unlawful, whether as infringing any relevant statutory provision or on grounds of public policy.

22. The only allegation of oppression for the purposes of Section 186(1) of the Companies Act alleged by the Respondent related to the giving by Mr. Caratti of the notice of acquisition dated 27th November 1974. Burt J. held that the Respondent "had established that the affairs of the Company are being conducted in a manner oppressive to himself within the meaning of s.

p.14, l.34 - p.15, l.5

Record

186(1) of the Act, that I think being made out in the particular and peculiar circumstances of this case by the giving of the notice of 27th November." It was contended before the Full Court that the giving of the notice was given by Mr. Caratti in his capacity as holder of a particular share in the exercise of his contractual rights as a shareholder and did not constitute conduct of the affairs of the Company by Mr. Caratti for the purposes of Section 186(1) of the Act. Alternatively it was submitted that if the giving of the notice was capable of constituting such conduct the manner in which the affairs of the Company were being conducted was not oppressive to the Respondent by the giving of the notice in the exercise of a valid and enforceable contractual right of purchase. It is respectfully submitted that the Full Court was in error in not upholding that submission.

p.223, l.35-p.224, l.36

p.244, ll.4-25

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23. It is respectfully submitted that the order of the Full Court dismissing the Appellants' appeal should be set aside and that in lieu thereof there should be an order allowing the appeal with costs in terms of the order sought in the Notice of Appeal to the Full Court.

p.236, l.18-p.237, l.6

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REASONS

(1) Burt J. and the Full Court should have found that on 2nd August 1961 the basis upon which the Respondent was to become a 10% partner in the partnership of S. & M. Caratti and W.A. Bulldozing Co. was agreed as recorded in the minutes of the meeting including the Respondent's verbal agreement to apply for 1,500 shares in the capital of the Company of $2.00 each in consideration of the sum of $3,000.00 as set out in such minutes.

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(2) Burt J. and the Full Court having correctly found or held that:-

(a) on 21st August 1961 the Respondent signed an application for 1,500 shares in the Company on terms that he agreed to be bound by the Memorandum and Articles of Association of the Company;

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(b) the said shares were duly allotted to the Respondent on 22nd August 1961;

(c) as between himself and the Company the Respondent was bound by Article 32;

(d) as between the Respondent and Mr. Caratti the Articles of Association (including) constituted a contract; and

(e) Article 32 conferred on Mr. Caratti the right compulsorily to acquire the shares of any other member (including the Respondent) at par in the manner and on the terms therein set out.

10 Burt J. and the Full Court should also have held that the Respondent did in fact or as a matter of law was deemed to have entered into a contract with Mr. Caratti in terms of the Memorandum and Articles of Association including Article 32 the terms of which were not affected by the Respondent's admission to partnership or any collateral agreement or understanding concerning the Respondent's 10% interest in "the business".

(3) Burt J. and the Full Court should have held
20 or found that:-

(a) the effect of Article 32 was that the Respondent had agreed in writing with Mr. Caratti that upon receipt of notice requesting him to do so, the Respondent would sell and transfer to Mr. Caratti his 1,500 shares in the Company for the sum of $3,000 being the capital paid upon such shares; and

(b) such agreement was specifically enforceable
30 at the instance of Mr. Caratti or could have been fully performed by the alternative means provided in Article 32;

(c) Mr. Caratti had paid the purchase price for the said shares and with the authority of the Company executed a transfer thereof in accordance with Article 32 although because it was restrained from doing so by interlocutory injunction the transfer had not been registered by the Company;

40 (d) the giving of the said notice or alternatively the payment of the purchase price and the execution of the said transfer constituted Mr. Caratti the owner of the said shares in equity and thereafter and in particular at the date of the hearing of the Petition, the Respondent held the shares in trust for Mr. Caratti;

Record

(f) Article 32 did not in substance confer any power on Mr. Caratti which was subject in its exercise at the date notice was given to any condition that the power could only be exercised to the extent that the consideration stipulated therein was equivalent to the value of the shares or to any understanding (to the extent that there was any such understanding) that the Respondent "would have a 10% interest in the business" and the agreement to sell constituted by Article 32 was not subject to any such condition or in any way qualified or affected by any such understanding and further that the motive or purpose of Mr. Caratti in exercising the power was irrelvant. No question of fraud on a power or breach of fiduciary duty arose.

(4) Burt J. and the Full Court should have held that, notwithstanding that the facts established a ground for winding up under both Sections 222 (1)(f) and 222 (1)(h) of the Companies Act, by reason of the matters referred to in paragraph (3) above the Respondent was not entitled to relief by way of an order winding up the Company because the Respondent would have no tangible interest in a liquidation and also in the circumstances the facts would not justify the making of a winding up order on the ground that it was just and equitable for the purposes of Section 186(2)(b) of the Companies Act.

(5) Insofar as Burt J. and the Full Court held that the Respondent had established that the affairs of the Company were being conducted in a manner oppressive to himself within the meaning of Section 186(1) of the Companies Act by the giving on 27th November 1974 of the notice dated 26th November 1974 pursuant to Article 32 of the Articles of Association Burt J. and the Full Court were in error in that the said notice was given by Mr. Caratti in his capacity as a shareholder in exercise of his contractual rights conferred at law by the Article to purchase the Respondent's shares and did not constitute any part of the conduct of the affairs of the Company by Mr. Caratti as a member or majority member for the purpose of Section 186 of the Act or alternatively (to the extent that the giving of the notice was capable of constituting such conduct) the manner in which such affairs were being conducted was not oppressive to the Respondent by reason of the giving of the notice.

C. LEWIS HAWSER

DAVID K. MALCOLM

IN THE PRIVY COUNCIL No.17 of 1977

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF WESTERN AUSTRALIA

BETWEEN :

1. CARATTI HOLDING CO. PTY LTD.

- and -

2. SERGIO CARATTI — Appellants (Respondents)

- AND -

BERNARDO ZAMPATTI — Respondent (Petitioner)

CASE FOR THE APPELLANTS

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