

IN HER MAJESTY'S PRIVY COUNCIL No. 17 of 1977

O N A P P E A L

FROM THE FULL COURT OF HER MAJESTY'S SUPREME
COURT OF WESTERN AUSTRALIA

B E T W E E N :

CARATTI HOLDING CO. PTY. LTD.
SERGIO CARATTI Appellants

- and -

BERNARDO ZAMPATTI Respondent

CASE FOR THE RESPONDENT

Record

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1. This is an appeal by leave of the Full Court against the Order of the Full Court of the Supreme Court of Western Australia (Jackson C.J., Wickham J. and Brinsden J.) dated 17th November, 1976 dismissing the Appellants' appeal against the Order of His Honour Burt J. made on the 19th September, 1975 whereby the Respondent on his Petition to wind up the Appellant Company was granted certain equitable relief, principally that the personal Appellant should purchase the Respondent's shares in the Appellant Company at their full value.

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2. In this Case the following expressions have the meanings respectively indicated against them:

Expression

Meaning

Mr. Caratti the personal Appellant

Mr. Zampatti the Respondent

The principal company the corporate Appellant

Mr. Pearce an Accountant, Mr. Caratti's adviser.

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ISSUES

3. The question which arises in this Appeal

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is whether Mr. Caratti is entitled to exercise a power of compulsory purchase contained in Article 32 of the Articles of Association of the principal Company, to purchase Mr. Zampatti's shares at a gross undervalue notwithstanding that the underlying relationship between them was of partnership. Article 32 is in the following terms:

"Compulsory Purchase of Shares

- During the lifetime of the Founder and whilst he is the registered holder of 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 shares to the Founder or his nominee in consideration of the payment of a 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. Any request or notice under this Article shall be effectively given if delivered to such member as aforesaid personally or if posted by registered post to the last address recorded for such member in the share register of the Company." 10
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4. It is submitted that the question resolves itself into four separate issues: 40
- (1) Whether a buyer under an agreement for sale of shares is entitled to rely upon the equitable concept of transfer of beneficial ownership otherwise than in circumstances in which equity would grant specific performance?
 - (2) If the answer to (1) is 'No', is this a case in which equity would grant specific performance?
 - (3) If the answer to (1) is 'Yes', is this a case

in which equity would injunct the buyer from procuring the execution and registration of any necessary transfers?

(4) Whether Mr. Caratti obtained his right of compulsory purchase as against Mr. Zampatti by abuse of a dominant position, or of trust, and is therefore not entitled in any event to enforce such a right to the detriment of Mr. Zampatti.

10 5. If the Appellants were to succeed in this Appeal it would mean, as Mr. Caratti intends, that Mr. Zampatti would forfeit to Mr. Caratti his 10% share of the assets and the wholly retained earnings of a highly successful partnership which he had worked to build up since 1961 without any drawings other than a weekly sum which was substantially less than his previous wage as an employee of Mr. Caratti.

20 FACTS

6. Mr. Caratti and Mr. Zampatti are cousins. p.207
Mr. Caratti started in business in Western Australia in 1939. Mr. Zampatti entered the business as an employee in 1955. By 1961 he was the manager of the business in the Mt. Barker area. Burt J. found that:

"The Mt. Barker branch was a very important and significant part of the partnership business and Zampatti as its manager was a key man." p.207
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30 In order, as his Honour found, 'to lock him in' in p.208
the partnership business (then carried on 1.26
under the names S. & M. Caratti, and W.A. Bulldozing Co.) Mr. Caratti offered Mr. Zampatti a 10% share both as to profits and as to capital with effect from 1 July 1961. This was agreed at a meeting on 2 August 1961. It was not a term of the partnership agreement that Mr. Caratti should have any right to
40 acquire the shares of any other partner.

7. At or before that meeting, in a decision to which Mr. Zampatti was not a party, Mr. Caratti and Mr. Pearce decided for taxation reasons that the principal company would purchase the assets of the partnership and lease them back. In order to give effect to the agreement that Mr. Zampatti would have 10% of the business it was decided to issue him p.211
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with 10% of the shares in the principal company. Mr. Zampatti signed an application for the shares and paid the \$3,000 consideration in full. As to this his Honour found:

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"I believe Zampatti when he says that he did not then understand he was becoming a shareholder in a limited liability company. My finding is that his understanding of the matter was simple and single, namely that he had acquired a 10% interest in Caratti's business. He was not concerned to know whether it was to be carried on by the partnership or by a limited company. These comments apply very much to Caratti as well."

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8. From 30 June 1961 to 1 July 1964 the business was carried on by the partnership, hiring the assets back from the principal company. For taxation reasons, the partnership then sold its entire business to the principal company at a figure representing the difference between debtors and creditors. Both the 1961 and the 1964 transactions were paper transactions; no cash was paid to the partnership.

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9. From 1965 onwards the principal company carried on the business. On the advice of Mr. Pearce various tax loss company transactions were effected, and also dealings with some six Caratti family companies. As a result of a related transaction, the facts of which have no relevance to these proceedings, litigation ensued and Mr. Zampatti left the Caratti group in mid 1971.

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10. At about that time Mr. Zampatti began trying to obtain accounts so that he could form an opinion as to the value of his 10% interest. He employed accountants to assist him. Neither he nor they had any success in obtaining information.

p.217

11. During 1972 various discussions took place between Mr. Caratti and Mr. Zampatti, the purpose of which was to put a value on Mr. Zampatti's interest in the Caratti group. In the course of this Mr. Caratti made an offer to purchase Mr. Zampatti's share for \$200,000, this on the basis that the net worth of the Caratti enterprise at that time was \$2,000,000. The offer was not accepted. In fact as at the year ended 30th June 1972 shareholders' funds stood at \$4,778,192.

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PREVIOUS AND INTERLOCUTORY PROCEEDINGS

12. On 26th March 1973 Mr. Zampatti issued a writ, the purpose of which was to force Mr. Caratti to produce the accounts. When these were supplied the action was discontinued. p.216
l.35
- 10 13. On 26th March 1973 Mr. Zampatti also issued a writ seeking a dissolution of the partnership and an account. After a hearing lasting 6 days judgment was reserved on 26th November 1974 and given in favour of Mr. Zampatti by Wallace J. on 6th December, 1974. p.217
l.10
- 20 14. Before that judgment was delivered, however, Mr. Caratti anticipated that Mr. Zampatti might also seek to wind up the principal company. Accordingly in order to destroy Mr. Zampatti's standing to present a petition to wind up, and to silence any argument about the value of the shares, on 27th November, he gave Notice to Mr. Zampatti pursuant to Article 32 of the Articles of Association to transfer his shares to him for \$3,000 on 10th December 1974.
15. On 3rd December 1974 Mr. Zampatti issued the petition in the present proceedings. p.1
- 30 16. On 3rd December, 1974 Wallace J. granted an interim injunction restraining Mr. Caratti from exercising the power contained in Article 32, and the principal company from registering any transfer of Mr. Zampatti's shares. On 6th December 1974 his Honour continued the injunction until the hearing of the petition. In giving judgment his Honour said :
- "If the injunction is not granted it simply means that (Mr. Caratti) is able to completely dispossess the petitioner of all power in the company".
- 40 17. The Respondents appealed to the Full Court. On 19th May 1975 the Court allowed the appeal by Mr. Caratti but dismissed that by the principal company. The reasons differed slightly but Jackson C.J., with whom Lavan J. agreed, said "In my view if there are grounds for an injunction, Zampatti's remedy is by separate action against Caratti."
18. On the following day, 20th May, 1975,

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Mr. Zampatti issued a writ and Notice of Motion in an action against Mr. Caratti personally.

p.266
267 Wickham J. granted an interlocutory injunction on 21st May restraining Mr. Caratti from exercising the power contained in Article 32 and from taking any further steps with respect to the Notice already served. According to the affidavit of

p.268 Mr. Christopher John Boyle, Articled Law Clerk, Mr. Caratti appears to have deliberately evaded service of the injunction upon him. On 3rd June 1975, notwithstanding the injunction granted on 21st May, Mr. Caratti tendered a bank cheque for \$3,000 to the principal company in consideration for the transfer to him of Mr. Zampatti's shares. The principal company resolved to receive the cheque; resolved to authorise Mr. Caratti to execute transfer and to transfer the shares in the form tabled; resolved to stamp the transfer; but resolved not to register the transfer so long as the Order of Wallace J. of 6th December 1974 remained in force. 10

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19. It is respectfully submitted that Mr. Caratti's behaviour in procuring the discharge of the 6th December 1974 injunction against him, in evading service of the injunction of 21 May 1975, in producing the bank cheque for \$3,000, and in passing the resolutions of 3rd June, was designed solely to procure an improper advantage for himself. That improper advantage was to enable Mr. Caratti to make the pleas contained in paragraphs (4) (d) and (e) of the Notice of Appeal to the Full Court. Those pleas were that the purchase price having been paid, and the transfers having been executed, Mr. Caratti had become the beneficial owner of Mr. Zampatti's shares. Those pleas were not available on the facts as they existed at the presentation of the Petition. 30

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20. Whether or not Mr. Caratti's conduct was a breach of the strict terms of any injunction, and whether or not he or the principal company knew of the terms of the injunction granted by Wickham J. on 21st May 1975, it is respectfully submitted that it amounted to a conscious and deliberate act done in order to circumvent the spirit and intention of the interlocutory injunctions. That conduct is accordingly relevant material to consider not only in relation to questions of the exercise of equitable jurisdiction, Issues (2) and (3), but also in considering whether Mr. Caratti is a man likely to abuse a dominant position, or a position of trust, Issue (4). 40

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PROCEEDINGS ON THE PETITION

10 21. The Petition was heard before His Honour Burt J. on 24 - 27 June and 21 July 1975, judgment being given on 4 September 1975. An Order was drawn up on 19 September 1975 by agreement between the parties to give effect to His Honour's judgment. The Appellants in their appeal to the Full Court challenged several of His Honour's findings of fact as well as one of his conclusions of law. The Full Court rejected both challenges in a reserved Judgment dated 17 November 1976.

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CONCURRENT FINDINGS OF FACT

22. As to the facts the Full Court, whose judgment was given by Wickham J., said:

"I think there to be no sufficient reason to conclude that any of His Honour's findings of fact were in error."

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20 23. Accordingly, as there are concurrent findings of fact by the Supreme Court and by the Full Court, the Respondent merely recites the effect of the material findings as summarised in the judgment of the Full Court:

"His Honour's conclusions of fact are now summarised:

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30 (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.

The Company was in the strict sense a family company;

(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;

40 (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;

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- (v) The agreement was that Zampatti would acquire a 10% interest in Caratti's business;
- (vi) Neither was concerned as to the legal structure 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;
- (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; 10
- (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; 20
- (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;
- (xii) When Caratti gave notice to purchase 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." 30

Having found that these findings of fact were not in error Wickham J. continued:

"... and importantly there is the finding that the agreement between Caratti and Zampatti was that the latter should have a 10% share in 'the business'. Zampatti became a partner in 'the business' with Caratti and other members of his family. The partnership having been constituted the ordinary fiduciary obligations between partners arose between Caratti and Zampatti." 40

It is those obligations which Mr. Caratti now

seeks to escape.

24. His Honour Burt J. also found that there had been substantial dealings by Mr. Caratti with the assets of the principal company for his own and his family's benefit (and thus to the detriment of Mr. Zampatti's interests). Those findings were not challenged on appeal to the Full Court.

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CONCLUSIONS OF LAW BY BURT J.

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25. As to the law Burt J. rejected all Mr. Zampatti's contrary contentions and accepted the Appellants' argument that Article 32 was binding as between him and the Company. However, His Honour said:

"As between Zampatti and Caratti personally the position was different ... As between Caratti and Zampatti nothing was said of Article 32. Zampatti never knew of it and Caratti had forgotten about it. At all times until they fell out in or about 1972 the understanding of each Caratti and Zampatti was that the latter owned a 10 per cent interest in the Caratti family business however it was conducted, and each dealt with the other on that basis."

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His Honour then held that although:

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

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nevertheless, because the interlocutory injunction confirmed by the Full Court on 19 May 1975 had prevented the legal transfer of title to Mr. Caratti, Mr. Caratti could only succeed in saying that Mr. Zampatti had no locus to present the Petition if he could rely upon the doctrine in Musselwhite v Musselwhite & Son Ltd. (1962) 1 Ch 964: that is, that the buyer of shares at once becomes the owner of them in equity if the agreement for sale is specifically enforceable.

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26. His Honour then held that the compulsory purchase agreement pursuant to Article 32 was not susceptible of specific performance, and so

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Mr. Zampatti did have a locus to present this
Petition:

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"Article 32 although formulated in terms of sale, is in substance the grant to the founder of a power of compulsory acquisition, and I cannot think that an attempt to exercise that power so as to compulsorily acquire shares at a gross undervalue, which I find to be the fact, and in my judgment 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, does prior to the transfer being registered and so prior to the acquisition being perfected result in the founder becoming the owner of the shares at equity. I cannot see the equity which would sustain that conclusion. It would seem to me to be inconsistent 'with equity and good conscience that he should be allowed to enforce it'. See Blomley v. Ryan (1956) 99 C.L.R. 362 at app. 401-401, per Fullagar J.'

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27. It thus appears that His Honour Burt J. answered Issue (1) 'No', and explicitly decided Issue (2) in favour of Mr. Zampatti. In Re Westbourne Galleries (1973) A.C. 360 was not in terms relied upon by His Honour in this judgment but it was cited to him in argument and it had been referred to with approval in one of the interlocutory judgments, so it must have been in His Honour's mind. It is respectfully submitted that this passage is in any event consistent with Re Westbourne Galleries, especially with the speech of Lord Wilberforce at p.379:

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"The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

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It would be impossible, and wholly undesirable, to define the circumstances in which these

10 considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable

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considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company;"

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28. Accordingly Burt J. was prepared to grant Mr. Zampatti relief because:

"In my opinion the petitioner has on the the facts established a ground for winding up under both sections 222 (1) (f) and 222 (1) (h) of the Act. I am also of the opinion that the petitioner has established 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."

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29. It is respectfully submitted that it is implicit in this part of His Honour's judgment that he would have decided Issue (4) in favour of Mr. Zampatti. Lloyds Bank v. Bundy (1975) Q.B. 326 was not cited to his Honour.

CONCLUSIONS OF LAW BY THE FULL COURT

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30. Having rejected the Appellants' attack upon Burt J.'s findings of fact the Full Court said:

"Much happened between 1961 and 1974 but on the facts of this case nothing which would affect the equities between Caratti and Zampatti in respect to Caratti's obligation not to erode for his own benefit Zampatti's 10% interest in 'the business'."

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31. Nevertheless the Appellants contended that as a matter of law "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". This was the only point of law argued in the appeal to the Full Court. Wickham J. recorded:

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"Subject to the effect of Article 32 and related matters it was not denied by the appellant that the facts of the case were such as would justify a winding-up order".

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32. In the light of the Australian authorities the Full Court determined by necessary implication, but not in express terms, that if the answer to Issue (1) were 'No' then Issue (2) should be decided in favour of Mr. Zampatti:

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"That Caratti by his action was attempting to deprive Zampatti of that which he had promised him, namely a 10% share in 'the business' would have been I think in itself a compelling reason for refusing specific performance. In addition to that however it is seen that Caratti through the company acquiring the land then later acquiring the goodwill of the business without payment had, assuming that Caratti's rights were exercised, dispossessed Zampatti of his interest in any possible capital gains in respect to the land and totally of his interest in a goodwill which on the facts must have been of substantial value. It may well be that the figure of four and a half million dollars arrived at in 1967 was not the true value of the goodwill but this figure does nothing to support the view that it was of no value, and the accumulation of some \$118,000 of nett debtors in three years suggests the contrary, as does a letter written on 29th November 1961 from Caratti's accountant to Zampatti to the effect that he was a partner in the firm of S. & M. Caratti and that 'this partnership will continue to operate a huge fleet of bulldozers and associated equipment on an anticipated turnover of approximately £500,000 per annum'. These two latter factors are I think not critical but add further weight to the view that a court of equity would not have ordered Zampatti to be dispossessed by specifically performing the legal obligation attached, unknown to him, to his shares. Ten years

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later the position in equity was the same and his Honour so held citing Blomley v. Ryan (1956) 99 C.L.R. 362 per Fullagar J. at 401-402. It follows from this that by the giving of notice of acquisition Caratti had not become the owner of the shares in equity, and that therefore Zampatti retained his standing in the winding-up proceedings."

10 33. In the Full Court the Appellants put their
case on this point in an alternative way, but
that also was rejected. The alternative
argument was that, since the Articles provided
a mechanism for the execution of a contested
compulsory transfer, the possibility of an
order for specific performance was not
necessary to transfer beneficial ownership.
The Full Court agreed that the test of whether
specific performance would be ordered was not
20 necessarily the same as whether an injunction
would issue to restrain the enforcement of a
legal right. In particular, if the injunction
"would in effect destroy the legal right. In
my view, if nothing more appears that cannot
be done." (The Respondent does not dispute
that formulation for the purposes of this
appeal but will if necessary respectfully
submit that in the circumstances of the present
case the argument proceeds upon a false
30 premise).

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34. However, accepting the premise, the Full
Court held that something more did appear. For
the final three pages of the judgment Wickham
J. held that an injunction would issue, at
least in the context of winding-up proceedings.
He said:

40 "Something more does appear. Caratti and
Zampatti were partners, and in matters
relating to the partnership business each
was in the legal relationship to the other
of agency. An accountant, Mr. Pearce, was
Caratti's accountant and it was he who
arranged and carried through the transaction
of sale of the tangibles to the company and
later the sale of the whole undertaking of
the company. Pearce may have in some
respects been acting for the firm and for
the company but in material respects he was
acting for the controlling partner and

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governing director, Caratti. It does not matter that Caratti did not then fully appreciate the effect of what Pearce was doing. His obligation to his partner was not to create through his servant a situation where his partner could be dispossessed, and a fortiori not to take advantage of that situation for his own benefit by in effect buying Zampatti's share in 'the business' for himself. Caratti was Zampatti's agent ..."

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"It is not sufficient, in order for Caratti to resist his liability to account, for him to show that he acted innocently in the first instance or to show that Zampatti did not object. He must show that Zampatti positively consented to Caratti being placed in a preferred position. This is so because of the provisions of s. 40 (1) of the Partnership Act which is in no way abrogated but rather reinforced by articles 12 and 13 of the partnership deed. In this respect the onus was upon Caratti."

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"Caratti failed to discharge this onus. He had, it seems, signed a transfer and, under the article, paid the money to the company. Registration was only delayed because of the injunction against the company, but even if he had successfully reduced the legal title in 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."

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35. The authority relied upon for this analysis was the approval in the High Court of Australia of Clegg v. Edmondson (1857) 8 deG.M. & G. at page 806 in Birtchnell v. Equity Trustee, Executors and Agency Co. Ltd. 42 C.L.R. 384, at page 389 per Isaacs J:

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"The onus of this case rests, as I think, upon the defendants, the managing partners. Having stood in a confidential relation, both as partners and as managers, the consequences which, according to the ordinary rules of this Court, flow from that relation must

10 attach upon them, unless they can by some means exonerate themselves from those consequences. It is not at all like a case in which the adverse litigants are, so to speak, strangers, and unconnected by any relation which begins by creating an obligation. If A sues B for fraudulent concealment producing damage, the concealment is an essential element in the cause of action. But in a case like the present, equity has always held that the fiduciary relation itself imposes on the party bound to fidelity the obligation of justifying any private advantage he obtains in the course of his trust, or by reason of an interest conflicting or possibly conflicting with his duty. This is invariable."

20 36. It is respectfully submitted that in this reasoning the Full Court is deciding both Issue (3) and Issue (4) in favour of Mr. Zampatti. Mr. Caratti had, through Mr. Pearce's advice, obtained an unfair advantage against Mr. Zampatti without his knowledge or consent. Whether that advantage is regarded as a breach of duty by an agent, or breach of trust by a partner, in whatever way the interest was obtained to give effect to it would be to deny the underlying mutual obligations of the parties. This the Full Court declined to do.

30 37. The reasoning of the Full Court may also be supported by reference to Lloyds Bank v. Bundy (1975) 1 Q.B. 326. where the defendant had relied entirely upon the bank and had received no independent advice. The bank had obtained a security wholly to its own advantage. The Court of Appeal set aside the security. Sir Eric Sachs, with whom Cairns L.J. agreed said, p. 342-3 :

"Such occasions, of course, fall within what Cotton L.J. in Allcard v. Skinner, 36 Ch.D 145, 171 described as the first class of cases to which the doctrine of undue influence applies. There is, however, a second class of such cases. This is referred to by Cotton L.J. as follows:

50 "In the second class of cases the court interferes, not on the ground that any

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wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

It is thus to be emphasised that as regards the second class the exercise of the court's jurisdiction to set aside the relevant transaction does not depend on proof of one party being "able to dominate the other as though a puppet" ... nor any wrongful intention on the part of the person who gains a benefit from it; but on the concept that once the special relationship has been shown to exist, no benefit can be retained from the transaction unless it has been positively established that the duty of fiduciary care has been entirely fulfilled....

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It is also to be noted that what constitutes fulfilment of that duty...depends again on the facts before the court. It may in the particular circumstances entail that the person in whom confidence has been reposed should insist on independent advice being obtained or ensuring in one way or another that the person being asked to execute a document is not insufficiently informed of some factor which could affect his judgment. The duty has been well stated as being one to ensure that the person liable to be influenced has formed "an independent and informed judgment", or, to use the phraseology of Lord Evershed M.R. in Zamet v. Hyman (1961) 1 W.L.R. 1442, 1446, "after full, free and informed thought." (The underlining in each case is mine.) As to the difficulties in which a person may be placed and as to what he should do when there is a conflict of interest between him and the person asked to execute a document: see Bank of Montreal v. Stuart (1911) A.C. 120, 139.

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Stress was placed in argument for the bank on the effect of the word "abused" as it appears in the above cited passage in the judgment of Cotton L.J. and in other judgments and textbooks. As regards the second class of undue influence, however, the word in the context means no more than that once the existence of a special relationship has been established, then any possible use of the relevant influence is, irrespective of the intentions of the persons possessing it, regarded in relation to the

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transaction under consideration as an abuse -
unless and until the duty of fiduciary care
has been shown to be fulfilled or the
transaction is shown to be truly for the
benefit of the person influenced. This
approach is a matter of public policy."

10 Since Burt J. held that "As between
Caratti and Zampatti nothing was said of
Article 32. Zampatti never knew of it and
Caratti had forgotten about it" and since
everything was done on the advice of Mr.
Pearce, who was Mr. Caratti's man, it is
respectfully submitted that the same
consequences should apply here: that is that
as between Mr. Caratti and Mr. Zampatti
Article 32 is unenforceable.

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20 38. The Respondent respectfully submits that
the Orders of Burt J. and of the Full Court
should be upheld for the following among
other

R E A S O N S

1. BECAUSE the underlying relationship
between Mr. Caratti and Mr. Zampatti was at
all material times since June 1961 one of
partnership.

30 2. BECAUSE Article 32 cannot be enforced
as between Mr. Caratti and Mr. Zampatti
consistently with the underlying partnership
unless Mr. Caratti pays a fair price for the
10% shareholding.

3. BECAUSE in the transaction in which
Article 32 became part of the contract between
Mr. Caratti and Mr. Zampatti Mr. Caratti acted
in breach of his fiduciary duty either as
partner of or agent for Mr. Zampatti and
obtained an unfair advantage for himself.

40 4. BECAUSE in that transaction, in the
alternative, Mr. Caratti abused a dominant
position to obtain an unfair advantage for
himself, in that he knew that at all times
Mr. Zampatti relied upon him and trusted him
to do what was right and fair between them.

5. BECAUSE the judgments of Burt J. and of
the Full Court were right and ought to be upheld.

RICHARD YORKE

IN HER MAJESTY'S PRIVY COUNCIL

O N A P P E A L

FROM THE FULL COURT OF HER MAJESTY'S
SUPREME COURT OF WESTERN AUSTRALIA

B E T W E E N :

CARATTI HOLDING CO. PTY. LTD.
SERGIO CARATTI

Appellants

- and -

BERNARDO ZAMPATTI

Respondent

CASE FOR THE RESPONDENT

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