Judgment 24 of 1978

24/78

IN THE PRIVY COUNCIL No. 17 of 1977

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF WESTERN AUSTRALIA

Between

CARATTI HOLDING CO. PTY. LTD.

and

SERGIO CARATTI — Appellants (Respondents)

and

BERNARDO ZAMPATTI — Respondent (Petitioner)

RECORD OF PROCEEDINGS

PART I

IN THE PRIVY COUNCIL No. 17 of 1977

ON APPEAL FROM THE FULL COURT OF

THE SUPREME COURT OF WESTERN

AUSTRALIA

Between

CARATTI HOLDING CO. PTY. LTD.

and

SERGIO CARATTI

Appellants
(Respondents)

and

BERNARDO ZAMPATTI

Respondent
(Petitioner)

RECORD OF PROCEEDINGS

PART I

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RECORD OF PROCEEDINGS

Index of Reference

PART I

No.	Description of Document	Date	Page
	IN THE SUPREME COURT OF WESTERN AUSTRALIA		
	Pleadings		
1.	Petition as amended by Orders dated the 5th day of June 1975 and the 19th day of June 1975. Original presented:	3.12.74	1 - 16
2.	Composite Request for Particulars of Petition and Answers thereto.		17 - 25
	Petitioner's Evidence		
	Affidavit Evidence		
3.	First Affidavit of Bernardo Zampatti verifying Petition, Sworn -	3.12.74	26
4.	Second Affidavit of Bernardo Zampatti verifying Petition, Sworn -	3.12.74	27 - 40
5.	Affidavit of Bernardo Zampatti, Sworn -	3. 4.75	41 - 44
6.	First Affidavit of Bernardo Zampatti, Sworn -	15. 4.75	45 - 46
7.	Second Affidavit of Bernardo Zampatti, Sworn -	15. 4.75	47
8.	Affidavit of Bernardo Zampatti, Sworn -	29. 5.75	48 - 50
9.	Affidavit of Bernardo Zampatti, Sworn -	16. 6.75	51
10.	Affidavit of Bernardo Zampatti, Sworn -	23. 6.75	52 - 55

No.	Description of Document	Date	Page
11.	Affidavit of Robert Michael Golding, Sworn -	20. 6.75	56 - 61
12.	Affidavit of Aubrey Shepherd, Sworn -	23. 6.75	62 - 64
	Oral Evidence		
13.	Bernardo Zampatti -		65 - 127
	Cross Examination		65 - 120
	Re-Examination		121 - 127
14.	Aubrey Shepherd -		128 - 149
	Cross Examination		128 - 145
	Re-Examination		146 - 149
	Other Evidence		
15.	Letter and Schedule of Admissions made by Respondents (Appellants)	20. 6.75	150 - 151
	Respondents' (Appellants') Evidence		
	Affidavit Evidence		
16.	Affidavit of Sergio Caratti, Sworn -	18. 2.75	152 - 175
17.	Affidavit of Sergio Caratti, Sworn -	8. 4.75	176 - 179
18.	Affidavit of Sergio Caratti, Sworn -	20. 6.75	180
19.	Affidavit of Peter Forbes, Sworn -	1. 5.75	181 - 189
20.	First Affidavit of Peter Forbes, Sworn -	18. 6.75	190
21.	Second Affidavit of Peter Forbes, Sworn -	18. 6.75	191 - 196
22.	Affidavit of Henry Maxwell Kitson, Sworn -	23. 6.75	197 - 199
23.	Affidavit of Robert Garton Smith, Sworn -	11. 4.75	200 - 202
24.	Reasons for Judgment of The Honourable Mr Justice Burt	4. 9.75	203 - 224
25.	Order of The Honourable Mr Justice Burt on hearing of Petition	19. 9.75	225 - 229
	BEFORE THE FULL COURT OF THE SUPREME COURT OF WESTERN AUSTRALIA		
26.	Notice of Appeal	9.10.75	230 - 244
27.	Notice of Petition pursuant to Order 63 Rule 9 (12)	19.12.75	245 - 246
28.	Reasons for Judgment	17.11.76	247 - 257
29.	Order dismissing Appeal	17.11.76	258
30.	Order granting final leave to appeal to Her Majesty in Council	13. 4.77	259 - 261

PART II

EXHIBITS

Exhibits to Affidavits

Exhibit Mark	Description of Document	Deponent	Date Sworn	Page
BZ2	Notice Under Article 32	Bernardo Zampatti	3.12.74	262 - 263
Y	Invoice from Caratti Aust.	Bernardo Zampatti	23. 6.75	264
Z	Group Certificates from 1964-1967	Bernardo Zampatti	23. 6.75	265
ZA	Injunction dated 21st May, 1975	Bernardo Zampatti	23. 6.75	266 - 267
ZB	Copy Affidavit of C.J. Boyle sworn 3.6.75	Bernardo Zampatti	23. 6.75	268 - 269
ZC	Photocopy letter from G.M. Handcock & Co.	Bernardo Zampatti	23. 6.75	270
B	Summary of Information from Caratti Holding Co. Pty. Ltd. Balance Sheets	Robert Michael Golding	20. 6.75	271
AS1	Chart setting out trading history	Aubrey Shepherd	23. 6.75	272
SC1	Memorandum & Articles of Association	Sergio Caratti	18. 2.75	273 - 341
SC4	Resolution of Allotment of Shares	Sergio Caratti	18. 2.75	342
SC5	Original of engrossed partnership agreement	Sergio Caratti	18. 2.75	343 - 358
SC6	Dissection of Shareholders Funds	Sergio Caratti	8. 4.75	359
SC7	Caratti Consolidated Pty. Ltd. Debenture	Sergio Caratti	8. 4.75	360 - 371
SC8	Minute Book of Caratti Holding Co. Pty. Ltd.	Sergio Caratti	20. 6.75	372 - 398
PF1	Copies of General Ledger cards transactions between Company and Zampatti	Peter Forbes	1. 5.75	399 - 408
PF3	Details of Loan Account for Kent River, Albany Forts, Chapman Valley, Bullfinch, Caratti Freeholds and Delbar	Peter Forbes	18. 6.75	409
PF4	" " " "	Peter Forbes	18. 6.75	410
PF5	Details of Loan Account for Kent River, Albany Forts, Chapman Valley, Bullfinch, Caratti Freeholds and Delbar	Peter Forbes	18. 6.75	411

Exhibit Mark	Description of Documents	Deponent	Date Sworn	Page
PF6	Details of Loan Account for Kent River, Albany Forts, Chapman Valley, Bullfinch, Caratti Freeholds and Delbar	Peter Forbes	18. 6.75	412 - 413
PF7	" " " "	Peter Forbes	18. 6.75	414 - 415
PF8	" " " "	Peter Forbes	18. 6.75	416 - 417
PF9	Agreement between Caratti and Latec Investments Ltd.	Peter Forbes	18. 6.75	418 - 433
A	Bundle of Balance Sheets and Schedules and Supporting Statements (only agreed extracts being balance sheets, profit and loss accounts and profit and loss appropriation accounts have been duplicated)	Robert Michael Golding	20. 6.75	434 - 462

Exhibits to Oral Testimony

Exhibit Mark	Description of Documents	Date	Page
31	Application by Bernardo Zampatti for Shares	21. 8.61	463
32	Overdue account	4.12.74	464
33	Overdue account	1.11.74	465
34	Bundle of correspondence		466 - 490
35	Bundle of Ledger Cards		491 - 496

LIST OF DOCUMENTS NOT TRANSMITTED

TO THE PRIVY COUNCIL

Description to Document	Date
Order of The Honourable Mr Justice Wallace on	6.12.74
Notice of Appeal	24.12.74
Summons pursuant to Rule 49(1)	23. 1.75
Order of The Honourable Mr Justice Jones on 5.12.74	Filed 4. 2.75
Masters Certificate Rule 49(1)	5. 2.75
Exhibit BZ1 to the Second Affidavit of Bernardo Zampatti Sworn -	3.12.74
Exhibit 36. Typewritten copy of Minutes of Meeting of -	3. 6.75
Exhibits A and B to the Affidavit of Bernardo Zampatti Sworn -	3. 4.75
Exhibits SC2 and SC3 to the Affidavit of Sergio Caratti Sworn -	18. 2.75
Exhibits PF2 and PF10 to the Affidavit of Peter Forbes Sworn -	18. 6.75
Balance of documents comprising Exhibit A to the Affidavit of Robert Michael Golding	20. 6.75
Motion for Leave to Appeal to Her Majesty in Council	1.12.76
Affidavit of David Kingsley Malcolm in Support of Motion for Leave, Sworn -	30.11.75
Order granting conditional Leave to Appeal to Her Majesty in Council	17.12.76

IN THE PRIVY COUNCIL No. 17 of 1977

ON APPEAL FROM THE FULL COURT
OF THE SUPREME COURT OF WESTERN
AUSTRALIA

Between

CARATTI HOLDING CO. PTY. LTD.

and

SERGIO CARATTI — Appellants (Respondents)

and

BERNARDO ZAMPATTI — Respondent (Petitioner)

RECORD OF PROCEEDINGS

No. 1
PETITION

In the
Supreme Court

No. 1

Petition as
amended by Orders
dated 5 June 1975
& 19th June 1975.
Original presented 3/12/74

This humble petition of BERNARDO ZAMPATTI of 73 Great Eastern Highway South Guildford near Perth in the State of Western Australia showeth as follows :

1. Caratti Holding Co. Pty. Ltd. (hereinafter called "the Company") was incorporated on or about 6th July 1960 under the Companies Act 1943-1960.

2. The registered office of the Company is situate at 517 Great Eastern Highway Redcliffe in the State of Western Australia.

3. The nominal capital of the Company is $200,000.00 divided into 100,000 shares of $2.00 each.

4. The issued capital of the Company consists of 15,002 shares of $2.00 each fully paid.

5. The shareholders of the Company are and have at all times since prior to 30th June 1962 been as follows :

As to 10,126 shares by SERGIO CARATTI (hereinafter referred to as "the Second Respondent")

As to 3,375 shares by MADDELIENE CARATTI the wife of the Second Respondent

As to 1 share by FREDERICK LAWLEY EDWARDES

As to 1,500 shares by the Petitioner.

6. The objects for which the Company was established are as follows :

In the
Supreme Court

No. 1

Petition as amended by
Orders dated 5 June 1975
& 19 June 1975.
Original presented 3/12/74

(1) To subscribe for purchase or otherwise acquire and hold underwrite sell dispose of and deal in shares debentures, debenture stock or securities of any company or corporation or any government or authority Supreme local or otherwise.

(2) To issue debentures debenture stock bonds obligations and securities of all kinds and to frame constitute and secure the same as may be expedient with full power to make the same transferable by delivery or by instrument of transfer or otherwise and either perpetual or terminable and either redeemable or otherwise and to charge or secure the same by trust deed or otherwise on the undertaking of the Company or upon any specific property and rights present and future of the company (including if thought fit uncalled capital) or otherwise howsoever.

(3) To carry on all kinds of promotion business and in particular to form constitute float lend money to assist control and/or manage any companies associations or undertakings whatsoever and for that purpose to appoint and remunerate any director accountants or other experts or agents.

7. Article 6 of the Articles of Association of the Company provides as follows :

6. The share for which Sergio Caratti (hereinafter called "the Founder") subscribes the Memorandum of Association of the Company shall be numbered 1 and is called "the Life Governor's share". The Founder whilst he is the registered holder of the Life Governor's share and on his death his personal representatives whilst the Life Governor's share is registered in the name of the Founder or in the names of his personal representatives shall be entitled to have and exercise the special rights and powers in respect of the Life Governor's share conferred by these Articles SUBJECT

ALWAYS to the provisions of any Article as to special rights and powers which are expressly stated to be only exercisable during the lifetime of the Founder. On the death of the Founder his personal representatives shall be deemed to hold the Life Governor's share until they shall sell it or transfer it to the beneficiary entitled thereto under the Founder's Will or in the distribution of his estate and wherever in these Articles it is stated that rights may be exercised by the personal representatives of the Founder such articles shall be read and construed subject to this Article. Thereafter the rights created by these Articles in respect of the Life Governor's share shall terminate and it shall thereupon no longer retain its identity as the Life Governor's share and shall thereafter rank as an ordinary share.

8. Article 32 of the Articles of Association of the Company provides as follows :

32. 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 that it may not be accompanied by the certificate or certificates for such shares. Any

11. Article 46 of the Articles of Association of the Company

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.

9. Article 43 of the Articles of Association of the Company provides as follows :

43. A general meeting shall be held once in every calendar year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the Company in general meeting, or in default, at such time in the third month following that in which the anniversary of the Company's incorporation occurs, and such place as the Directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following and may be convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the Directors.

10. Article 45 of the Articles of Association of the Company provides as follows :

45. The Directors may, whenever they think fit, convene an extra-ordinary general meeting, and extra-ordinary general meetings shall also be convened on such requisitions, or, in default may be convened by such requisitionists, as provided by Section 116 of the Act. If at any time there are not within the State of Western Australia sufficient directors capable of acting to form a quorum, any director or any two members of the Company may convene an extra-ordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the Directors.

In the Supreme Court

No. 1 Petition as amended by Orders dated 5 June 1975 & 19 June 1975. Original presented 3/12/74

11. Article 46 of the Articles of Association of the Company provides as follows :

> 46. Subject to the provisions of Section 119(1) of the Act relating to special resolutions fourteen days' notice at least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day and the hour of meeting and in case of special business, the general nature of that business shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the Company in general meeting, to such persons as are, under the regulations of the Company, entitled to receive such notice for the Company; but with the consent of all the members entitled to receive such notices of some particular meeting, that meeting may be convened by such shorter notice and in such manner as those members think fit.

12. Article 116 of the Articles of Association of the Company provides as follows :

> 116. A notice may be given by the Company to any member either personally or by sending it by post to him to his registered address, or (if he has no registered address within the State of Western Australia) to the address, if any, within the said State supplied by him to the Company for the giving of notices to him.

13. Article 101 of the Articles of Association of the Company provides as follows :

> 101. The Directors may from time to time declare a dividend to be paid to the members entitled thereto.

14. Article 102 of the Articles of Association of the Company provides as follows :

In the Supreme Court

> 102. No dividend shall be paid otherwise than out of profits but it shall not be necessary to recoup trading

No. 1 Petition as amended by Orders dated 5 June 1975 & 19 June 1975. Original presented 3/12/74

losses in respect of past years or capital losses before declaring a dividend.

15. Article 103 of the Articles of Association of the Company provides as follows :

> 103. Subject to the rights of persons, if any, entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares but if and so long as nothing is paid up on any of the shares in the Company, dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purpose of this article as paid on the share.

16. Article 104 of the Articles of Association of the Company provides as follows :

> 104. The Directors, may before declaring any dividend, set aside out of the profits of the Company, such sums as they think proper as a reserve or reserves which shall, at the discretion of the Directors, be applicable for meeting contingencies, or for equalising dividends, or for any other purpose to which the profits of the Company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the Company, or be invested in such investments (other than shares of the Company) as the Directors may from time to time think fit.

17. The registered address of the Petitioner as referred to in Article 116 of the Articles of Association of the Company is 73 Great Eastern Highway South Guildford.

18. All shares issued in the capital of the Company rank equally pari passu one with the other as to dividends and there is no share with special rights to dividends as referred to in Article 103 set forth above.

In the Supreme Court

No. 1 Petition as amended by Orders dated 5 June 1975 & 19 June 1975. Original presented 3/12/74

19. The Second Respondent is the Founder as described in Article 32 of the Articles of Association.

20. The Second Respondent has for many years since prior to 1961 conducted various businesses of bulldozing and contracting.

21. Prior to 1st July 1961 the Second Respondent conducted the said business as managing partner of a partnership consisting of the Second Respondent and his wife and another person as trustee for the children of the Second Respondent.

22. From 1st July 1961 until the events hereinafter set forth the Second Respondent as managing partner conducted the said business in the following manner :

(a) As to a partnership between the Second Respondent and his wife and the said person as trustee for the children of the Second Respondent and as to a 10% interest therein the Petitioner.

(b) The said partnership referred to in the preceding subparagraph of this paragraph was carried on under two names, namely W.A. Bulldozing Co. and S. & M. Caratti.

(c) The plant used by the said partnership was owned by the Company and leased by the partnership from the Company which said lease was not reduced to writing.

23. The Second Respondent to the exclusion of the Petitioner also conducted the affairs of the Company other than to the extent that the Petitioner was employed as a manager of the general bulldozing business but did not receive salary from nor was he an employee of the Company save as hereinafter set forth.

24. During late 1960 or early 1961 the Second Respondent offered to the Petitioner the right upon certain terms and conditions agreed between them that the Petitioner should become a 10% owner of all assets of and incidental to the said business.

24A. The Petitioner and the Second Respondent on behalf of himself, his partners and the Company agreed that :

(i) The Petitioner should become a 10% partner in the bulldozing and earthmoving business operated by the Second Respondent and others;

(ii) The Petitioner would take up shares to give him a 10% shareholding in the Company which company had been incorporated on the 6th July 1960;

(iii) In consideration of the interest in the partnership and for his shares in the Company the Petitioner would forego bonuses and arrears of wages.

24B. It was an implied term and condition of the agreement that there would be no limitation or inhibition on the Petitioner's absolute ownership and control of the 10% interest or 10% shareholding.

24C. In pursuance of this agreement and upon its inducement on or about 1st July 1961 the Petitioner became a 10% partner and on 21st August 1961 applied for and was allotted 1,500 shares in the capital of the Company.

25. There was no term and condition of the said agreement in any way limiting or inhibiting the absolute ownership and control by the Petitioner of the said 10% interest.

26. In pursuance of this agreement and upon its inducement and not otherwise on or about 1st July 1961 the Petitioner became a 10% partner in the said partnership business referred to in paragraph 22 of this petition and on or about 21st August 1961 the Petitioner applied for and was allotted the said 1,500 shares in the capital of the Company.

27. At the time of the agreement and the application and the becoming a member of the partnership the command of written English of the Petitioner was minimal.

28. The Petitioner arrived in Australia from Italy during 1949 and had not thereafter received any schooling.

29. At no time until the events hereinafter set forth did the Petitioner see or become aware of the terms and con-

dition in the Articles of Association of the Company set forth and in particular Article 32 thereof.

30. The Petitioner has received from the Company no moneys whatsoever or howsoever save and except as to salary for one year ending approximately 30th June 1965.

31. The Petitioner has received no dividends nor distributions of any kind whatsoever out of the profits of the Company.

32. The Petitioner has received no notices of any general meeting of the Company.

33. The Petitioner is unaware as to whether any general meetings of the Company have been held but he has attended no such meetings nor has he been invited formally or informally to so attend.

34. Until the giving of the notice pursuant to Article 32 as hereinafter set forth the Second Respondent has at all times held out to the Petitioner that the Petitioner is entitled absolutely to the said 1,500 shares being approximately 10% of the capital of the Company without limitation or inhibition.

35. During 1973 the Petitioner commenced proceedings for dissolution of the said partnership referred to in paragraph 22 of this petition being Matter No. 2361 of 1973 heard in the Supreme Court of Western Australia. At all times until the conclusion of the said proceedings it was held out to the Petitioner that the Second Respondent had not and would not purport to exercise the power purported to be granted by the said Article 32.

36. Judgment in the said partnership proceeding No. 2361 of 1973 was reserved on the 26th November 1974.

37. On 27th November 1974 there was delivered to the Petitioner a document in the form in the Schedule hereto of which delivery telephone advice was given to the home of the Petitioner by a person representing the Second Respondent on the evening of the 26th November 1974.

In the Supreme Court

No. 1 Petition as amended by Orders dated 5 June 1975 & 19 June 1975. Original presented 3/12/74

38. The Second Respondent alleges that upon the taking of a proper accounting of the said partnership business referred to in paragraph 22 of this petition that the Petitioner will be indebted in the sum of approximately $3,000/$5,000 and will not be entitled to receive any moneys whatsoever or howsoever.

39. In early 1972 the Second Respondent caused to be prepared a statement of the value of the interest of the Petitioner in both the said partnership and as a shareholder of the Company.

40. Resultant from such preparation the detail of which is not known to the Petitioner the Second Respondent offered to the Petitioner the sum of $200,000 as consideration for the transfer by the Petitioner of the said 1,500 shares in the capital of the Company and of his interest in the said partnership.

41. Insofar as the said Article 32 creates any contractual right as between the Petitioner and the Second Respondent (which is not admitted) the Petitioner charges that it is implied that all profits of the Company of whatsoever nature earned by the Company up to the date of exercise of the rights purported to be granted pursuant to the provisions of the said Article 32 should be distributed amongst the members of the Company prior to the date of the exercise of the power purported to be contained in the said Article.

42. The balance sheet of the Company, so far as shareholders' funds are concerned, disclose the following :

30th June 1963		$49,395.00
30th June 1964		$34,838.00
30th June 1965	(subject to amendment)	$36,838.00
30th June 1966		$29,966.00
30th June 1967		$179,521.00
30th June 1968		$4,678,576.00
30th June 1969		$4,790,548.00
30th June 1970		$4,749,017.00

In the Supreme Court

No. 1 Petition as amended by Orders dated 5 June 1975 & 19 June 1975. Original presented 3/12/74

30th June 1971	$4,761,098.00
30th June 1972	$4,778,192.00

43. The Petitioner first became aware of the existence and contents of the said balance sheets as a result of proceedings taken during 1973 for the purpose of obtaining the said balance sheets.

44. The Company has no intangible assets and the shareholders' funds are wholly represented by tangible assets.

45. The plant and equipment owned by the Company at 30th June 1972 in accordance with the said balance sheet at cost less depreciation is in the amount of $112,068.00.

46. The said plant was almost wholly acquired during the year ended 30th June 1972 and at 30th June 1971 the only plant and equipment shown in the balance sheet of the Company was in the amount of $1,012.00.

47. The land and buildings of the Company at 30th June 1972 in accordance with the said balance sheet at cost was in the amount of $535,381.00 and is worth more than the said balance sheet figure.

48. In addition to the said land and buildings the said balance sheet at 30th June 1972 indicates the ownership of unencumbered real estate in the amount of $99,900.00 the detail of which was not known to the Petitioner.

49. Substantially all other assets of the Company are represented by debtors and investments in shares in subsidiary and associated companies other than 100,000 preference shares in the capital of Landall Holdings Limited.

50. Of the debtors the sum of $2,201,083.00 is shown as secured and $1,551,722.00 is shown as unsecured.

51. Included among the unsecured debtors is the sum of $258,016.00 owed by Delbar Investments Pty. Limited being a company controlled by the Second Respondent.

52. At 30th June 1971 the said Delbar Investments Pty. Limited was indebted to the Company in the sum of $171,152.00.

53. No interest has been charged to Delbar Investments Pty. Limited.

54. The total of interest received during the year ended 30th June 1972 was $5,983.00.

55. At 30th June 1967 the Company was indebted to the partnership referred to in paragraph 22 of this petition in the sum of $93,605.00.

56. During the year ended 30th June 1968 the Company disposed of various assets by sale to Caratti Consolidated Pty. Limited in which latter company the Company held slightly less than 50% of its capital and which sale gave rise to a capital profit in the sum of $4,540,854.00 and which sale gave rise to a debenture in favour of the Company from Caratti Consolidated Pty. Limited which at 30th June 1968 was in the amount of $4,131,456.00.

57. Since 30th June 1968 the Second Respondent has withdrawn divers moneys and benefits from the Company which said moneys and benefits has been charged against the account of W.A. Bulldozing Co. (theretofore being the said partnership account in the books of the Company).

58. At 30th June 1972 the account of W.A. Bulldozing Co. in the records of the Company indicated that W.A. Bulldozing Co. was indebted to the Company in the sum of $781,805.00.

59. The Petitioner charges that by these means the Second Respondent has withdrawn from the Company divers moneys and benefits between 30th June 1967 and 30th June 1972 totalling $875,410.00.

60. The Petitioner charges that in addition to the said moneys drawn out as set forth in the preceding three paragraphs of this petition the Second Respondent has drawn from the Company further moneys which have been charged in the books of the Company as loans to Companies entitled Caratti Bullfinch Pty. Limited, Albany Forts Freehold Pty. Ltd., Caratti (Chapman Valley) Pty. Limited and Caratti Freeholds Pty. Limited. The total indebtedness of these companies in

the books of the Company at 30th June 1972 amounted to approximately $510,000.00 and at 30th June 1967 the said companies were indebted to the Company in amounts totalling approximately $220,000.00.

61. The Petitioner charges that by these means the Second Respondent has obtained further moneys and benefits from the Company in amounts totalling approximately $290,000.00.

62. At no time prior to the obtaining of the said balance sheets was the Petitioner aware that the said moneys or any moneys were being so drawn by the Second Respondent.

63. No balance sheet or accounts of the Company after 30th June 1972 have been made available to the Petitioner and the Petitioner is not aware of any changes which would affect the value of the Company.

64. The Second Respondent has at all times conducted the affairs of the Company for his own benefit and not for the benefit of the Company as a whole.

65. The Petitioner says

A. that Article 32 is void and of no effect by reason:

(a) that the rights which such article purports to vest in the Second Respondent while the registered holder of the Life Governor's share in the Company were not within the ambit of the powers of the Company expressed or implied in its Memorandum of Association or derived from the Companies Act 1948 and its amendments;

(b) Alternatively that the provisions of such article do not impose contractural obligations upon the shareholders of the Company in respect of which an action will lie either at the suit of the Company or the Second Respondent.

B. Alternatively : the service and delivery by the Second Respondent of the notice set forth in the

In the Supreme Court

No. 1

Petition as amended by Orders dated 5 June 1975 & 19 June 1975

Original presented 3/12/74

Schedule hereto is contrary to and in breach of the agreements between the Petitioner and the Second Respondent and is in the circumstances oppressive to the Petitioner as a shareholder and constitutes a denial of the rights of the Petitioner.

66. The conduct of the Second Respondent in the management of the Company and in the withdrawing of the funds of the Company and in the withholding of dividends and profits of the Company and in the giving of the notice in the circumstances hereinbefore set forth is and constitutes the acting by a director of the Company in his own interests rather than in the interests of the Company as a whole.

67. The Second Respondent has at all times been the Governing Director of the Company having the powers of the Board in accordance with the provisions of Article 67 of the Articles of Association which provides as follows :

> 67. The government and control of the Company shall be vested in the Governing Director and he may exercise all the powers authorities and discretions hereby expressed to be vested in the Governing Director and all those expressed to be vested in the Directors by these Articles.

68. The Second Respondent has at all times exercised the said powers referred to in the preceding paragraph of this petition.

69. It is just and equitable that the Company be wound up.

70. The Petitioner therefore humbly prays as follows :

(1) That Caratti Holding Co. Pty. Ltd. be wound up by the Court under the provisions of the Companies Act 1961;

(2) That it be declared that Article 32 of the Articles of Association is void and of no effect or alternatively that the Company by itself its directors. its servants and agents be restrained from registering or purporting to register any transfer or

In the Supreme Court

No. 1 Petition as amended by Orders dated 5 June 1975 & 19 June 1975. Original presented 3/12/74

purported transfer of shares held by the Petitioner in the capital of the Company pursuant to Article 32 without the consent in writing of the Petitioner first had and received:

(3) Alternatively to the first order sought herein that the Second Respondent be ordered to purchase from the Petitioner the shares held by the Petitioner in the capital of the Company at such price as to this Honourable Court seems just;

(4) Alternatively to the first and second orders sought herein either that the capital of the Company might be reduced by the payment to the Petitioner of an amount equal to 1,500 out of 15,002 parts of its shareholders' funds as and by way of consideration for the cancellation of the said 1,500 shares held by the Petitioner OR that it be declared that Article 32 of the Articles of Association does not grant to the Second Respondent the right to obtain the transfer of the shares held in the capital of the Company by the Petitioner unless the Second Respondent shall first have caused the Company to declare, distribute and pay by way of dividend the whole of its distributable reserves existing at the date of exercise.

(5) Such further or other order as to this Honourable Court may seem just.

In the Supreme Court

No. 1 Petition as amended by Orders dated 5 June 1975 & 19 June 1975. Original presented 3/12/74

No. 2

In the Supreme Court

No. 2

Particulars of Petition

COMPOSITE REQUEST FOR PARTICULARS OF PETITION AND ANSWERS THERETO

REQUEST	ANSWER
1.Q As to paragraph 20: Give particulars of the various businesses referred to.	1.A As to paragraph 20 Paragraphs 21 and 22 provide the particulars sought with respect to paragraph 20.
2.Q As to paragraph 21: Give particulars of the said business.	2.A As to paragraph 21 S. & M. Caratti.
3.Q As to paragraph 22 (a): State whether the alleged partnership was constituted pursuant to any and if so what agreement and whether the same was verbal in writing or to be implied and:	3.A As to paragraph 22 (a) Verbal.
(a) if in writing identify the document or documents alleged to constitute the same and say when and where it or they may be inspected;	(a) Not applicable.
(b) if verbal say when and where the same was made and set out the substance of each material conversation alleged to constitute the same;	(b) Agreement was reached in 1961 20 Mount Barker that the petitioner was to receive 10% of the assets and 10% of the profits of the partnership in consideration for which the petitioner would forego a claim for arrears of wages.
(c) if to be implied state each fact matter or thing from	(c) Not applicable.

which such implication was to be drawn.

4.Q As to paragraph 23:

Give particulars of each fact, act, matter or thing upon which the petitioner relies to support the allegation that the second respondent to the exclusion of the petitioner conducted the affairs of the company.

5.Q As to paragraph 24:

(a) State whether the alleged offer was verbal in writing or to be implied and:

(i) if in writing identify the document or documents alleged to constitute the same and say when and where it or they may be inspected;

(ii) if verbal say when and where the same was made and set out the substance of each material conversation alleged to constitute the same;

(iii) if to be implied state each fact matter of thing from which such implication was to be drawn.

In the Supreme Court

No. 2

Particulars of Petition

4.A As to paragraph 23

Full particulars as to the matters complained about in paragraph 23 as set out in detail in paragraphs 30 31, 32, 33, 34, 43, 51, 52, 53, 54 57, 58, 59, 60 and 61 of the petition.

5.A As to paragraph 24

(a) verbal and implied.

(i) Not applicable.

(ii) In or about 1960 or 1961 at Mount Barker the second respondent offered the petitioner 10% of all his business operations including 10% of shares in Caratti Holding Co. Pty. Ltd.

(iii) It was an implied term of such offer that there would be no limitation or inhibition over the petitioner's absolute control or ownership of the petitioner's shares in Caratti Holding Co. Pty. Ltd. No discussion was ever held with the petitioner and no agreement was reached whereby there was to be

any limitation or inhibition as aforesaid.

(b) As to the alleged terms and conditions agreed state whether the said agreement was verbal in writing or to be implied and:

(b) Verbal and implied.

(i) if in writing identify the document or documents alleged to constitute the same and say when and where it or they may be inspected;

(i) Not applicable.

(ii) if verbal say when and where the same was made and set out the substance of each material conversation alleged to constitute the same;

(ii) The offer made by the second respondent as set out answer 5 (a) (ii) above was accepted by the petitioner in or about 1961 at Mount Barker and by such acceptance the implied term set out in answer 5 (a) (iii) above was thereby incorporated into the agreement The petitioner cannot be more specific about the date and substance of such conversations because they occurred over 13 years ago.

In the Supreme Court

No. 2

Particulars of Petition

(iii) if to be implied state each fact matter or thing from which such implication was to be drawn.

(iii) See the preceding sub-paragraph.

(c) As to the alleged terms and conditions give full particulars thereof.

(c) The terms are set out above in answers 5 (a) (ii) and (iii) and 5 (b) (ii) and (iii).

(d) Give particulars of:

(i) the said business; and

(d) Full particulars of the business are set out in paragraph

(ii) the assets alleged to be the assets of and incident to the said business.

22 of the petition.

The assets of the business at the time is information more particularly within the knowledge of the respondents and not within the knowledge of the petitioner.

6.Q As to paragraph 34:

Give particulars showing at what times in what manner it is alleged that the second respondent held out to the petitioner the matters referred to stating in respect of each occasion out whether the holding out was in writing verbal or to be implied and:

(a) if in writing identify the document or documents alleged to constitute the same and say when and where it or they may be inspected;

(b) if verbal say when and where the same was made and set out the substance of each material conversation alleged to constitute the same;

(c) if to be implied state each fact matter or thing from which such implication was to be drawn.

7.Q As to paragraph 34:

Give particulars showing at what times and in what manner it is alleged that the matters referred to were held out to the petitioner and by whom stating

6.A As to paragraph 34

Verbal and implied.

In the Supreme Court

No. 2

Particulars of Petition

(a) Not applicable.

(b) & (c) The petitioner was informed verbally by the second respondent and his servants or agents that the petitioner had 10% "of everything".

At the time of the Latec transaction (in or about 1967) the second respondent informed the petitioner that the transaction would result in a saving so far as tax was concerned and that Mr. Zampatti would retain his 10% interest in "everything" through a debenture which was to be held by the first respondent.

with respect to each occasion whether the holding out was verbal, in writing or to be implied and:

(a) if in writing identify the document or documents alleged to constitute the same and say when and where it or they may be inspected;

(b) if verbal say when and where the same was made and set out the substance of each material conversation alleged to constitute the same;

(c) if to be implied state each fact matter or thing from which such implication was to be drawn.

In the Supreme Court

No. 2

Particulars of Petition

Mr. Kitson as senior partner with the auditing firm Messrs Henry Rae & Court and financial adviser to the first and second respondent informed the petitioner on various occasions (the petitioner cannot now recall the exact dates) that the petitioner had a 10% interest in a debenture of 5.23 million dollars and that the petitioner's interest therein represented an amount of approximately $500,000.

Prior to the Landall transaction a meeting was called by the second respondent and held at the second respondent's house. There Mr. Kitson explained that the sale to Landall would result in the petitioner "getting his money" out of the company.

The petitioner also relies inter alia upon a conversation he had with the second respondent when the second respondent offered $200,000 for Mr. Zampatti's shares, this offer implying that the shares were worth more than the nominal value of $3,000 placed on them if the shares be called up pursuant to Article 32. The holding out is to be implied from such conversations in that no mention

was ever made to the petitioner that his shareholding might be worth only the par value of his shares and that they could be called up at any time by the second respondent.

8.Q As to paragraph 40:

State whether the alleged offer was verbal, in writing or to be implied and:

(a) if in writing identify the document or documents alleged to constitute the same and say when and where it or they may be inspected;

(b) if verbal say when and where the same was made and set out the substance of each material conversation alleged to constitute the same;

(c) if to be implied state each fact matter or thing from which such implication was to be drawn.

9.Q As to paragraph 41:

As to the alleged implication state each act, fact, matter or thing from which such implication is to be drawn.

8.A

(7) As to paragraph 40

Verbal.

(a) Not applicable.

(b) At 517 Great Eastern Highway Redcliffe the second respondent offered the petitioner $200,000 in consideration for which the petitioner would transfer his shares in the first respondent to the second respondent and would transfer his interest in the partnership to the second respondent. This offer was made in 1971 or 1972.

9.A

(8) As to paragraph 41

The implication arises as a result of the particulars given with respect to paragraphs 24 and 34. The petitioner maintains that as a matter of law the profits up to the

date of exercise of the rights purported to be granted by Article 32 should be distributed. The petitioner will ask the Court to take into account all of the circumstances set out in the petition and these particulars in making such an orde

10.Q As to paragraph 57:

Give particulars of the divers moneys and benefits alleged to have been withdrawn from the company by the second respondent and particulars showing how the second respondent benefited thereby.

10.A

(9) As to paragraph 57

Full particulars of the moneys with drawn (and consequently the benefits obtained by the second respondent) are set out in the balance sheets the first respondent between 1968 and 1972. Such moneys withdrawn were credited to the current accounts of the partners of W.A. Bulldozing Co. other than the petitioner there by benefiting the second respondent and his family.

In the Supreme Court

No. 2

Particulars of Petition

11.Q As to paragraph 59:

Give particulars of the divers moneys and benefits alleged to total the sum of $875,410.00 and particulars showing how the second respondent benefited thereby.

11.A

(10) As to paragraph 59

Full particulars of the moneys totalling $875,410.00 are set out the balance sheets of the first respondent between the years 1967 to 1972.

12.Q As to paragraph 60:

Give particulars showing in what manner it is alleged that the second respondent is alleged to have withdrawn the moneys referred to and particulars showing how the second respondent is alleged to have benefited thereby.

12.A

(11) As to paragraph 60

Such moneys were loaned to the companies referred to without any interest payable by them. The second respondent is and was at all material times a director and shareholder of such companies and therefore received the benefit of such

13.Q As to paragraph 61:

Give particulars of the amounts said to total approximately $290,000.00 and particulars showing how it is alleged the second respondent obtained the same and benefited thereby.

14.Q As to paragraph 64:

Give particulars showing at what times and in what manner it is alleged that the second respondent conducted the affairs of the company for his own benefit and not for the benefit of the company as a whole.

15.Q As to paragraph 65:

(a) Give particulars of each of the alleged agreements stating with respect to each whether the same was verbal, in writing or to be implied and:

(i) if in writing the document or documents alleged to constitute the same and say when and where it or they may be inspected;

(ii) if verbal say when and where the same was made and set out the substance of each material conversation alleged to constitute the same:

interest-free loans through his shareholdings.

13.A

(12) As to paragraph 61

Full particulars of the amounts totalling $290,000.00 or thereabouts are fully set out in the balance sheets between 1967 and 1972 which documents will be referred to at the hearing of the petition.

14.A

(13) As to paragraph 64

Full particulars in this regard are set out in the particulars provided with respect to paragraph 23. Further particulars are also provided in paragraphs 57 to 61 of the petition.

15.A

(14) As to paragraph 65

(a) Full particulars of the agreement are set out in answer 5 (b) herein.

In the Supreme Court

No. 2

Particulars of Petition

(iii) if to be implied state each fact matter or thing from which such implication was to be drawn.

(b) Give particulars showing in what respect the service and delivery of the Notice referred to was in breach of all or any of the said agreements.

(c) Give particulars of the circumstances referred to.

(d) Give particulars of the rights of the petitioner referred to.

16.Q As to paragraph 66:

Give particulars of:

(a) the conduct of the second respondent;

(b) the withdrawing of the funds of the company; and

(c) the dividends and profits of the company alleged to have been withheld.

17.Q As to paragraph 69:

State what material facts are relied upon to support the allegation therein.

(b) The service and delivery of the notice referred to was in breach of the implied term particularised in answer 5(a) (iii) and (b) (iii).

(c) See the preceding subparagraph

(d) See subparagraph (b) of this answer.

16.A As to paragraph 66

(15) See the particulars given with respect to paragraph 23 of the petition and refer to paragraphs 57 to 61 of the petition for further and better particulars of the allegation contained in paragraph 66

17.A

(16) As to paragraph 69

The petitioner relies upon all of the allegations contained in the petition and in these particulars to seek an order that the company be wound up on the just and equitable grounds. The moneys loaned to companies in which the second respondent was a director and shareholder and the moneys loaned to the partnership were moneys which could and should have been distributed to the petitioner and other shareholders of the first respondent.

In the Supreme Court

No. 2

Particulars of Petition

NO. 3

In the Supreme Court

Petitioner's Evidence

No. 3

First Affidavit of B. Zampatti Verifying Petition 3rd December, 1974

FIRST AFFIDAVIT OF BERNARDO ZAMPATTI VERIFYING PETITION

FIRST AFFIDAVIT VERIFYING PETITION

I,BERNARDO ZAMPATTI of 73 Great Eastern Highway South Guildford near Perth in the State of Western Australia being duly sworn make oath and say that such of the statements in the petition now produced and shown to me and marked with the letter "A" as related to my own acts and deeds are true and such of the said statements as related to the acts and deeds of any such other person or persons I believe to be true.

10

SWORN by the Deponent BERNARDO ZAMPATTI at Perth in the State of Western Australia this 3rd day of December 1974. Before me:

B. Zampatti

P.G. Foss

A Justice of the Peace

In the Supreme Court

Petitioner's Evidence

No. 4
Second Affidavit of B. Zampatti Verifying Petition 3rd December 1974

SECOND AFFIDAVIT OF BERNARDO ZAMPATTI VERIFYING PETITION

SECOND AFFIDAVIT VERIFYING PETITION

I, BERNARDO ZAMPATTI of 73 Great Eastern Highway South Guildford near Perth in the State of Western Australia being duly sworn make oath and say as follows:-

1. I am the Petitioner herein and the Applicant in this summons.

2. I am informed by my Solicitors and verily believe the facts set forth in paragraphs 3, 4, 5, 17, 18, 42, 44, 46, 47 down to the figure $535,381.00, 48 down to the figure $99,900.00, 49, 50, 51, 52, 53, 54, 55, 56 and 58 of this my affidavit in which Caratti Holding Co. Pty. Ltd. is referred to as "the Company" and in this affidavit I refer to myself as "I" or, alternatively as "the Petitioner". 10

3. The nominal capital of the Company is $200,000.00 divided into 100,000 shares of $2.00 each.

4. The issued capital of the Company consists of 15,002 shares of $2.00 each fully paid.

5. The shareholders of the Company are and have at all times since prior to 30th June 1962 been as follows:-

As to 10,126 shares by SERGIO CARATTI (hereinafter referred to as "the Second Respondent") 20

As to 3,375 shares by MADDELIENE CARATTI the wife of the Second Respondent

As to 1 share by FREDERICK LAWLEY EDWARDES

As to 1,500 shares by the Petitioner.

6. I am the plaintiff in Supreme Court action No. 2361 of 1973 and exhibited to me at the time of swearing this my affidavit and marked for identification with the letters BZ1 is a true transcript of the evidence given by me in the said action and of the addresses by Counsel in the said action.

7. Article 6 of the Articles of Association of the Company provides as follows:-

> 6. The share for which Sergio Caratti (hereinafter called "the Founder") subscribes the Memorandum of Association of the Company shall be numbered 1 and is called "the Life Governor's share". The Founder whilst he is the registered holder of the Life Governor's share and on his death his personal representatives whilst the Life Governor's share is registered in the name of the Founder or in the names of his personal representatives shall be entitled to have and exercise the special rights and powers in respect of the Life Governor's share conferred by these Articles SUBJECT ALWAYS to the provisions of any Article as to special rights and powers which are expressly stated to be only exercisable during the lifetime of the Founder. On the death of the Founder his personal representatives shall be deemed to hold the Life Governor's share until they shall sell it or transfer it to the beneficiary entitled thereto under the Founder's Will or in the distribution of his estate and wherever in these Articles it is stated that rights may be exercised by the personal representatives of the Founder such articles shall be read and construed subject to this Article. Thereafter the rights created by these Articles in respect of the Life Governor's share shall terminate and it shall thereupon no longer retain its identity as the Life Governor's share and shall thereafter rank as an ordinary share.

In the Supreme Court

Petitioner's Evidence

No. 4

Second Affidavit of B.Zampatti Verifying Petition 3rd December 1974

8. Article 32 of the Articles of Association of the Company provides as follows:-

> 32. 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 that 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.

9. Article 43 of the Articles of Association of the Company provides as follows:-

> 43. A general meeting shall be held once in every calendar year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the Company in general meeting, or in default, at such time in the third month following that in which the anniversary of the Company's incorporation occurs, and such place as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held

in the month next following and may be convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the directors.

10. Article 45 of the Articles of Association of the Company provides as follows:-

45. The directors may, whenever they think fit, convene an extra-ordinary general meeting, and extra-ordinary general meetings shall also be convened on such requisitions, or, in default may be convened by such requisitionists, as provided by Section 116 of the Act. If at any time there are not within the State of Western Australia sufficient directors capable of acting to form a quorum, any director or any two members of the Company may convene an extra ordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the Directors.

11. Article 46 of the Articles of Association of the Company provides as follows:-

46. Subject to the provisions of Section 119(1) of the Act relating to special resolutions fourteen days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day and the hour of meeting and in case of special business, the general nature of that business shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the Company in general meeting, to such persons as are, under the regulations of the Company, entitled to receive such notice for the Company; but with the consent of all the members entitled to receive such notices of some particular meeting, that meeting may be convened by such shorter notice and in such manner as those members think fit.

12. Article 116 of the Articles of Association of the Company provides as follows:-

> 116. A notice may be given by the Company to any member either personally or by sending it by post to him to his registered address, or (if he has no registered address within the State of Western Australia) to the address, if any, within the said State supplied by him to the Company for the giving of notices to him.

13. Article 101 of the Articles of Association of the Company provides as follows:-

> 101. The Directors may from time to time declare a dividend to be paid to the members entitled thereto.

14. Article 102 of the Articles of Association of the Company provides as follows:-

> 102. No dividend shall be paid otherwise than out of profits but it shall not be necessary to recoup trading losses in respect of past years or capital losses before declaring a dividend.

15. Article 103 of the Articles of Association of the Company provides as follows:-

> 103. Subject to the rights of persons, if any, entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares but if and so long as nothing is paid up on any of the shares in the Company, dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purpose of this article as paid on the share.

16. Article 104 of the Articles of Association of the Company provides as follows:-

> 104. The Directors, may before declaring any dividend, set aside out of the profits of the Company, such sums as they think proper as a reserve or reserves which

shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalising dividends, or for any other purpose to which the profits of the Company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the Company, or be invested in such investments (other than shares of the Company) as the Directors may from time to time think fit.

17. The registered address of the Petitioner as referred to in Article 116 of the Articles of Association of the Company is 73 Great Eastern Highway South Guildford.

18. All shares issued in the capital of the Company rank equally pari passu one with the other as to dividends and there is no share with special rights to dividends as referred to in Article 103 set forth above.

19. The Second Respondent is the Founder as described in Article 32 of the Articles of Association.

20. The Second Respondent has for many years since prior to 1961 conducted various businesses of bulldozing and contracting.

21. Prior to 1st July 1961 the Second Respondent conducted the said business as managing partner of a partnership consisting of the Second Respondent and his wife and another person as trustee for the children of the Second Respondent.

22. From 1st July 1961 until the events hereinafter set forth the Second Respondent as managing partner conducted the said business in the following manner:-

(a) As to a partnership between the Second Respondent and his wife and the said person as trustee for the children of the Second Respondent and as to a 10% interest therein the Petitioner.

(b) The said partnership referred to in the preceding subparagraph of this paragraph was carried on under two names, namely W.A. Bulldozing Co. and S. & M. Caratti.

In the Supreme Court

Petitioner's Evidence

No. 4

Second Affidavit of B. Zampatti Verifying Petition 3rd December 1974

(c) The plant used by the said partnership was owned by the Company and leased by the partnership from the Company which said lease was not reduced to writing.

23. The Second Respondent to the exclusion of the Petitioner also conducted the affairs of the Company other than to the extent that the Petitioner was employed as a manager of the general bulldozing business but did not receive salary from nor was he an employee of the Company save as hereinafter set forth.

24. During late 1960 or early 1961 the Second Respondent offered to the Petitioner the right upon certain terms and conditions agreed between them that the Petitioner should become a 10% owner of all assets of and incident to the said business.

25. There was no term and condition of the said agreement in any way limiting or inhibiting the absolute ownership and control by the Petitioner of the said 10% interest.

26. In pursuance of this agreement and upon its inducement and not otherwise on or about 1st July 1961 the Petitioner became a 10% partner in the said partnership business referred to in paragraph 22 of this petition and on or about 21st August 1961 the Petitioner applied for and was allotted the said 1,500 shares in the capital of the Company

27. At the time of the agreement and the application and the becoming a member of the partnership the command of written English of the Petitioner was minimal.

28. The Petitioner arrived in Australia from Italy during 1949 and had not thereafter received any schooling.

29. At no time until the events hereinafter set forth did the Petitioner see or become aware of the terms and conditions in the Articles of Association of the Company set forth and in particular Article 32 thereof.

30. The Petitioner has received from the Company no moneys whatsoever or howsoever save and except as to salary for one year ending approximately 30th June 1965.

31. The Petitioner has received no dividends nor distributions of any kind whatsoever out of the profits of the Company.

32. The Petitioner has received no notices of any general meeting of the Company.

33. The Petitioner is unaware as to whether any general meetings of the Company have been held but he has attended no such meetings nor has he been invited formally or informally to so attend.

34. Until the giving of the notice pursuant to Article 32 as hereinafter set forth the Second Respondent has at all times held out to the Petitioner that the Petitioner is entitled absolutely to the said 1,500 shares being approximately 10% of the capital of the Company without limitation or inhibition.

35. During 1973 the Petitioner commenced proceedings for dissolution of the said partnership referred to in paragraph 22 of this petition being Matter No. 2361 of 1973 heard in the Supreme Court of Western Australia. At all times until the conclusion of the said proceedings it was held out to the Petitioner that the Second Respondent had not and would not purport to exercise the power purported to be granted by the said Article 32.

36. Judgment in the said partnership proceeding No. 2361 of 1973 was reserved on the 26th November 1974.

37. On 27th November 1974 there was delivered to the Petitioner a document in the form in the Schedule hereto of which delivery telephone advice was given to the home of the Petitioner by a person representing the Second Respondent on the evening of the 26th November 1974.

38. The Second Respondent alleges that upon the taking of a proper accounting of the said partnership business referred to in paragraph 22 of this petition that the Petitioner will be indebted in the sum of approximately $3,000/$5,000 and will not be entitled to receive any moneys whatsoever or howsoever.

prepared a statement of the value of the interest of the Petitioner in both the said partnership and as a shareholder of the Company.

40. Resultant from such preparation the detail of which is not known to the Petitioner the Second Respondent offered to the Petitioner the sum of $200,000 as consideration for the transfer by the Petitioner of the said 1,500 shares in the capital of the Company and of his interest in the said partnership.

41. The first time that I became aware of the provisions of the Articles of Association as referred to in paragraph 29 of this my affidavit was during the latter part of 1972 after the Second Respondent had made to me the offer of $200,000.00 as referred to in paragraph 40 of this my affidavit.

42. The balance sheet of the Company, so far as shareholders' funds are concerned, disclose the following:-

30th June 1963		$49,395.00
30th June 1964		$34,838.00
30th June 1965	(subject to amendment)	$36,838.00
30th June 1966		$29,966.00
30th June 1967		$179,521.00
30th June 1968		$4,678,576.00
30th June 1969		$4,790,548.00
30th June 1970		$4,749,017.00
30th June 1971		$4,761,098.00
30th June 1972		$4,778,192.00

43. The Petitioner first became aware of the existence and contents of the said balance sheets as a result of proceedings taken during 1973 for the purpose of obtaining the said balance sheets.

44. The Company has no intangible assets and the shareholders' funds are wholly represented by tangible assets.

45. The plant and equipment owned by the Company at 30th June 1972 in accordance with the said balance sheet at cost

less depreciation is in the amount of $112,068.00.

46. The said plant was almost wholly acquired during the year ended 30th June 1972 and at 30th June 1971 the only plant and equipment shown in the balance sheet of the Company was in the amount of $1,012.00.

47. The land and buildings of the Company at 30th June 1972 in accordance with the said balance sheet at cost was in the amount of $535,381.00 and is worth more than the said balance sheet figure.

48. In addition to the said land and buildings the said balance sheet at 30th June 1972 indicates the ownership of unencumbered real estate in the amount of $99,900.00 the detail of which was not known to the Petitioner.

49. Substantially all other assets of the Company are represented by debtors and investments in shares in subsidiary and associated companies other than 100,000 preference shares in the capital of Landall Holdings Limited.

50. Of the debtors the sum of $2,201,083.00 is shown as secured and $1,551,722.00 is shown as unsecured.

51. Included among the unsecured debtors is the sum of $258,016.00 owed by Delbar Investments Pty. Limited being a company controlled by the Second Respondent.

52. At 30th June 1971 the said Delbar Investments Pty. Limited was indebted to the Company in the sum of $171,152.00.

53. No interest has been charged to Delbar Investments Pty. Limited.

54. The total of interest received during the year ended 30th June 1972 was $5,983.00.

55. At 30th June 1967 the Company was indebted to the partnership referred to in paragraph 22 of this petition in the sum of $93,605.00.

56. During the year ended 30th June 1968 the Company disposed of various assets by sale to Caratti Consolidated Pty. Limited in which latter Company the Company held

In the Supreme Court

Petitioner's Evidence

No. 4

Second Affidavit of B. Zampatti Verifying Petition 3rd December 1974

slightly less than 50% of its capital and which sale gave rise to a capital profit in the sum of $4,540,854.00 and which sale gave rise to a debenture in favour of the Company from Caratti Consolidated Pty. Limited which at 30th June 1968 was in the amount of $4,131,456.00.

57. Since 30th June 1968 the Second Respondent has withdrawn divers moneys and benefits from the Company which said moneys and benefits has been charged against the account of W.A. Bulldozing Co. (theretofore being the said partnership account in the books of the Company).

58. At 30th June 1972 the account of W.A. Bulldozing Co. in the records of the Company indicated that W.A. Bulldozing Co. was indebted to the Company in the sum of $781,805.00.

59. The Petitioner charges that by these means the Second Respondent has withdrawn from the Company divers moneys and benefits between 30th June 1967 and 30th June 1972 totalling $875,410.00.

60. The Petitioner charges that in addition to the said moneys drawn out as set forth in the preceding three paragraphs of this petition the Second Respondent has drawn from the Company further moneys which have been charged in the books of the Company as loans to Companies entitled Caratti Bullfinch Pty. Limited, Albany Forts Freehold Pty. Ltd., Caratti (Chapman Valley) Pty. Limited and Caratti Freeholds Pty. Limited. The total indebtedness of these Companies in the books of the Company at 30th June 1972 amounted to approximately $510,000.00 and at 30th June 1967 the said Companies were indebted to the Company in amounts totalling approximately $220,000.00.

61. The Petitioner charges that by these means the Second Respondent has obtained further moneys and benefits from the Company in amounts totalling approximately $290,000.00.

62. At no time prior to the obtaining of the said balance sheets was the Petitioner aware that the said moneys or any moneys were being so drawn by the Second Respondent.

In the Supreme Court

Petitioner's Evidence

No. 4

Second Affidavit of B. Zampatti Verifying Petition 3rd December 1974

63. No balance sheet or accounts of the Company after 30th June 1972 have been made available to the Petitioner and the Petitioner is not aware of any changes which would affect the value of the Company.

64. At various times from late 1960 or early 1961 until 1972 I had conversations with the Second Respondent. These conversations would be not more than five or six in number of which two or three took place during late 1960 or early 1961 and of which two or three took place during 1971 and 1972 and all of which conversations included words to the effect following:-

Zampatti — What is the position about my 10% interest in the business?

Caratti — Don't worry, you have 10% of everything.

On some occasions the reply was in words to the following effect:-

Caratti — Don't worry about it, you've got 10% of everything, but I've got too many problems at the moment.

In the Supreme Court

Petitioner's Evidence

No. 4

Second Affidavit of B.Zampatti Verifying Petition 3rd December 1974

65. After I had left the Supreme Court on the conclusion of the action No. 2361 of 1973 when I arrived home my wife informed me that somebody had rang asking for me and saying words to the effect that Mr. Caratti's lawyers had a document they wished to deliver to me personally.

66. At approximately 7.30 a.m. on the 27th November 1974 a document which is exhibited to me and marked with the letters BZ2 for identification a true copy of which is the schedule to the petition was delivered to me at my home at 73 Great Eastern Highway South Guildford by a person whose name I do not know.

67. Until some time after the discovery of the Articles of Association of the Company in 1972 when they were explained to me by Mr. Golding of O.L. Haines & Company I was totally unaware that there was any restraining condition in any document affecting my absolute ownership of what I believed to be a 10% interest in the capital

68. I am unsure of the precise date upon which the Memorandum and Articles of Association of Caratti Holding Co. Pty. Ltd. were discovered but I believe from facts which I heard given in the course of action No. 2361 of 1973 and from statements which I heard made by Mr. Malcolm of Counsel for the defendants and from the fact that I did not became aware of the terms of the Articles of Association until after the Second Respondent had made to me the offer referred to in paragraph 40 of this my affidavit that the date upon which I became so aware must have been during the middle or latter part of 1972.

69. So far as I am aware (other than as to the Memorandum and Articles of Association referred to above) the contractual relationship between me and the Second Respondent and his family was never reduced to writing and the agreement was made upon a basis, so far as I was concerned, of mutual faith in a person who is my first cousin and whom I regarded as a close personal relation and friend.

70. I refer to the document marked exhibit BZ1 to this my affidavit and say that I was in Court during the whole of the time of action No. 2361 of 1973 during which evidence was being given by any witness and that no evidence was given in the said matter by the Second Respondent.

71. I have seen but I am not personally aware of the precise detail of all land, buildings and real property owned by Caratti Holding Co. Pty. Ltd. but from my knowledge of the properties owned by that Company the value shown in the balance sheet at 30th June 1972 is very considerably less than the actual present value of the said property. I am not a qualified valuer and in order to determine the excess I believe that the evidence of a qualified valuer would be required.

72. So far as I am aware all assets in the balance sheet of Caratti Holding Co. Pty. Ltd. are worth at least the

In the Supreme Court

Petitioner's Evidence

No. 4

Second Affidavit of B. Zampatti Verifying Petition 3rd December 1974

value ascribed thereto with the exception that I am unaware of what value should be ascribed to the preference shares held in the capital of Landall Holdings Limited to which Company a receiver has been appointed and I am unaware of the extent of or security granted in relation to the first group charge granted by Landall Holdings Limited.

73. I crave leave to refer to exhibit 78 in partnership action No. 2361 of 1973 being an exhibit tendered by the defendants in the said matter and being a draft of a mock dissolution of partnership of W.A. Bulldozing Co. which sets forth the amount alleged by the Second Respondent to be owed by me upon such a dissolution.

74. I crave leave to refer to exhibit 79 in the said action being an exhibit tendered by the defendants and being accounts of Caratti Holding Co. Pty. Ltd. from 1962 to 1972 from which exhibit appears the figures and facts set forth in paragraphs 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, and 60 of this my affidavit.

SWORN by the Deponent BERNARDO ZAMPATTI at Perth in the State of Western Australia this 3 day of December Before me :

A Justice of the Peace.

In the Supreme Court

Petitioner's Evidence

No. 4

Second Affidavit of B. Zampatti Verifying Petition 3rd December 1974

In the Supreme Court

Petitioner's Evidence

No. 5
Affidavit of
B. Zampatti
3rd April 1975

AFFIDAVIT OF BERNARDO ZAMPATTI

I, BERNARDO ZAMPATTI of 73 Great Eastern Highway, South Guildford near Perth in the State of Western Australia being duly sworn make oath and say as follows :

1. The petition herein was presented on the 3rd December, 1974 and the date appointed for hearing on the petition was the 19th February, 1975.

2. The petition was mentioned on the 19th February, 1974 and adjourned to the 24th March,1975. In the meantime a request for particulars had been filed and served by the respondents. These particulars have now been supplied.

3. I am seeking to have the company wound up inter alia on the just and equitable ground and on grounds of appression details of which are set out in the petition.

4. One of the matters complained of in the petition is that the second respondent (hereinafter referred to as "Caratti") has sought to exercise certain powers he purports to have under Article 32 which is set out in full in paragraph 8 of the petition.

5. Article 32 inter alia gives power to the Life Governor to enforce a sale of my shares to him at par. Caratti is the Life Governor.

6. The exercise of this power is in breach of the agreement between me and Caratti pursuant to which agreement I became a share holder in the company. There was no term or condition of the agreement between me and the second respondent in any way limiting or inhibiting the absolute ownership or control by me of shares taken up in Caratti Holding Co. Pty. Ltd.

7. If Caratti had been permitted to proceed with the sale of my shares to me pursuant to Article 32 I may have lost my standing to proceed in the petition.

8. I believe my share holding in Caratti Holding Co. Pty. Ltd. to be worth in the vicinity of $400,000.00- $500,000.00. Caratti in purporting to exercise his powers under Article 32 seeks to enforce the sale of my shares at par, namely $3,000.00.

In the Supreme Court

Petitioner's Evidence

No. 5

Affidavit of B. Zampatti 3rd April 1975

9. On the 6th December, 1974 The Honourable Mr. Justice Wallace granted an interlocutory injunction against the company and against Caratti to restrain them from effecting the transfer of my shares. The injunction is up to and including the date of the hearing of the petition.

10. The respondents have appealed against the order granting that injunction and that appeal is to be heard late in April.

11. If Caratti is unsuccessful in the Supreme Court appeal I believe that he will appeal to the High Court. An appeal to the High Court would not be heard before September. Caratti's wife telephoned me in December, 1974 after an article appeared in "The West Australian" newspaper about the dispute between the Caratti family and myself and informed me that the Caratti family would thenceforth fight each and every legal step taken by me. She said that the family would take me to the "highest court in the land" in any action I took.

12. However, if there is no appeal to the High Court by

Caratti it is probable that the hearing of the petition will not be before June. The hearing will take 3½ days and by the end of April the listings for May will have been published.

13. Notwithstanding the outcome of the appeal before the Supreme Court I would ask the Court to proceed with the hearing of the petition. If there is a stay of proceedings until any High Court appeal has been dealt with then the petition will not be heard until the end of this year.

14. The petition discloses that the major asset held by the company is being constantly reduced in value. It was created in 1968 following the sale of the assets and good will of Caratti Holding Co. Pty. Ltd. The debenture secured payment of a sum in excess of $4,000,000.00 to Caratti Holding Co. Pty. Ltd. by Caratti Consolidated Pty. Ltd.

In the Supreme Court

Petitioner's Evidence

No. 5

Affidavit of B. Zampatti 3rd April 1975

15. The balance sheet for 30th June, 1968 shows Caratti Consolidated Pty. Ltd. as owing $4,131,456.00. Now produced and shown to me and marked with the letter "A" is a photocopy of the balance sheet.

16. The balance sheet for 30th June, 1969 shows the amount owing as having been reduced to $3,590,544.00.

17. Between 1970 and 1973 the amount has been further reduced to $1,523,108.00. Now produced and shown to me and marked with the letter "B" is a photocopy of the balance sheet to 30th June, 1973.

18. I have never received a dividend nor any other moneys (other than minor amounts referred to in the petition) from Caratti Holding Co. Pty. Ltd. I am therefore concerned that the moneys being paid to Caratti Holding Co. Pty. Ltd. by Caratti Consolidated Pty. Ltd. are being disbursed against

the interests of the shareholders as shareholders.

19. Caratti Holding Co. Pty. Ltd. is purely an investment company. It does not trade or carry on a business. Accordingly the appointment of a provisional liquidator will not interfere with the company.

20. I believe that if the provisional liquidator is not appointed the value of the debenture could be totally depleted by September of this year.

21. I crave leave to refer to the petition, the particulars thereto and to the affidavits in support of petition to provide the evidence in support of this application to appoint a provisional liquidator.

SWORN by the said BERNARDO ZAMPATTI at Perth in the said State this 3rd day of April 1975.

B. Zampatti

Before me:

E. L. Balto.

A Commissioner of the Supreme Court of Western Australia for taking affidavits.

In the Supreme Court

Petitioner's Evidence

No. 5

Affidavit of B. Zampatti 3rd April 1975

NO. 6

FIRST AFFIDAVIT OF BERNARDO ZAMPATTI

In the Supreme Court

Petitioner's Evidence

No. 6

First Affidavit of B.Zampatti 15th April 1975

I, BERNARDO ZAMPATTI of 73 Great Eastern Highway, South Guildford in the State of Western Australia, Company Director, being duly sworn make oath and say as follows :

1. I refer to the affidavit sworn by Sergio Caratti on the 8th April, 1975 and filed herein. In particular I refer to exhibit SC6 to that affidavit which is headed "Dissection of Shareholders' Funds".

2. As complained of in the petition the shareholders' funds are represented to a large degree by interest free loans to companies controlled by Sergio Caratti and by interest free loans to partners of W.A. Bulldozing Co. other than myself.

3. I refer once again to the balance sheets of Caratti Holding Co. Pty. Ltd. for the 30th June, 1968 and the 30th June, 1973 which are exhibits A and B respectively to my affidavit sworn the 3rd April, 1975 and filed herein.

4. The balance sheet for the 30th June, 1968 discloses loans by the company totalling $353,786.00.

5. The balance sheet for the 30th June, 1973 discloses loans by the company totalling $1,729,646.00, an increase of $1,375,860.00.

6. To the best of my knowledge, information and belief Sergio Caratti is a director and shareholder of the companies which have been advanced the moneys referred to in the balance sheets I have no shares in any of those companies.

7. I am a partner in W.A. Bulldozing Co. but I have not received any of the moneys advanced to that partnership.

8. Accordingly Caratti Consolidated Pty.Ltd. has made payments of $2,608,288.00 in reduction of the amount owing under the debenture and of that sum $1,375,860.00 has been loaned out on an interest free basis to the various companies referred to in the balance sheets and to the partners of W.A. Bulldozing Co. other than myself.

SWORN by the said BERNARDO)
ZAMPATTI at Perth in the)
said State this 15)
day of April 1975.)

B. Zampatti

Before me :

A Commissioner of the Supreme Court of Western Australia for taking affidavits.

In the Supreme Court

Petitioner's Evidence

No. 6

First Affidavit of B. Zampatti 15th April 1975

NO. 7

In the Supreme Court

Petitioner's Evidence

No. 7

Second Affidavit of B.Zampatti 15th April 1975

SECOND AFFIDAVIT OF BERNARDO ZAMPATTI

I, BERNARDO ZAMPATTI of 73 Great Eastern Highway, South Guildford in the State of Western Australia, Company Director, being duly sworn make oath and say as follows :

1. This affidavit is supplementary to my affidavit of even date and filed herein.

2. I refer to the affidavit sworn by Sergio Caratti on the 8th April, 1975 and filed herein. In particular I refer to paragraph 7 of his affidavit. I do not know any of the details of the alleged payments of moneys on my behalf as any such payments were made without reference to me. So far as the alleged benefits from December, 1965 on are concerned, I can only say that I do not recollect receiving any such moneys or any benefits as alleged by Mr. Caratti. I have not received any cash payments after 1965 as alleged by Mr. Caratti or at all.

SWORN by the said BERNARDO ZAMPATTI at Perth in the said State this 15th day of April 1975.)

Before me:

A Commissioner of the Supreme Court of Western Australia for taking affidavits.

In the
Supreme Court

Petitioner's
Evidence

No. 8
Affidavit of
B. Zampatti
29th May 1975

I, BERNARDO ZAMPATTI of 73 Great Eastern Highway, South Guildford in the State of Western Australia, Company Director, being duly sworn make oath and say as follows :

1. I am the petitioner herein.

2. I swear this affidavit in support of an application to amend the petition in accordance with the Minute of Proposed Amendment which is now produced to me and marked with the letter "A" at the time of swearing this my affidavit.

3. Such of the statements in the proposed amendment as are related to my own acts and deeds are true and such of the said statements as relate to the acts and deeds of any other person or persons I believe to be true.

4. When the petition was drafted and settled it was done so under great pressure because at that time I had been served with the notice under Article 32. As a result instructions taken from me were taken in my solicitors' office and the petition was dictated and settled while I was present. There was not sufficient time for my solicitors to take all the details of the allegations which were broadly stated in the petition.

5. My solicitors now advise me, as a result of taking further instructions from me and fully proofing me with respect to the history of this matter, that the petition requires amendment as set out in the Minute.

6. The facts supporting the proposed amendment are as follows.

7. In mid 1961 I had been working with the second respondent (hereinafter referred to as "Caratti") for a considerable period of time and I was owed a substantial amount of money being arrears of wages. I was living in Mt. Barker and at that time the business in Mt. Barker was expanding and about twelve earthmoving machines were being operated.

8. At that time Caratti was trading in partnership with other members of his family.

9. By 1960 or 1961 I felt that I had enough experience to set up my own business. Caratti heard about this on one of his regular trips to Mt. Barker and talked to me about my future. I had a discussion with him in my house in Dean Street, Mt. Barker one day and it was agreed that I should become a 10% partner in the earthmoving business.

10. It was agreed that I would receive 10% of the assets and income that Caratti had at that time and that in consideration I would reduce my wage from $80.00 a week to $50.00 per week. At this meeting I had no idea about the company Caratti Holding Co. Pty. Ltd. I believe that I did not even know about Caratti Holding Co. Pty. Ltd. at that time.

11. Subsequently, however, on one of Caratti's frequent trips to Mt. Barker he told me that I should go to Perth and see Mr. A.B. Pearce of Messrs. A.B. Pearce & Co. to sign for my shares. I asked Caratti about the shares and what the shareholding related to.

12. Caratti told me that it was a family company and that I was to have 10% of the shares. This confirmed my understanding as to the original agreement, namely that

In the Supreme Court

Petitioner's Evidence

No. 8

Affidavit of B. Zampatti 29th May 1975

I was to receive 10% of "everything" that the Caratti family had.

13. I asked Caratti what my position would be with respect to the shares and Caratti said that I would have 10% of the shares and that the interest would be the same as in the partnership. There was no restriction of any sort on my interest in the partnership. This has been confirmed by the judgment of this Honourable Court in action No. 2361 of 1973 where it was declared I was entitled to a 10% share of the assets and profits of the partnership as from 1st June, 1961. I accepted what Caratti said when he said that my interest would be the same as in the partnership.

In the Supreme Court

Petitioner's Evidence

No. 8

Affidavit of B. Zampatti 29th May 1975

14. As a result I went to Perth and I remember signing some documents at the office of Messrs. A.B. Pearce & Co. in Beaufort Street, Perth.

15. I cannot recall exactly what document I signed at this time.

16. I also recall that Mr. A.B. Pearce explained that I was to have 10% of the shares in Caratti Holding Co. Pty. Ltd. and that I would be in the same position in the company as I was in the partnership.

17. The consideration flowing from me in the agreement whereby I took up shares in Caratti Holding Co. Pty. Ltd. was a forgiveness of a claim for arrears of wages and bonus moneys.

SWORN by the said BERNARDO ZAMPATTI at Perth in the said State this 29th day of May 1975.

Before me:

A Commissioner of the Supreme Court of Western Australia for taking affidavits.

NO. 9

AFFIDAVIT OF BERNARDO ZAMPATTI

In the Supreme Court

Petitioner's Evidence

No. 9

Affidavit of B. Zampatti 16th June 1975

I, BERNARDO ZAMPATTI of 73 Great Eastern Highway, South Guildford in the State of Western Australia, Company Director, being duly sworn make oath and say as follows :

1. I am the petitioner herein.

2. As a result of advice received from my solicitors and from counsel retained herein, I hereby apply to amend the petition by the addition of the words set out in the Minute which is marked with the letter "B" and produced and shown to me at the time of swearing this my affidavit.

3. Such of the statements in the proposed amendments to the petition contained in the exhibit hereto as relate to my own acts and deeds are true and such of the statements as relate to the acts and deeds of other persons I believe to be true.

SWORN by the said BERNARDO ZAMPATTI at Perth in the said State this 16 day of June 1975. Before me:

B. Zampatti

A Commissioner of the Supreme Court of Western Australia for taking affidavits.

In The Supreme Court

Petitioner's Evidence

No. 10
Affidavit of
B. Zampatti
23rd June 1975

AFFIDAVIT OF BERNARDO ZAMPATTI

I, BERNARDO ZAMPATTI of 73 Great Eastern Highway, South Guildford in the State of Western Australia, Company Director being duly sworn make oath and say as follows:

1. I refer to the affidavit of Sergio Caratti sworn on the 18th February, 1975 and filed herein (referred to hereafter as "the affidavit" or "Caratti's affidavit").

2. I refer in particular to paragraph 13 thereof. In the last sentence of that paragraph Caratti says that I knew there was a family partnership and that he told me there was also a family company. So far as the company is concerned I did not learn about that until some time after the discussions about my becoming a partner.

3. I refer to paragraph 15 of the affidavit. So far as I was concerned the meeting at the office of Messrs. A.B. Pearce & Co. concerned the partnership only and did not concern the company. I do not know whether the meeting was held on the 2nd August, 1961 or not.

4. With respect to paragraph 19 I deny that I received moneys and benefits save a weekly wage which in 1961 was $50.00 per week and which rose slowly until in 1971 I was earning $92.00 per week clear of tax.

5. I refer to paragraph 22 of Caratti's affidavit. In subparagraph (a) thereof Caratti deposes that I was paid $7,178 by way of salary by the company in the year ended 30th June, 1965. That is not correct. My taxation return for the 30th June, 1965 discloses an amount of $3,589 paid to me by the company and this is supported by a Group Certificate for that amount.

6. In subparagraph (b) of paragraph 22 Caratti says that when I was employed by Glenfalloch Contractors Pty. Ltd. during the year ended 30th June, 1966 I was paid a salary of $7,394 by Glenfalloch Contractors Pty. Ltd. (which changed its name to Caratti Bulldozing Co. Pty. Ltd.). This is not correct. My taxation return for the year ended 30th June, 1966 discloses an income of $3,697 for the full year, that sum having been paid by Caratti Bulldozing Co. Pty. Ltd. That information is supported by a Group Certificate for that amount.

7. In the same subparagraph of paragraph 22 Caratti says that in the year ended 30th June, 1967 I was paid $9,486 by Caratti Bulldozing Co. Pty. Ltd. This is not correct. My taxation return for the year ended 30th June, 1967 discloses an income of $4,743 paid by Caratti Bulldozing Co. Pty. Ltd. and this is supported by a Group Certificate for that amount.

8. Now produced and shown to me and marked with the letter "Z" is a sheet being a photocopy of the three Group Certificates hereinbefore referred to being the Group Certificate of Caratti Holding Co. Pty. Ltd. for the period 1st July 1964 to 27th June, 1965, the Group Certificate of Caratti Bulldozing Co. Pty. Ltd. for the period 1st July, 1965 to 29th June, 1966 and the Group Certificate of Caratti Bulldozing Co. Pty. Ltd. for the period 1st July, 1966 to the 30th June, 1967

9. I received no Group Certificates after 1967 save in 1971 I received a Group Certificate from Caratti Australia Pty. Ltd. disclosing an income of $5,520 for the full year. This is the maximum amount ever paid to me by the Caratti group. During the period when I was employed by Caratti Australia Pty. Ltd. I was earning far less than many of the employees under me, such as mechanics and fitters and turners.

In the Supreme Court

Petitioner's Evidence

No. 10 Affidavit of Bernardo Zampatti 23rd June 1975

10. I have never received any holiday pay, long service pay and I never took a holiday between 1955 and the time when I was dismissed by the Receiver of Caratti Australia Pty. Ltd.

11. I was content during that time with the amount paid because of the representations by Caratti that I was entitled to 10% of the assets which were being built up.

12. Between 1961 and the time when I was dismissed by the Receiver of Caratti Australia Pty. Ltd. I provided three motor vehicles which were use constantly during my employment with the Caratti group. I was not reimbursed for providing those motor vehicles.

13. Before the discussion which was held at Caratti's house at 67 Fauntleroy Avenue, Redcliffe in May or June 1970 as referred to paragraph 22 of Caratti's affidavit I went to see Mr. Kitson at his office with the intention of making a Will. I went to see Mr. Kitson as he was the adviser to the Caratti group.

14. Mr. Kitson said that I should delay making my Will because Caratti was attempting to form a public company and my share would be worth approximately $500,000. On that basis he suggested I should wait until the public company had been floated before making my Will.

15. I refer to paragraph 41 of Caratti's affidavit. Work was carried out on the Ongerup property but it was limited to chaining of scrub and the sinking of a dam. Some or all of this work was carried out by companies other than Caratti Holding Co. Pty. Ltd. Now produced and shown to me and marked "Y" is a copy of an invoice from Caratti Australia Pty. Ltd. dated December 1969 relating to the cost of sinking the dam.

16. I refer to exhibit "B" to the affidavit of ROBERT MICHAEL GOLDING sworn the 20th June 1975 and filed herein. No part of the sum of $839,376 advanced by Caratti Holding Co. Pty. Ltd. to W.A. Bulldozing Co. has been advanced to me.

In the Supreme Court

Petitioner's Evidence

No. 10 Affidavit of Bernardo Zampatti 23rd June 1975

17. I refer to the affidavit of Sergio Caratti sworn the 20th June, 1975 and filed herein. I also refer to the minute dated 3rd June, 1975 exhibited thereto.

18. Now produced and shown to me and marked with the letters "ZA" is the sealed copy of an order made by Mr. Justice Wickham in action No. 5581 of 1975. The writ in that action was issued on the 20th May, 1975 which was the day after the judgment of the Full Court in the appeal herein by Caratti and the Company.

19. Now produced and shown to me and marked with the letters "ZB" is an affidavit of CHRISTOPHER JOHN BOYLE sworn the 3rd June, 1975 and filed in action No. 5581 of 1975. This affidavit was sworn in support of an application for substituted service of the writ of summons and of the injunction which is exhibit "ZA" hereto. An order for substituted service was made on the 4th June, 1975.

20. I am informed by my solicitors and verily believe that a process server visited Caratti's place of work on four occasions between 21st May, 1975 and 28th May, 1975 in an endeavour to serve the writ and the injunction. Now produced and shown to me and marked "ZC" is a photocopy of a letter dated 30th May, 1975 received by my solicitors from the process servers G.M. Handcock & Co.

21. I saw Caratti at 517 Great Eastern Highway, Redcliffe on the morning of the 31st May, 1975. His Mercedes motor vehicle was at that address. Later on the same day I saw this motor vehicle at Caratti's home at 202 Williams Road, Gooseberry Hill. I then arranged for Mr. Boyle to attend at 202 Williams Road, Gooseberry Hill. Mr. Boyle's affidavit relates the efforts made by him to serve the writ and the injunction.

In the Supreme Court

SWORN by the Deponent at Perth in the said State this 23 day of June 1975. Before me:

B Zampatti

Petitioner's Evidence

J Watt

A Commissioner of the Supreme Court of Western Australia for taking Affidavits

No. 10 Affidavit of Bernardo Zampatti 23rd June 1975

In the Supreme Court

Petitioner's Evidence

AFFIDAVIT OF ROBERT MICHAEL GOLDING

No. 11

Affidavit of Robert Michael Golding 20th June 1975

I, ROBERT MICHAEL GOLDING of 3 Kaduka Way, Lynwood in the State of Western Australia, Chartered Accountant, being duly sworn make oath and say as follows:

1. I am a Fellow of the Institute of Chartered Accountants.

2. I carry on practice as a Chartered Accountant under the name of O.L. Haines & Co. at 4th Floor, Law Chambers, Cathedral Square, Perth.

3. Now produced and shown to me at the time of swearing this my affidavit and marked with the letter "A" is a bundle of balance sheets and schedules and supporting statements from 30th June, 1961 to 30th June, 1974 being the balance sheets, schedules and supporting statements of Caratti Holding Co. Pty. Ltd.

4. Now produced and shown to me at the time of swearing this my affidavit and marked with the letter "B" is a schedule entitled "Summary of Information from Caratti Holding Co. Pty. Ltd. Balance Sheets".

5. With respect to figures shown on exhibit "B" I say as follows:

(i) As to the amount shown as owing to W.A. Bulldozing by Caratti Holding Co. Pty. Ltd. at 30th June, 1965 I have offset the amount shown under the title "Loans to Shareholders" in the 1965 balance sheets against the amount shown in that balance sheet as owing to W.A. Bulldozing Co.

(ii) As to the year ended 30th June, 1972 there is an error due to illegibility of the balance sheet in

the amount of $80 but this error would be a compensating error and would not affect the overall result.

(iii) I am informed by the solicitors for the petitioner that each of the companies and firms listed at the left-hand side of exhibit "B" are companies and firms wholly owned and controlled by Mr. Sergio Caratti or owned by him and by other members of his family which information I verily believe to be true. The said companies and firms are referred to as "the Caratti Group".

(iv) From my inspection of the balance sheets and accounts of Caratti Holding Co. Pty. Ltd. I say that it appears that Caratti Holding Co. Pty. Ltd. has no share interest or right of ownership with respect to any of the Caratti Group (other than with respect to Albany Forts Freehold Pty. Ltd. the shares in which company ceased to be owned by Caratti Holding Co. Pty. Ltd. during the year ended 30th June, 1971) nor does any benefit appear to have flowed to Caratti Holding Co. Pty. Ltd. from the making of advances to the Caratti Group.

In the Supreme Court

Petitioner's Evidence

No. 11

Affidavit of Robert Michael Golding 20th June 1975

(v) I am further informed by the said solicitors and verily believe that the firm W.A. Bulldozing (also known as S. & M. Caratti) is the firm in which the petitioner is entitled to a 10% interest as partner.

6. The amounts set forth in exhibit "B" are the amounts appearing in the said balance sheets contained in exhibit "A" and show the amount of indebtedness of Caratti Holding Co. Pty. Ltd. to the Caratti Group and also shows the amount of the indebtedness of each of the Caratti Group to Caratti Holding Pty. Ltd. and the net balance namely $1,881,067 represents a benefit to the owners of the group.

7. From my inspection of the said balance sheets and accounts I say that the indebtedness of Caratti Holding Co. Pty. Ltd. to W.A. Bulldozing at 30th June, 1961 and at 30th June, 1962 emerges from a sale by W.A. Bulldozing to Caratti Holding Co. Pty. Ltd. of land and buildings and plant owned by W.A. Bulldozing.

8. From my inspection of the balance sheets and accounts comprised in exhibit "A" substantially no interest has been charged by Caratti Holding Co. Pty. Ltd. to any of the Caratti Group nor has Caratti Holding Co. Pty. Ltd. paid any interest to any of the Caratti Group.

9. From my inspection of the documents comprised in exhibit "A" and from the summary being exhibit "B" which summary I have checked the total indebtedness of the Caratti Group at 30th June, 1974 amounted to $1,881,067.

10. From the documents referred to in the preceding paragraph the benefits which have been received in each year by the Caratti Group are as follows:

Year Ended	Amount
30th June, 1964	34,938 pounds
30th June, 1965	90,860 pounds
30th June, 1966	140,487 dollars
30th June, 1967	51,395 dollars
30th June, 1968	141,420 dollars
30th June, 1969	279,182 dollars
30th June, 1970	626,685 dollars
30th June, 1971	207,334 dollars
30th June, 1972	124,528 dollars
30th June, 1973	178,165 dollars
30th June, 1974	171,187 dollars

11. From the same sources of information I say that as and from some date after 30th June, 1965 and prior to 30th June, 1966 the Caratti Group obtained benefits such that they were indebted to Caratti Holding Co. Pty. Ltd. in sums exceeding the indebtedness of that company to the Caratti Group and

that thereafter that indebtedness has continued to increase until as deposed to before at 30th June, 1974 the net amount of indebtedness was $1,881,067.

12. In the course of my practice as a chartered accountant which has continued for approximately ten years I am reasonably familiar with the accounting aspects and methods involved in the use of "tax loss" companies as a means of legal avoidance of income tax.

13. I am informed by Mr. Aubrey Shepherd and verily believe that during the year ended 30th June, 1966 and 30th June, 1967 Caratti Holding Co. Pty. Ltd. traded through another "loss company" then entitled Glenfalloch Pty. Ltd. I am informed by Mr. Aubrey Shepherd and verily believe that the name of this company was changed to Caratti Bulldozing Co. Pty. Ltd.

14. From the balance sheets comprising exhibit "A" Caratti Holding Co. Pty. Ltd. was indebted to Glenfalloch Pty. Ltd. at 30th June, 1967 in the amount of approximately $667,000 which amount should approximately represent or be not less than the trading profit earned by Glenfalloch Pty. Ltd. during those two years and paid to Caratti Holding Co. Pty. Ltd.

15. From the said balance sheets comprised in exhibit "A" it is shown that certain assets of Caratti Holding Co. Pty. Ltd. were sold during the year ended 30th June, 1968 realising a capital profit of approximately $4,500,000. I am further informed by Mr. Aubrey Shepherd and verily believe that the sale price of the assets which gave rise to this capital profit was in the amount of $5,230,000 which would indicate a cost or written down value of those assets in the books of Caratti Holding Co. Pty. Ltd. of about $700,000.

16. Thereafter, from year to year, the amount owing under the debenture granted to secure the said sum of $5,230,000 has been reduced indicating a repayment on account of the amount owing on the sale of the said assets. /

17. It is apparent from the balance sheets comprised in exhibit "A" that the assets sold comprised the land and buildings and plant and machinery previously owned by Caratti Holding Co. Pty. Ltd. and that no figure was ascribed for goodwill.

18. I am further informed by the said Mr. Aubrey Shepherd and verily believe that thereafter the trading was carried on by Caratti Bulldozing Co. (1967) being a partnership consisting of a group of companies known as the Carbul companies which were companies previously being subsidiary companies of Latec Investments Limited which companies had incurred large trading losses. This group of companies is hereafter called "the Loss Companies".

19. The effect of this method of trading is that profits earned by the Loss Companies offset the previous losses incurred by them such that no revenue reserves emerge and that in lieu thereof a capital reserve has emerged in Caratti Holding Co. Pty. Ltd.

20. The amount paid in reduction of the debenture securing the original debt should be approximately related to and arising from the amount of trading profits earned by the Loss Companies.

In The Supreme Court

21. The approximate reduction in the debenture is as follows:

Petitioner's Evidence

Year Ended	Amount
30th June, 1968	$1,100,000
30th June, 1969	540,000
30th June, 1970	580,000

No. 11

Affidavit of Robert Michael Golding 20th June 1975

22. These reductions total approximately $2,220,000 which should approximate or be not less than the trading profits earned during those three years by the Loss Companies for the benefit of Caratti Holding Co. Pty. Ltd. and paid to it in reduction of the said debenture.

23. From my examination of the said balance sheets comprised in exhibit "A" the trading profits earned by the various "loss companies" (Glenfalloch Pty. Ltd. and the

Carbul Company) and paid to the benefit of Caratti Holding Co. Pty. Ltd. with respect to the years ended 30th June, 1966 to 30th June, 1970 inclusive amounted to approximately $2,890,000.

24. This sum of $2,890,000 represents in factual terms a realisation from revenue of the capital profit shown in the Capital Profit Reserve of Caratti Holding Co. Pty. Ltd.

25. From my experience as a chartered accountant and from my examination of the said balance sheets comprised in exhibit "A" the conclusion that profits amounting to and not less than approximately $2,890,000 appears correct in virtue of the amount by which the debenture has been reduced against the amount of the Capital Profit Reserve.

26. Insofar as any one or more of the Caratti Group may not be owned beneficially by Mr. Sergio Caratti and his family (but excluding Mr. Bernardo Zampatti) I say that providing:

In the Supreme Court

Petitioner's Evidence

No. 11

Affidavit of Robert Michael Golding 20th June 1975

(a) that Mr. Sergio Caratti and his family beneficially own the shares issued in the capital of each of:

Caratti Kent River Pty. Ltd.
Caratti (Bullfinch) Pty. Ltd.
Albany Forts Freehold Pty. Ltd.
Caratti (Chapman Valley) Pty. Ltd.
Caratti Freeholds Pty. Ltd., and
Delbar Investments Pty. Ltd.

whether directly or indirectly through other companies; and

(b) that no benefit from the advance of $853,859 made by Caratti Holding Co. Pty. Ltd. to W.A. Bull-dozing has flowed to Mr. Bernardo Zampatti

the inclusion of any of those other companies would make no difference to the final result as shown in exhibit "B" and the benefit to Mr. Caratti would remain $1,881,067.

SWORN by the Deponent at Perth in the said State this 20th day of JUNE 1975. Before me :

A Commissioner of the Supreme Court of Western Australia for taking Affidavits.

In the Supreme Court

Petitioner's Evidence

No. 12
Affidavit of
A. Shepherd
23rd June 1975

AFFIDAVIT OF AUBREY SHEPHERD

I, AUBREY SHEPHERD of 33 Morgan Road, Redcliffe in the State of Western Australia, Accountant being duly sworn make oath and say as follows:

1. I was employed by Messrs. A.B. Pearce & Co. in 1963. I commenced work on the books of the Scolari group of companies. The intention was at that time that Caratti Holding Co. Pty. Ltd. would be taking over the Scolari companies. After working on the Scolari books for about six months I was then introduced to the books of W.A. Bulldozing Co. and Caratti Holding Co. Pty. Ltd. (hereinafter referred to as "the company" or "the holding company").

2. I used to work on them on a full-time basis supervising ledger posting, balancing the ledgers and working on the balance sheets. I carried out all of the accounting up to the point of producing the taxation returns. A.B. Pearce & Mr. F.L. Edwards prepared the returns for the company and for the partners of W.A. Bulldozing Co.

3. I left the firm of A.B. Pearce & Co. in 1965 and joined the company in the same year.

4. In June 1968 I was appointed joint secretary of the company with Mr. Peter Forbes. I then worked at 515 Great Eastern Highway.

5. I remained a joint secretary until I left the Caratti group in September 1972.

6. I have read paragraph 6 of the affidavit of Peter Forbes sworn on the 1st May, 1975 and filed herein. Paragraph 6 thereof is correct. So far as I am aware problems

on the accounting side were never referred to Mr. Zampatti for any decision on his part. His decisions were confined solely to the operational side of the business and to problems relating to maintenance of the machinery.

7. So far as the accounts and records were concerned I recall that between about 1965 and 1967 I kept the records relating to the Caratti group including those of the company in a suitcase. The records were not accessible to anybody who wished to see them. I was instructed that I was not to allow anyone to inspect the records. The suitcase stayed in my office during the working day and then locked up at night in the office of Mr. Forbes. When I joined the company in 1965 I was instructed by Mr. Sergio Caratti not to let anybody see the accounts and not to give anybody including the petitioner information about them. Before joining the company and while I was still working with A.B. Pearce & Co. I was instructed by Mr. Pearce not to give any information relating to any of the Caratti companies or the partnership to the petitioner.

In the Supreme Court

Petitioner's Evidence

No. 12

Affidavit of A. Shepherd 23rd June 1975

8. I can recall in years between 1963 and 1965 working with A.B. Pearce on at least two occasions when minutes were prepared for the company. The minutes were dictated by Mr. Pearce with respect to general meetings of the company and other companies in the Caratti group. The minutes were prepared for meetings which had not been held. The main object in preparing the minutes was to see that the date selected for the non-existent meeting was a date which satisfied the requirements of the Companies Act.

9. I never attended a general meeting for any of the years when I was secretary.

10. I was never aware of any general meeting which was held if any was ever held.

11. I never saw any notices of general meetings.

12. I have read the affidavit sworn by Sergio Caratti dated 18th February, 1975 and filed herein. Paragraph 22 correctly

sets out the history of the various Caratti companies in a general sense save that subparagraph (c) thereof on page 9 of the affidavit says that the earthmoving business was carried on by a partnership comprised of Caratti Consolidated Pty. Ltd. and Carbul 1 Pty. Ltd., Carbul 2 Pty. Ltd., Carbul 3 Pty. Ltd. and Carbul 4 Pty. Ltd. To the best of my memory the partnership was constituted only by the loss companies - the Carbul companies - which traded as a firm under the name Caratti Bulldozing Co. (1967).

13. Now produced and shown to me and marked "AS.1" is a chart setting out the basic trading history of the Caratti group. It demonstrates how the partnership known as W.A. Bulldozing Co. and S. & M. Caratti traded until 1965. Thereafter the earthmoving business was operated by Caratti Holding Co. Pty. Ltd. between 1964 and 1965 and then by the loss company Glenfalloch Contractors Pty. Ltd. In 1967 Glenfalloch Contractors Pty. Ltd. (Caratti Bulldozing Co. Pty. Ltd.) ceased trading. Between 1967 and 1969 a group of loss companies trading as the partnership Caratti Bulldozing Co. (1967) carried on the business. Since 1969 Caratti Consolidated Pty. Ltd. has been the trading company.

SWORN by the Deponent at)
Perth in the said State) A. Shepherd
this 23 day of June)
1975. Before me:)

Joseph F. O'Halloran

A Commissioner of the Supreme Court of Western Australia for taking Affidavits.

In the Supreme Court

Petitioner's Evidence

No. 12

Affidavit of A. Shepherd 23rd June 1975

In The Supreme Court

Petitioner's Evidence

ORAL EVIDENCE OF

BERNARDO ZAMPATTI

No. 13
B. Zampatti
Cross Examination

CROSS-EXAMINED BY MR MALCOLM:

MR MALCOLM: Mr Zampatti, could you tell us your occupation?---Company Director.

Of what companies are you a director?---Of General Bulldozing Co. and Balcatta Hiring Pty Ltd.

When you refer to General Bulldozing Co. is that General Bulldozing Co. Pty Ltd which was incorporated on the 29th May, 1973?---That is correct.

The registered office of that company is at 21 Koojan Avenue, South Guildford?---Or Haines & Co. I believe - L. O. Haines & Co.

BURT J: Could you speak a little louder? The room is a difficult room anyhow and as it is raining outside it makes it hard to hear.

MR MALCOLM: You say you are not sure whether the registered office of General Bulldozing Co. Pty Ltd is at 21 Koojan Avenue or at O.L. Haines & Co?---That is correct.

But in any event 21 Koojan Avenue, South Guildford is the site of a workshop property and land which is owned by Caratti Holding Co. is it not?---I believe so.

Do you not know that to be the fact?---The last discovery we made was that it was owned by Landall.

Are you not aware that under the September 1971 settlement with Landall the property came back into the ownership of the Caratti Holding Co?---I believe so.

It was the fact, was it not, that Landall informed you of this and indicated that they had been appointed agents to collect rent for that property?---Yes.

And that it was disclosed to you that the owner of the property after the 15th September 1971 was Caratti Holding Co. Pty Ltd?---Not in those terms.

Did you not become aware of what you were informed by Landall that after the 15th September 1971 the owner of the property was Caratti Holding Co. Pty Ltd?---After several letters written by me to Landall to give me the chance to speak to Caratti regarding the rent of his property they wrote back saying, "You are quite right nominating Caratti as the owner but he still insists that we are their agent to collect the rent."

You were familiar with the General Bulldozing Co. property at 21 Koojan Avenue prior to 1970 when the Landall transaction took place, were you not?---That is correct.

And in fact that property was then owned by Caratti Holding Co. prior to the Landall transaction, was it not?---Yes.

A business was carried on from those premises under the name General Bulldozing Co. was it not?---Yes.

This was part of the Caratti Earthmoving business? --- That is correct.

MR MALCOLM: Specialising in agricultural and clearing work? ---That is right.

I think you were the operations manager in charge of that section of the business, were you not?---That's right.

When did that section of the business commence from the General Bulldozing property?---About 1967, roughly.

BURT J: Is this at 513 Great Eastern Highway?

MR MALCOLM: No, your Honour. This property was a separate property from the main workshop property at 515-517 Great Eastern Highway, Redcliffe and the Redcliffe workshops were the main workshops for the Caratti earthmoving business, were they not?---That is correct.

Do you know the property which is described as 513 Great Eastern Highway, Redcliffe?---No.

I think you told us that you were also a director of Balcatta Limestone & Hiring Pty Ltd?---That is correct.

That was a company which is now called Balcatta Holdings Pty Ltd, is it not?---No, it is called Balcatta Limestone Hiring Pty Ltd.

I see. I am instructed that as a result of searches made at the Companies Office this week that Balcatta Hiring Pty Ltd changed its name to Balcatta Limestone & Hiring Pty Ltd on the 23rd July 1974. Do you agree with that?---Yes.

And it subsequently changed its name to Balcatta Holdings Pty Ltd on the 8th November 1974?---Yes.

That is correct, is it not - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR MALCOLM (continuing) - - - Not?---Yes.

What is the nature of the business of the Balcatta Company - if I can refer to it by that expression?---Namely producing limestone to build roads for shires and main roads.

Does it not engage in general earthmoving and contracting business? ---No, we are solely producers.

Does not the extraction of limestone involve the use of earthmoving and contracting machinery?---Yes.

And who provides that machinery to the Balcatta Company?---I do.

That is through the company known as General Bulldozing Company Pty. Ltd?---That's correct.

And that company is also engaged generally in the earthmoving and contracting business?---Mainly through Balcatta.

But it is also engaged generally in the earthmoving and contracting business is it not?---In a very small way, yes.

In a reasonable way - in fact, in a very successful way, is it not? ---Yes.

And it has been since its incorporation in 1973?---Yes.

Are you a director of any other company?---Not that I know of.

Are you a director of a company called Consolidated Bulldozing Pty. Ltd?---I was.

Was that company incorporated on the 6th day of August 1971?---Yes.

And does it have its registered office at 21 Koojan Avenue, South Guildford?---O.L. Haines & Co. I think.

Well, perhaps the Companies Office hav_en't quite caught up with it. It is a fact, is it not that the sole shareholders of that company are you and your wife, Valwyn Joan Zampatti? ---No.

You and your wife are the sole directors of the company, are you not? ---That's correct.

But apart from certain shares which are held in trust for your children?---Yes.

There are certain shares held in trust for your children. Is it not a fact that that company is a company which is controlled by you?---That's correct.

What was the purpose of incorporating that company on the 2nd of August 1971?---Well, when Landall dismissed me in the end of June, 1971, I started a small business through the receiver known as General Bulldozing, using General Bulldozing company with their permission, and extracting limestone for Balcatta Hiring and carried on until August 1971.

I think the receiver was appointed on the 25th of February 1971, was he not - the receiver of Caratti Australia appointed by Landall?---Yes.

In the Supreme Court

Petitioner's Evidence

No. 13

B. Zampatti XXN

MR MALCOLM: And you were employed by Caratti Australia through the receiver until the end of June, 1971?---That's correct.

When you were dismissed by the receiver, as you call it - your employment terminated - did you have a conversation with Mr Caratti?---Yes, many of them.

Was the general subject of the conversation the necessity for each of you to start off in business again because of the collapse of Caratti Australia?---My conversation was mainly to do with the money that was coming in from Landall and I was trying to get out because I thought - -

Was not the necessity for each of you to start off in business again, in the earthmoving business, a matter discussed after your employment was terminated by Landall? Was it discussed, or was it not?---I made a lot of discussion - possibly.

It was discussed?---Possibly.

Did not Mr Caratti say to you at that time that he would like you to come back with him and re-establish the earthmoving and contracting business?---He asked me to.

I think you told him did you not that you would prefer to go out on your own?---Well, there was many discussion and seeing the result of the money didn't come forward from Landall - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

WITNESS (Continuing) - - - Landall. I would have said that, yes.

MR MALCOLM: Yes, you told him you would prefer to go out on your own?---Yes.

You then established business on your own account at the Koojan Avenue property known as the general bulldozing property? ---And operating as general bulldozing.

Yes, which was a business name which had been previously operated by the Caratti Holding Company?---Yes, with the permission of the receiver.

Yes. And you rented those premises at that time from the receiver and subsequently from Landall when that property was transferred out to Landall by the receiver?---I rented them from the receiver.

What was the rent you were paying?---While I had the machinery there I think it was $400 a month and then when all the machinery was taken away it was raised to $800 a month.

It was $400 a month so long as the receiver was in the picture and $800 a month when Caratti came into the picture in the middle of September 1971?---No.

When did it go up to $800 a month?---As soon as they shifted all the machinery out, about a week after.

Can you remember when that was?---No.

It was some time between June 1971 and September 1971, was it not?---No. because by July they had sold almost all of the machinery.

Just to come back to the General Bulldozing Company, I think you and your wife are the only two directors of that company are you not?---Yes.

And you and your wife and your three children are the only shareholders of that company?---Yes.

You say you operated the business under the name General Bulldozing Company after you left your employment with Caratti Australia in June 1971. What was the purpose of incorporating a company on 2nd Auguat 1971 under the name Consolidated Bulldozing Company Pty Limited?---It was one of the schemes of Caratti that he was going to put in all the plant that came back from Landall into the company and I would give his son, John Caratti, 40 percent of the company. That never happened.

That never happened but in 1971 you were quite prepared for that to happen, were you not?---Yes.

You were quite prepared to go into business with Mr John Caratti at the suggestion of Mr Sergio Caratti and Mr John Caratti is Sergio Caratti's son?---That is correct.

And one of the shareholders in the Caratti Holding Company Pty Limited subject to trust?---Yes.

BURT J: I do not really know what that meant, do you? One of the shareholders in the holding company subject to trust?

MR MALCOLM: One of the beneficiaries of the trust under which Mr Sergio Caratti holds shares on Caratti Holding Company?---John Caratti's son. Is that what you meant?

John Caratti - Mr Caratti's son?---Yes, John Caratti.

I would like to go back to Mount Barker in late 1960 or 1961. On how many occasions prior to 1st July 1961 did you have a discussion with Mr Caratti regarding the possibility of becoming a partner or a shareholder? - A partner in the family partnership or a shareholder in Caratti Holding Company Pty. Limited?---There was one definite one.

One discussion?---The final discussion.

One final discussion. Was there more than one discussion prior to 1st July 1961, or was there only one discussion at Mount Barker?---There was one discussion.

One discussion at Mount Barker?---That is correct.

Was the next discussion the one that took place at the office of Mr A. B. Pearce & Co, in August of 1961?---I believe so - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

WITNESS: (Continuing) - - - believe so.

MR MALCOLM: At the discussion in Mt Barker which you say took place in late 1960 or early 1961 was there any discussion concerning the capital of the partnership? ---To me it was explained that I would become a partner of everything that Caratti had.

Everything Caratti had. What did you understand by that?---There were twelve machines and a workshop and that was it.

All the assets of the earthmoving and contracting business. Is that what you understood?---Of the partnership.

But was anything said as to the amount you would be required to contribute to the capital of the partnership at Mt Barker?---No; the reduction of wages was discussed because at the time I was getting 40 pounds a week.

Answer my question for the moment. There was no discussion about any contribution to the capital of the partnership at Mt Barker?---No.

Was there any discussion about drawings which people would make from the partnership at Mt Barker?---Yes. He explained to me that all the money would stay in the partnership so we could build up the business as it went on.

That is all the profits would stay in the partnership?---That is correct.

Was there any discussion about a partnership bank account?---No.

Was there any discussion about salaries which would be paid to partners?---Only mine.

No discussion about anyone else's salary?---No.

Was there any discussion about goodwill or any payment on account of goodwill?---No.

I think at that stage the turnover of the business was in the vicinity of 500,000 pounds per annum, was it not?---Or a lot less.

Or less? - how much less?---I don't know.

Did you not have a letter written on your behalf in 1961 shortly after you became a partner in which it was said to the Department of Lands & Surveys that you were a partner in a partnership which had a turnover of approximately 500,000 pounds per annum?---Yes.

And you knew, did you not, that the Mt Barker branch of which you were the manager had a turnover of approximately 200,000 pounds per annum at that time?---It was the major branch.

So at all events the turnover was at least more than 200,000 pounds in 1961?---Yes.

So far as the company was concerned was there any discussion between you and Mr Caratti at Mt Barker about the number of shares you would take up in the company?---There was no such thing as shares.

MR MALCOLM: What do you mean when you say, "There was no such thing as shares" ?---I was to become a 10 per cent partner of the whole lot.

When you say"the whole lot"did that not include a 10 per cent shareholding in the holding company?---It was not discussed in Mt Barker.

(Could the particulars of the petition be shown to the witness, please?) The booklet does not identify the date of the particulars but on the court file they would be dated 26th March 1975:

> "Further and better particulars of the petition pursuant to the respondent's request dated 14th February 1975."

BURT J: Dated which day in March?

MR MALCOLM: "The further and better particulars of the petition pursuant to the respondent's request dated 14th February 1975" dated 26th March 1975 and the request and answer are set out in composite form from p.19 of the booklet, your Honour.

BURT J: If you have got a spare strike of the composite request and answer it may be easier to put that to him, mightn't it? If it is agreed that it is accurate.

MR MALCOLM: Yes - - -

MR MALCOLM: Yes, well, sir I will put - -
(confers aside)
TO WITNESS: Mr Zampatti, you recall paragraph 24 of the petition which says that if you look on the booklet at p.7 - p.7 of the book which is in front of you - the numbers are at the bottom right hand corner of the page.

MR SMITH: I am afraid he hasn't got that book.

MR MALCOLM: Yes, he has.

MR SMITH: I am sorry, I didn't think he had.

WITNESS: Page 2 in my book; yes.

MR MALCOLM: If you turn up p.7, the numbers I am referring to are those at the bottom right hand corner of each page. I assume you are looking at the same book that I am looking at. Have you found p.7?---You say at the bottom?

Yes. At the bottom right hand corner is 0007?---Yes.

Have you got that?---Yes.

If you look at para. 24 it says : "During late 1960 or early 1961 the second respondent offered to the petitioner the right upon certain terms and conditions agreed between them that the petitioner should become a ten per cent owner of all assets of and incidental to the said business."

That is what you say in your petition and it is what you have verified by affidavit. Do you agree with that?---Yes.

Then is the statement there a correct statement?---Yes.

Now, if you would turn to p.20. As you will see there if you will look at the part which starts : "As to paragraph 24" which is about a third of the way down the page?---Yes.

You are asked to state whether the offer which is referred to in para. 24 of the petition was verbal, in writing, or to be implied and you state there that it was verbal and implied and in answer to the question : "If verbal, say when and where the same was made and set out the substance of each material conversation alleged to constitute the same?" it is said : "In or about 1960 or 1961 at Mt. Barker the second respondent offered the petitioner ten per cent of all his business operations, including ten per cent of shares in Caratti Holding Company Pty. Ltd?---Yes.

I suggest to you that that is a correct statement?---Now, it is.

I beg your pardon?---Now, it is.

What do you mean "It is now". Isn't this setting out your case as to what happened at Mt. Barker in 1960 or 1961 in the discussions that we have been talking about?---Well, now we all know what Caratti Holding Company is.

Are you not saying that at Mt Barker Mr Caratti offered you 10 per cent of his business operations, including 10 per cent of the shares in Caratti Holding Company?---No.

MR MALCOLM: Well, perhaps you could tell us what it is that you are saying?---I am saying that in Mt Barker we agreed that he would give me 10 per cent of the partnership.

I see. Are you saying that there was no reference to the holding company at Mt Barker in late 1960 or early 1961?---Not at that meeting.

Are you saying there was no reference to any family company at Mt Barker in late 1960 or early 1961?---Not at that meeting.

So the matter wasn't really discussed at all?---No company at all.

I see. You are saying then, are you, that the first time the question of shares of the holding company came up was at the meeting at A.B. Pearce & Co in August of 1961?---No. 10

Well I think you have told us that you had one discussion with Mr Caratti at Mt Barker prior to July of 1961. You had another discussion at the offices of A.B. Pearce & Co. in August 1961 - - -

MR MALCOLM: (Continuing) - - - August 1961. Two discussions? ---It appears that we had one in Perth in August - some time in August.

Yes but I was asking you earlier whether there were any other discussions about your 10 per cent share in the partnership or the holding company prior to July of 1961?---There was never any company mentioned to me at all.

Is it not the fact that apart from the discussion which took place at Mt Barker there was no further discussion regarding the partnership prior to August 1961 when you went to the offices of A.B. Pearce & Co?---I was asked to go to the office to sign up for the partnership.

Apart from being asked to go there to sign up for the partnership is it not the fact that there was no discussion other than the discussion which took place at Mt Barker?---We went to the office at A.B.Pearce to discuss the partnership.

We know that and we know that took place in August 1961. What I am putting to you is that the only discussion about you becoming a partner, or taking a share in the business, before the meeting in August of 1961 was the meeting at Mt Barker which you told us about?---Yes.

Thank you. At the meeting in August of 1961 the basis upon which you would take a 10 per cent share in the partnership and a shareholding in the company was discussed between you, Mr Edwards, Mr Pearce and Mr Caratti at A.B.Pearce & Co. was it not?---No.

What happened in August of 1961?---We went there to sign up a partnership.

Did you sign anything about the partnership?---There was never one signed.

What happened when you went there?---We discussed the partnership.

Yes and did you not also discuss the basis upon which you would take up shares in the holding company?---No.

(Could exhibits 13 and 14 in the partnership action No.2361 of 1973 be produced please?)
TO WITNESS: Would you look at the first of those documents please, Mr Zampatti? That is a carbon copy of a letter dated 17th August 1961 from A.B.Pearce & Co. to yourself at Mt Barker. Can you identify that as a true copy of a letter dated 17th August 1961 addressed to you at Mt Barker?---I never got such a letter.

Do you remember Mr F. A. Hulme giving evidence in the partnership action?---No, not quite.

The letter refers to the following:

> "As you are aware you have been allotted 1,500 ordinary shares in Caratti Holding Co. Pty Ltd but before the certificate can be issued in your name it is necessary for you - - "

BURT J: Just a moment, Mr Malcolm. Yes, Mr Smith?

MR SMITH: The witness has said he never received any such letter and it seems rather odd that my learned friend should then proceed to read the contents of the letter into the transcript.

BURT J: Well there is no apparent progress to the present so he may as well. Yes, Mr Malcolm?

MR MALCOLM: Would you look at the contents of the letter please, Mr Zampatti?---Yes.

In August 1961 were you aware that you had been allotted 1,500 ordinary shares in Caratti Holding Co?---No. 10

Will you look at the other document which is a document dated the 21st August 1961 and headed up "Caratti Holding Co. Pty Ltd application for shares" ?---Yes.

Does that document bear a signature?---It does.

Whose 'signature is it?---Mine.

Your signature and did you not in fact sign that document on or about the 21st August 1961?---What - twelve months after - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

WITNESS (Continuing): - - - after? It could be 12 months after.

MR MALCOLM: You did in fact sign that document, did you not?---It appears so.

And perhaps - would you read the document to his Honour?---Caratti Holding Company Pty, Limited. Application for shares. The Governing Director, Caratti Holding Company Pty. Limited, c/o A. B. Pearce & Co., 32 Beaufort Street, Perth. Dear Sir, I .... apply for 1500 shares ordinary shares of $1 each. I agree to accept.....(reads)..... company."

MR MALCOLM: I think it says, "I hereby apply for 1500 ordinary shares at one pound each. I agree to accept the said shares and to be bound by the memorandum and articles of association of the company." I suggest to you that the question of your taking up those shares was a question which was discussed when you went to the offices of A. B. Pearce & Co. on the 2nd August 1961? ---No.

At all events, you signed this document although you say it could have been a year after 21st August 1961?---It could have been a blank document

I beg your pardon?---It could have been a blank piece of paper.

Do you recollect signing the document?---No.

You say it could have been a blank piece of paper?---Yes, that is correct.

What basis do you have for saying that?---Because every time Caratti come to Mount Barker he say for him to be able to sign cheques I usually sign them without disputing it.

At some stage you must have decided that you were going to take up a 10% shareholding in the company?---Caratti informed me that he had a family company and he would give me 10 percent share in that.

And the purpose of signing this document was to take up that shareholding was it not?---No.

If your Honour pleases, I will tender the application for shares.

BURT J: You are taking it off another file in a matter which is going on appeal?

MR MALCOLM: Yes.

BURT J: Will you let me have a photograph of what it is that you now wish to tender in due course. I think the exhibit should be returned to the original file.

MR MALCOLM: It is important, I think, your Honour, to look at the document in the light of what has been said.

BURT J: That is why I want a photograph of it.

MR MALCOLM: But to the actual document which I undertake to supply.

EXHIBIT

EXHIBIT 31 .... Photostat copy of letter applying for 1500 ordinary shares.

MR MALCOLM: In your affidavit in support of the petition you have put in as an exhibit, BZ1, a copy of the transcript of your evidence at the partnership action No. 2361 of 1973. It is exhibit BZ1 to your affidavit sworn on 3rd December 1974. Could it be produced to the witness, please?

I am not served with a copy of the exhibit.

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

BURT J: It must be on the company file, Mr Malcolm, mustn't it?

MR MALCOLM: Perhaps my learned friend, Mr Pullin, can tell us what happened with the transcript, sir?

BURT J: There are two affidavits verifying the petition.

MR MALCOLM: Yes.

BURT J: And is it exhibited to the first, or the second?

MR MALCOLM: It is exhibited to the second - the longest of the two affidavits.

BURT J: Yes, in paragraph 6.

MR MALCOLM : Paragraph 6.

MR PULLIN: Sir, the exhibit is in the black folder.

BURT J: It's in the black - - Is it in my folder?

MR MALCOLM: No, sir.

MR SMITH: It is with your clerk, sir. He didn't recognise it because it was in a folder.

MR MALCOLM (Could you give that to the witness, please). Your Honour, I do have an additional copy of the transcript here.

BURT J: I don't quite know how it really happened. "The transcript is exhibited to me at the time of swearing this, my affidavit, and marked for identification."

MR MALCOLM: Yes.

BURT J: Well, what is the status of it now?

MR MALCOLM: Well, I understand, sir, on the basis that my learned friend outlined yesterday, that this has been made part of Mr Zampatti's case - that the affidavits and all the exhibits are regarded as being in evidence.

BURT J: But this isn't an exhibit. It is marked for identification?

MR MALCOLM: Well, he said"exhibited hereto and marked for identification."

BURT J: "Exhibited to me. "

MR MALCOLM: "- - is a true copy."

BURT J: It is exhibited to me.

MR MALCOLM: Well, I think that is perhaps a shorthand saying of what is normally said : "Now produced and shown to me."

BURT J: Well, what am I supposed to do with it?

MR MALCOLM: Well, my understanding, your Honour, is on the basis where we are at the moment, that document is in evidence.

BURT J: Well, it was never served on the company?

MR MALCOLM:-No, sir, because I think as the solicitors for the petitioner well knew, the company was in possession of copies of the transcript.

BURT J: Well you don't complain about that?

MR MALCOLM: I don't complain about that at all.

BURT J: Perhaps I could ask Mr Smith.

What status do you think I should give it, Mr Smith?

MR SMITH: I must confess, sir, I wondered how it ever became an exhibit, or how it ever could become and exhibit in these proceedings and I certainly didn't rely on it in any way in presenting the petitioner's case in opening.

All I can say is that it appears that it was intended to be exhibited.

BURT J: But you don't want to rely upon it?

MR SMITH: I don't want to rely upon it.

BURT J: Well I think I should ignore it, except to the extent that Mr Malcolm wishes to put it in through this witness in cross-examination.

MR SMITH: Yes, sir.

BURT J: We are going to have enough transcript without going to other cases.

MR SMITH: That's right.

BURT J: Is that satisfactory, Mr Malcolm? You can refer the witness to any part of it that you like and make such use of it as you think fit.

MR MALCOLM: Certainly, your Honour.

BURT J: If you are going to cross-examine him on it though, he has a copy, you have a copy, but it might help if I had a copy.

MR MALCOLM: And I have a copy for you, your Honour.

MR MALCOLM: Would you turn to p.60 of the transcript please, Mr Zampatti? Now, if you look at the part at that page half way down the page you will see a letter "C" in the right hand margin - about half way down the page, when I asked you a question : "You first heard of a holding company in 1964?"---Yes.

There was some confusion about 1954 and 1964?---That's correct.

And the next question was : "You have just identified Exhibit 14 which was an application by you for 1500 shares in the holding company and that was dated the 21st of August 1961. I suggest to you that you were well aware of the existence of the holding company on the 21st of August 1961?" Was not your answer : "It would depend on what form that form would have been presented to me. It could have been presented to me as something to do with anything else and I signed it."?---That's true.

MR MALCOLM: You were then asked : "Would you like to have a look again at Exhibit 13 which was the letter which was written to you - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR MALCOLM: (Continuing) " - - - to you which accompanied that form? That letter states, does it not - - ?" That is the letter of the 17th August to which we referred a moment ago and you were asked: "I suggest to you that that states very clearly that you were being allotted 1,500 shares in Caratti Holding Co. Pty Ltd. Do you wish to vary your earlier statement that you had not heard of it until 1964?" and your answer was, "Well to me it is getting very confusing but that form referring - - I didn't complete that form if it was presented to me. Whenever it was presented to me I signed it and that was it. I didn't complete that form."

"When you said you didn't complete the form you meant you didn't fill out all the details on the form, did you not?"

BURT J: The form was not what it purported to be, was it, apparently on the evidence?

MR MALCOLM: He said, "I didn't complete the form."

BURT J: No, it was not an application to have shares allotted.

MR MALCOLM: No, it was an application for shares.

BURT J: It wasn't that either. Shares had been allotted.

MR MALCOLM: The allotment resolution is dated 22nd August 1961.

BURT J: Well the letter is wrong.

MR MALCOLM: As appears from exhibt SC4 which is exhibit 15.

BURT J: The letter is wrong.

MR MALCOLM: Yes, the letter is wrong.

BURT J: If the application is right.

MR MALCOLM: Yes.

TO WITNESS: When you said, "I didn't complete that form" in the partnership action, Mr Zampatti, did you not mean that although you had signed the form you had not filled in the contents of the share application form? ---And also meant that that was not a form that I would have seen anyhow. It could have been any form.

You have never before disputed the authenticity of this document, have you? You have never said on any previous occasion that this was not a form which you signed?---I have never seen it before.

But you saw it in the partnership action, did you not?---He showed me a copy of it, yes.

The document which was produced to you then and which was marked as an exhibit is the document produced to you a few minutes ago which is the document you then identified.

Would you look at the question at the bottom of p.60 of the transcript? You were asked:

"I am suggesting to you, you received the letter from A.B.Pearce & Co. dated 17th

Auqust 1961 with the application form enclosed made out as an application for 1,500 shares and that you signed it and returned it as requested in this letter?."

and your answer was,"Possibly, yes." ?---Possibly.

MR MALCOLM: From what is said on p.61 you were talking about the date. You were not sure of the date on which you signed the letter of application. Was that not the position?---As far as me becoming aware of any company called a family company Caratti explained to me and Mr Pearce explained to me was a long time after we went into partnership. That's what I mean.

Would you look now at p.70, again halfway down the page and you were asked:

"Would you look again at the application form (exhibit 14)? What does the last paragraph of that state?"

and you read out, "I agree to accept the said shares and to be bound by the Memorandum and Articles of Association of the company. 1973 was the time I read the Memorandum and Articles."

You had no difficulty reading out those words on that occasion, did you?---No.

No difficulty at all?---No.

And that was last October 1974. You said, "1973 was the time I read the Memorandum and Articles"?---That is correct.

I was asking you some other questions about the articles and on letter D you were asked, "But of course there is no suggestion that the Articles of Association of the company were altered because you were becoming a member of the company, is there?"

and you said, "With that I would not agree because you can't produce one that I signed and I know I signed one."

What did you mean when you said, "you can't produce one that I signed and I know I signed one"?---If I was appearing today I still believe that I signed an Article into a family company.

What you are saying is that you still believe today that you were asked to sign the Memorandum and Articles of Association of Caratti Holding Co. Pty Ltd?---Of a family company- - -

MR MALCOLM (Continuing): - - - company.

Was there any other company that you understood to be the family company other than Caratti Holding Company Pty. Limited? ---No.

And you say you recollect signing the memorandum and articles of association. Do you recollect why you signed them?--- Because Mr Pearce took me around to an office in Barrack Street and asked me to sign it.

Did he explain to you why he wanted you to sign them?---Only that I would get 1500 shares in the family company and it would still be the same as the partnership.

There is no other company in which you have 1500 shares other than Caratti Holding Company Pty. Limited, is there? ---No.

Will you look also at the question which follows? It was put to you that the company was incorporated under its present memorandum and articles in July 1960 and that that memorandum and articles was registered at the company's office in Perth. That was a company formed in 1960 and in August 1961 you made an application for shares in the company and agreed to be bound by the memorandum and articles of association. Mr Caratti was the governing director of the company with what are generally recognised as governing director's powers, power to acquire the shares of other shareholders at par. The answer you gave was "Yes".That was the end of quite a long period of cross-examination on the subject of your shareholding and your interest in the partnership,was it not? It was a summing up of the position with which you agreed?---Yes, because I read the memorandum and articles and that is what it said.

And it is the fact that you never asked to see the memorandum and articles of association of the company when you were applying for shares?---I did not even know what it meant then.

In fact, no steps were taken by you to find out what you rights as a shareholder were until after your employment with Caratti Australia Limited was terminated in June of 1971? ---No.

If you turn over to page 71 you will see the question on letter B, the third last question on page 71. You were then asked: "The position has been at all times since 1961 that Mr Caratti has had the power to call up your 1500 shares in Caratti Holding Company for $3000", and your answer was"Yes". That is correct is it not?---Because I read the memorandum and articles.

And it was then put to you in this form - "But he hasn't done so yet, has he?" and your answer was "Not yet"?---Not yet, but it was done the next day or the same night.

We are talking about your cross-examination on 7th October 1974 and I think the notice under article 32 was delivered to you personally on 27th November 1974?---That is correct.

MR MALCOLM: We are talking about the month before and on the 7th October 1974 and I suggest to you that when you said that he hadn't - "Not yet" - that you had it in your mind that you fully expected him to attempt to exercise that power?---I would not put it past him, no.

When you answered "Not yet", you were expecting that the time would come when he would do that?---If he had a way to get out he would use it. And that conclusion came to me after spending almost three years negotiating a way to a final solution for him to get my shares.

Mr Zampatti, you have alleged in paragraph 23 of the petition that Mr Caratti, to the exclusion of yourself conducted the affairs of the company other than to the extent that you were employed as manager of the General Bulldozing Business. Is that a complaint? When you say that Mr Caratti conducted the affairs of the company to the exclusion of yourself, are you making a complaint?

BURT J: I think that is rather an ambiguous question, Mr Malcolm.

MR MALCOLM: Perhaps I will put it to you this way: Did you ever seek to be a director of Caratti Holding Company Pty. Limited - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR MALCOLM (Continuing): - - - Pty. Limited?---I did not think it was ever necessary.

And did you have any complaint about Mr Caratti and the way in which he conducted the affairs of the company up to 1971?---Yes.

What was your complaint?---One complaint was back in 1964 after I went to town to do my tax I went back to him with a question because I was told by Mr Edwards that Mr Caratti was not running the company to the benefit of myself. He was looking after himself only.

That was in 1964?---Yes.

Did you make any complaint to Mr Caratti about that?---Yes.

What did you say to him?---I asked him for an explanation and we went down in Fonteroy Avenue and we spent a couple of hours in a car under a tree and he explained to me that everything we would do we would do together. I amalways a 10% shareholder and partner in the whole operation. Everything is going along fine. We are buying more machinery, the company is expanding - what am I worried about.

And it was the fact that you were in 1964 buying more machinery and the earth moving and contracting business was expanding, was it not?---Yes.

And you accepted what he said?---Yes.

But so far as the management of the affairs of the company was concerned you always accepted that Mr Caratti was the governing director of the company and had its sole management, did you not?---No, because while he was away for one month I had to run the company all by myself.

But apart from when he might have been away, you accepted that he, as governing director, had the sole management and control of the affairs of the company, did you not? ---I did not understand it that way. We were partners. We were running the business together.

I see. But, so far as operations were concerned, of course, you and he were very closely associated in co-ordinating plant, negotiating for contracts and so on and the day to day operations of the earth moving business?---Yes.

And you consulted with one another about ordinary commercial decisions, as to jobs you would contract for, the machinery required and so on?---Yes, and farms.

And the work which would be done on the farms?---Before we bought them we went and seen them together.

I think you were particularly interested in what we know as the Mount Barker farm because you were the manager of the Mount Barker branch of the business?---Up until 1962, yes. I developed the whole farm, yes, 5000 acres of it, and bought three other blocks, in the absence of Mr Caratti, for the company.

MR MALCOLM: For the holding company?---For the partnership - the family company - known now as the holding company.

Yes, known now as the holding company?---Yes.

And these are the properties which we have heard were talked about at Kent River, otherwise known as the Mount Barker farm?---One there and three on the Porongorups. Then there was one in the holding company and one in a share basis between myself, Mr Caratti and Mrs Caratti.

Yes, when you were partners, but it was for the purposes of the partnership and then later for the purposes of the holding company?---Yes. 10

MR Zampatti, you have complained in your petition that you receive no moneys whatsoever, or howsoever from the holding company and neither did you receive any dividends or distributions of any kind from the company?---That is correct.

From 1961 until the termination of your employment by the Landall receiver in June of 1971, did you pay any income tax out of your own pocket?---No.

Do you know who paid your income tax?--Mr Caratti. 20

And you know that the income tax was paid either out of the holding company or out of the partnership?---By somebody - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

WITNESS (continuing) - - - somebody, yes, including benefit from my doctor's bill, which I used to take in every year.

MR MALCOLM: But your tax was in fact paid by Mr Caratti?---But no refund for any medical expense that I incurred.

But you would claim deductions in your income tax return and whatever tax was assessed was paid by Mr Caratti, that's all I am suggesting to you?---Yes, right.

BURT J: What do you mean by "Out of his own pocket"? Out of his own pocket, do you mean?

MR MALCOLM: I beg your pardon?

BURT J: Out of Mr Caratti's pocket?

MR MALCOLM: No, I was suggesting that Mr Caratti paid Mr Zampatti's income tax through either the holding company or the partnership during that time.

BURT J: Well, is that what you really mean? He got somebody else to pay it - his company. The company paid it?

MR MALCOLM: Well, I think it would appear to be the fact and I thought the witness had agreed that Mr Caratti had paid it, but what I am seeking to establish is that Mr Caratti in turn charged the amount through the books of the holding company, or the partnership.

TO WITNESS: Is that your understanding?---Would you repeat it please?

Mr Caratti paid your income tax and that the amounts were charged out in the books of the holding company or the partnership? ---It would be wrong, because if my income tax was paid by Mr Caratti or by the company, less the medical expense and my car deduction, the holding company would have saved money on paying my tax.

We are not talking about what was saved on tax, but the tax which was in fact paid?---Yes, but - -

(can I have Exhibit 18 from the partnership action, please)

WITNESS: If I may explain that; I got a group certificate. The company already paid the tax, so why should Mr Caratti pay it the second time? Or the holding company?

BURT J: What income, Mr Zampatti, were you receiving?---Twenty five pounds a week, and at a - -

No, what time are you speaking of?---From 1961 to about 1965 and then he gradually increased it to $92 a week clear of tax in 1971 when I was dismissed and I was working seven days a week, had three telephones in my home, and the whole of my family had to put up with the ringing up two or three o'clock in the morning, because I had the main line from the switchboard to my house.

MR MALCOLM: Let's go back to 1967 for a moment, and I want to produce to you exhibit 18 from the partnership action which is a photocopy of three notices of assessment together with a summary of account relating to your income tax.

MR MALCOLM: Your Honour, the document which the witness is looking at is one which commences at p.314 of the Appeal Book in the partnership action.
TO WITNESS: Do you have that document in front of you, Mr Zampatti?---Yes.

You identified that as an amended assessment for income tax which you received dated the 29th of June, 1967?---Yes.

That relates to income tax for the years ended the 30th of June 1962, 30th June 1963 and the 30th June 1964?---That's correct.

Three assessments?---Yes.

And they set out your taxable income - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR MALCOLM: (Continuing) - - - income in 1961-62 as being increased to $13,142?---Yes.

1962-63 $15,526. If you look on the reverse, I think, of the first of the forms which is the one which starts with "As a result of investigation add $6,720"?---That is correct.

On the reverse of that you will see there is a calculation of average income and it calculates the total amount of income for each of the years 1961-62, 1962-63, 1963-64? That is correct but I didn't get any of the money.

I am not saying that you received the money. A lot of us are familiar with partnerships on which we pay tax but don't receive the money but that was your taxable income as assessed for those years, was it not?---After a re-examination of the tax, yes.

As a result of that the additional tax you were called upon to pay was $17,517.18. If you turn to the reverse of the last page there is a document which is headed up, "Summary of accounts"?---That is correct.

That was in fact the amount of tax which you were called upon to pay as a result of this investigation - $17,317.18? ---Including extra charges for not doing them properly.

Yes and the further assessment for the year ended 30th June 1963 included an assessment in respect of a dividend from Caratti Holding Co. Pty Ltd, omitted, of $584, did it not?---Which year?

I think it is the second of the assessments and it is headed up, "As a result of investigation add: re W. A. Bulldozing Co. adjusted" and there is a figure and then "dividends from Caratti Bulldozing Co. P/L, omitted, $584." It would be either on the second or third of the assessments and on the front of the assessment?---What was the amount again?

Perhaps if you could pass the document back to me I will show you the page I am looking for. It is, as I suggested, the second of the documents. You will see the capital print over on the lefthand side (the print in capitals) which says, "Reason for amendment. As a result of investigation add in W.A.Bulldozing Co. adjusted - -" I am not quite sure of the figure because the print I have has something and then a figure of $7,442?---That is correct.

And "dividend from Caratti Holding Co. Pty Ltd, omitted, $584"?---That is correct.

These assessments were accepted by you, were they not and passed on to Mr Caratti's accountants, A.B.Pearce & Co. with a request for payment by Mr Caratti?---I had a letter from Mr Edwardes saying about this assessment and then he passed them on to Mr A.B.Pearce for Mr Caratti to look after them.

You expected Mr Caratti to see to the payment of this assessment did you not?---That is correct; yes.

And he in fact did see to the payment and the payment was made, was it not?---Yes, the last payment 1971.

MR MALCOLM: Yes and in fact you paid no part of this assessment?
---No, except a lot of embarrassment, because 1971 the bailiffs came and almost repossessed my vehicle for this assessment that wasn't paid then.

I understand there was some arrangement with the Taxation Department regarding the payment of - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR MALCOLM (Continuing): - - - payment of this amount which formed approximately 10 percent of the total additional tax payable by the members of the partnership for those years? ---Yes, but every time the due date was not met, he used to come and see me because I was held responsible.

But at all times you looked to Mr Caratti to see to the payment? ---That is correct.

I tender those assessments, perhaps on the same basis as the previous document taken from the parnership file.

BURT J: Why do you want to tender these assessments?

MR MALCOLM: Perhaps it is not entirely necessary. We will not tender them. We will put them back on the partnership file.

TO WITNESS : Mr Zampatti, you recall in the partnership action that evidence was given to the effect that the amount of the so-called loan to W.A.Bulldozing Company from Caratti Holding Co. Pty. Limited was reflected in the current account of Mr. Caratti in the partnership? ---Yes.

And that various payments were made by Mr Caratti and debited to his current account in the partnership?---Without balance sheets or figures I just could not explain.

I just want to put to you that the amount of income tax in the sum of approximately $170,000, payable by the partners arising from this tax investigation, was paid by Mr Caratti and debited to his current account in the partnership which in turn enlarged the loan from the holding company?---If it is in the books, yes

I thought we agreed in the partnership action that that was what was in the books?---I am not a book expert.

Do you agree with this, that the money which had to be paid to the commissioner for taxation came out of the holding company through W.A.Bulldozing Company?---There was only one bank account. It was S.&N. Caratti the whole time so that whatever switch they made within the companies I would not know.

You give your address at 73 Great Eastern Highway, South Guildford? ---Correct.

Who owns that property?---I believe the holding company.

How long have you been residing in the property at 73 Great Eastern Highway, South Guildford?---From approximately 1967.

When was it that you came to Perth from Mount Barker?---Late 1962.

Did you have a house in Mount Barker?---Yes, I built a new house in Mount Barker and lived in it eight months before I was asked to move to Perth.

Is it not the fact that you had some assistance from the business in the construction of your house in Mount Barker?---Not one cent.

No materials, machines, labour?---None.

MR MALCOLM: At all events, in late 1962 you sold the house in Mount Barker and you came to Perth?---To suit Mr Caratti.

Did you then purchase a house at 292 Great Eastern Highway, Belmont? ---279.

279 Great Eastern Highway, Belmont. When you moved to 73 Great Eastern Highway, what did you do with the other house at 279 Great Eastern Highway, Belmont?---Rented it.

And between 1967 and June 1970 you were living at 73 Great Eastern Highway, rent free, were you not?---Correct.

In a house which belonged to the holding company?---Mr Caratti did not pay any rent on any of his houses. 10

Does he live in a house which belongs to the holding company?---He used the money from S.& N. Caratti to buy it in the first place.

When the ownership of Caratti Australia changed hands in June 1970 and Landall took over, did you continue to live at the house at 73 Great Eastern Highway?---Yes.

And were you called upon to pay rent ---

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR MALCOLM (continuing) - - - rent?---No.

When were you first called upon to pay rent for the property at 73 Great Eastern Highway?---By the receiver, in April 1971.

April 1971?---Yes.

What was the rent you were paying him?---Twenty two dollars.

Twenty - -?--- - - two dollars.

Twenty two dollars per week?---Per week, yes.

And it is a fact that Caratti Holding Company once again became the owner of those premises in September 1971, is it not?---Apparently, yes.

Well, it is the owner of the property today, is it not?---Not that I know of.

I beg your pardon?---I don't know if they are. I haven't made any discovery on that.

Did not Landall tell you that the Holding Company had become the owner of the property after the settlement in September of 1971?---No.

Not at any time?---I wrote to Landall regarding the rent on the workshop and the house for them to disclose the owner so I could make a deal with them and they wrote back and said that the owner wouldn't let himself be identified, and then I wrote back again and said : "Well would you ask Mr Caratti can I make a deal with him" and they wrote back saying : "Well, it appears that you know who owns the property now, but he refused to - - he just appointed us as agent to collect rent, that's all."

Did you, subsequent to September 1971 - early in 1972 have a discussion with Mr Caratti about rent for the house and the general bulldozing workshop property at Koojan Avenue?---Yes.

And did you not tell him that you didn't consider you should have to pay rent for either of those properties because you were a shareholder in the holding company?---That's correct - until he bought the holding company to a satisfactory settlement which at the time we were trying to negotiate.

But you were telling him that it was not proper for him to ask rent of these properties from you because you were a shareholder of the holding company?---He wasn't paying any rent for the workshop in Perth or the workshop in Mt Barker, the workshop in Esperance, the workshop in Merredin.

Yes, but after the collapse of Caratti Australia in 1971, Mr Caratti reactivated Caratti Consolidated Pty. Ltd as a business which was leasing premises from the holding company?---Am I a shareholder in that?

No, but Caratti Holding Company beneficially owns the whole of the shares in Caratti Consolidated, does it not?---I don't know the whole structure.

Well, it has been suggested to us that Caratti Holding Company - and I think it has been agreed between my learned friend, Mr Smith and me, that Caratti Holding Company now owns beneficially all of the shares in Caratti Consolidated Pty. Ltd.

MR SMITH: This is the ...?... (away from microphone).

BURT J: I thought that Latec had something to do with it?

MR SMITH: As I understood it, and as the documents disclose, or the second respondent's affidavit discloses, Latec and the holding company jointly owned it and I understood myself yesterday (and I thought I so informed your Honour) that Latec's 50 per cent share was now held by Delbar Investments and how it was held, I didn't know.

Apparently my learned friend is now telling me - or telling the court - -

BURT J: That is how it was explained to me I think, yesterday, Mr Malcolm, because it is apparent on this family tree that - -

MR MALCOLM: Your Honour, I am speaking of time subsequent to the 30th of June 1970 - and really subsequent to September 1971, when there was the settlement with Landall and the agreement dated the 30th of June 1970 - the - -

BURT J: What's it all leading to when you get there? What is this line of cross-examination devoted to?

MR MALCOLM: Well the point is, your Honour, that we had side tracked a little I think at the moment by a reference from Mr Zampatti to Caratti Colsolidated, but so far as the Koojan Avenue property and the residence at Great Eastern Highway are concerned, it is our contention that these are substantial material benefits which Mr Zampatti has had from the company and that so far as the Koojan Avenue property is concerned, he has been carrying on business on his own account through other companies in which he is the sole controller, since 1971 and the line of cross-examination is intended to suggest that since September 1971 he has declined to pay rent to the - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR MALCOLM (Continuing): - - - rent to the holding company for these properties based on an assertion made by him that as a shareholder he should not have to pay rent.

BURT J: All that will be provisionally established. What is the point of it? I am considering whether a company should be wound up. One shareholder says to me in broad terms it is being pillaged by your client and your client is saying, "Well that may well be right, but the petitioner is doing his best to pillage it as well." That may merely fortify the decision that it is proper to wind it up. It is not a matter of one shareholder doing it. both of them are doing it and, therefore, let us get it finished with.

MR MALCOLM: It is a question of the shareholders taking financial benefits out of the company in the way which suits them and not necessarily in the conventional way of accumulating profits and declaring dividends and paying tax on the profits and tax on the dividends.

BURT J: If I see that and see if this has become an established way in which the company is carrying on perhaps it ought to be wound up, because there is no justice.

MR MALCOLM: The question in these proceedings is whether it is just and equitable as beteen thepetitioning shareholder and all the other shareholders of the company that the company should be wound up. If it be established that the affairs of the company are being conducted in a way which suits the shareholders in this particular context then as between them my submission would be that it would not be just and equitable to wind up the company. The complaint to which we are addressing ourselves is that he received no moneys, no financial benefit - - He has got nothing from the company.

BURT J: I can see the point of that. But where it leads to in the end is perhaps another matter. However, go on:

WITNESS: All I am trying to do, your Honour, is to try and get this company to come to some conclusion as quick as possible by refusing to pay the rent because if I stay there and pay the rent as I did for the last 18 years I would still be working for Mr Caratti.

MR MALCOLM:
In other words, you have used the question of rent as one means to force Mr Caratti to buy your shares. That is what you want to do, do you not? You want to force Mr Caratti to buy your shares?---I am not forcing him. I am asking him.

But that is the reason - the reason why you are refusing to pay rent for these properties is in an attempt to persuade him to buy your shares?---And I am still entitled to because he is not paying any rent on the other properties.

Do you remember an occasion in May 1972 when Mr Caratti asked you whether you could carry out some repairs on a machine known as an 824 at your workshop property?---I carried out a lot of repairs - -

Answer the question please. Do you remember Mr Caratti asking you in May 1972 to carry out some repairs on a machine known as an 824?---Yes.

MR MALCOLM: Was it not the fact that you refused to return that machine?---It was the fact that it was removed from the premises while I was not there. I try to stop it from being removed and eventually was arrested.

But did you not say that you were not going to return the machine until something was done about your shares?---That was a matter of payment. I repaired several machines for Mr Caratti, not just the 824. There was two or three D7, two D9, and the 824 and I paid for the parts and everything else.

When you were setting up in business on your own account in 1971, did you not make arrangements with Mr Caratti to hire a D7 bulldozer which had come back to the holding company after the Landall settlement in September 1971? ---No.

Did you in October 1971 make arrangements with Mr Caratti for the use by your business of a D7 machine belonging to the holding company?---No.

Did you in October 1971 make arrangement with Mr Caratti regarding the use of a D7 bulldozer?---No.

Between October 1971 and February 1972, did you have operating a D7 bulldozer?---No.

I am instructed that between 27th October 1971 and the 16th March - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

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MR MALCOLM (continuing) - - - 1972, you were - through Consolidated Bulldozing Pty. Ltd - using a D7E bulldozing machine which was the property of Caratti Holding Company Pty. Ltd?---Not a D7.

Well, I am also instructed that in addition to the D7, you were using a D9G and that was between the 8th February 1972 and the 20th August 1972?---Yes.

You admit to the use of that machine?---Yes.

And was not the rate of hire $50 per hour?---Ridiculous. It's not true.

What was the rate of hire?---It was a contract - a verbal contract that that machine would produce rubble (crushed rubble - which is limestone rubble) at the quarry of Balcatta and whatever it produced it would get 22 cents per cubic yard and a separate docket card kept for that purpose. That is true.

Have any payments been made on account of this verbal agreement that you refer to?---No.

If payments were to be made, were they not to be made to the holding company?---No.

To whom were they to be made?---To Caratti.

Did he not tell you that this was a holding company machine which had come back from the Landall settlement?---No, and you know why I haven't made any payment?

Perhaps you could tell his Honour?---Because the amount that that machine produced and the repairs that I have done to the D9 and the D7s and other trucks was more than what the machine earned at the time.

(Could the correspondence between Mr Zampatti and Landall be produced, please. There was a complete file of correspondence at one stage).

TO WITNESS: Mr Zampatti, would you look at these two accounts from Landall Holdings Limited. They cover - - Perhaps you could look at this one first. It is addressed to you by Landall Holdings Limited, receiver and manager appointed, rental of house Great Eastern Highway, and inclusive of the monthly rent for December 1974 $95.00 it is $ 3,752.00?---That's correct.

Does that account correctly show the rent calculated at the rate of $95 a month for the house at Great Eastern Highway to December 1974?---That's true - yes.

I will tender that, if your Honour pleases.

EXHIBIT — EXHIBIT 32 .... Account from Landall Holdings Limited receiver and manager appointed re rent of Great Eastern Highway premises.

MR MALCOLM: The rent has continued since December 1974 to accrue at $95 a month?---That's correct.

MR MALCOLM: And none of that has been paid by you to either Landall (as agents for the holding company) or to the holding company itself?---No, except that I done quite a bit of repair to the house and paid myself for it.

Would you look at this account from Landall Holdings Limited - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR MALCOLM: (Continuing) - - - Holdings Ltd, receiver and manager appointed dated 1st November 1974 covering rent from the 25th July to 31st October and rent for November 1974 at the monthly rate of $800, a total of $32,184.62. Do you identify that as an account which you received in respect of rental? ---That is correct.

Does that correctly set out the amount of rental?---Yes.

The rental on the Koojan Avenue property has continued to accrue at $800 a month since November 1974?---That is correct.

No part of that amount has been paid by you either to Landall or to the holding company?---No.

I tender that, your Honour.

EXHIBIT — EXHIBIT 33 .... Statement of rent from Landall Holdings Ltd.

MR MALCOLM: I take it then that you dispute any liability to the holding company on account of the hire or use of plant or machinery of the holding company from October 1971 to August of 1972?---Yes, I dispute it.

No liability to the holding company at all?---None.

BURT J: Did you have any of their machines during that period? Any holding company machines?---Not that I can recall.

MR MALCOLM: Do you say that you have had no machines at all from Mr Caratti, whether from the holding company or Caratti Consolidated or otherwise - no machines from Mr Caratti? Is that what you say?---I had the D9 with that arrangement.

Apart from the D9 the subject of this arrangement about Balcatta that you spoke about do you deny that you have had any other machines?

BURT J: During that period.

MR MALCOLM: During that period?---Yes, I might have had another one. I'm not quite sure. I might have had another one.

Let us go back to June of 1971 when you decided to start out in business on your own account. What earthmoving machinery did you start out in business with?---One D9, four D7's that I bought from the - - one D9 I bought outside privately and mortgaged my house and everything else, my car and my personal guarantee to buy it and some machinery that I bought from the receiver of Caratti Australia.

Do you say that Mr Caratti gave you no assistance in acquiring machinery to start out in business in 1971?---None at all.

Did he not pay certain debts which were owing by you to Caratti Australia in 1971?---Not that I know of.

MR MALCOLM: (Could exhibit PF1 - No.21 it is on the list - be produced, please? It is the copies of general ledger cards transactions between company and Zampatti.) TO WITNESS: Perhaps while we are looking for that document, Mr Zampatti, is it not the fact that since July-August 1971 Consolidated Bulldozing Pty Ltd and General Bulldozing Co. Pty Ltd have been carrying on earthmoving and contracting business in direct competition with Caratti Consolidated Pty Ltd?---No.

Had those companies - Consolidated Bulldozing and General Bulldozing - not been carrying on the earthmoving and contracting business since July-August 1971?---Yes. 10

Had they not competed for work with Caratti Consolidated Pty Ltd? ---Not that I know of.

Are the two companies not engaged in the same area of business - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR MALCOLM (continu-ing) - - - business?---Completely different.

Was not Merredin one of the major areas in which Caratti Consolidated carried on business?---Yes.

And have you not opened your own branch for activities at Merredin? ---No.

Have you not taken over a considerable number of former employees of Caratti Consolidated who had been employees in the various Caratti businesses for many years?---When?

Since August of 1971?---Possibly one mechanic.

Possibly one mechanic? What is his name?---Leno Marconi.

What about Mr Madison?---He was employed by Caratti Australia and then by the receiver and when I started my new business he came with me. I didn't take him from Caratti Consolidated.

But had he not been employed by Caratti Consolidated prior to his employment by Caratti Australia?---Yes.

And the same was the case for a number of other people, was it not? ---It is a free country. They all started with me at 1st July 1971.

But that was a considerable advantage to you in establishing a business on your own account, was it not - to have these people who had been long-term employees in the Caratti business with you?---Because they were loyal to me - yes. They could have gone to Mr Caratti just as well if they were loyal to him.

I see. Has he not complained to you about poaching and pirating his employees?---I never touched one of his employees.

BURT J: You were about to look at the general ledger cards I think, Mr Malcolm.

MR MALCOLM: Yes.
TO WITNESS: Mr Zampatti, I think you have had occasion to look at the originals of those ledger cards on inspection of documents in relation to this matter; that's the original ledger cards, photocopies of which are collected in that Exhibit PF1 which is No. 21 on the list?---Yes.

You have gone through those and have you read the affidavit of Mr Peter Forbes which was sworn the 1st of May, which extracts transactions which are shown on there.
(Perhaps that affidavit could be shown to the witness)

Mr Zampatti, could you turn up p.101 in the booklet of affidavits. If it is difficult for you to find that, there's the original affidavit.

(confers aside)

I am sorry, I thought he had got the booklet back.
TO WITNESS: Would you look at p.5 of the affidavit. Do you see that what Mr Forbes is referring to - marked PF1 - is a bundle of copies of general ledger cards?
(It appears, your Honour, from p. 100 of the booklet).

At the top of p.6 he sets out a summary of the

transactions shown in the ledger cards? Do you dispute that the summary correctly reflects what is in the ledger cards? I am not asking you to say that what is in the ledger cards is correct, but whether the summary correctly reflects what is in the ledger cards? Have you had occasion to check out these ledger cards before today? ---No.

MR MALCOLM: I see. Well, looking at those items which are listed there - of course the dividend of $585 - income tax has in fact been paid on that amount on your behalf, has it - - - 10

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR MALCOLM (Continuing): - - - if not?---Yes.

And we know that there were various payments made on behalf of income tax. Do you dispute that the payments which are shown there as being made on account of income tax in 1964, 1965, 1965, were in fact paid on your behalf?---No.

Do you dispute any of the items in that summary?---Yes, from 1965 onwards.

Apart from income tax you have accepted that payments were made in respect of income tax?--That is correct.

But you dispute all the other items after 1965 of from 1965. Let us start with February 26, 1965, "Loan $2400". Do you dispute that?---I do, because I do not know what it is.

Do you say that you do not know what it is or do you say that you did not receive the money?---I did not receive the money.

Nor was any payment made on your behalf?---Not that I know of.

In 1965 did you have a bank account at the Commonwealth Trading Bank? ---Yes.

I suggest to you that on 26th February 1965 an amount of $1200 was paid into that bank account with the Commonwealth Trading Bank?---Possibly.

1200 pounds?---That is correct. That is the loan on the house, yes. I am not disputing that one.

So you admit that on 26th February 1965, you were lent $2400 which was a loan in relation to your house?---That is correct.

There is an amount of $1902.60 on February 26th 1965 shown as a further loan but in fact in the ledger card it relates to a payment to the Commissioner of Taxation. Do you not agree that on that date a sum which was then 951--pounds-6-shillings was paid to the Commissioner for Taxation on your behalf?---It would be the same sum after the 1965 re-arrangement of tax after the new assessment,' would it not?

No. I am suggesting to you that it represented the tax on your income as originally returned, being your share in the profits of W.A.Bulldozing Company and S. & M. Caratti? ---I am not disputing any of the tax at all.

What I am suggesting to you is that the amount, the second amount on February 26th, 1965,shown as a loan of $1902.60 represented a payment on your behalf of income tax in respect of your share of profits from the W.A.Bulldozing Company?---I did not receive any profit.

I am not suggesting that you actually received the profit. I am only suggesting that you incurred a liability to pay tax.(Could Exhibit 15 in the partnership action be produced - extracts from taxation returns) Will you look at these documents, please Mr Zampatti. You recall that in the partnership action you were asked to produce extracts from your income tax returns?---Yes.

Are they the extracts which you then produced and which were tendered in evidence in the partnership action as exhibit 15? - - -

MR MALCOLM: I think just to refresh your memory perhaps we will go back to the partnership action at p.78 of the transcript. You have a copy of the transcript there? ---Yes.

Will you go back to p.78 of the transcript and you will see at the top of the page there was a request from the defendant's solicitors (that is Mr Caratti's and the other defendant's solicitors) and your own solicitors provided extracts from your taxation returns for the years ended 30th June 1960 to 30th June 1971 inclusive. Do you remember that?---Yes.

And you remember now that these returns were provided by your solicitors?---Yes.

The documents which you have before you (exhibit 15) are those documents, are they not?---Yes.

Was it not agreed for the purposes of the partnership action that you had certified each of the returns for the years ended 30th June 1960 to 30th June 1970 inclusive as being true and correct?---And I said then that some of the returns I had to sign them blank because I didn't even have any group certificate to go with them. It might not be on the same page but - -

Well it is on the same page. Perhaps I had better read it out. The documents, your Honour, went into evidence in these circumstances:

> "Do you recognise those documents as being extracts from tax returns?---Yes they look like it.
>
> "They have been agreed, your Honour. I am just tendering them."

and exhibit 15 was tendered being extracts of taxation returns for B. Zampatti for years ended 30th June 1960 to 30th June 1971.

> He was then asked:
> "Of course you signed the originals of all your tax returns, did you not, Mr Zampatti? ---Yes, sometimes prior to being filled.
>
> "Sometimes prior to them being filled in?---Yes.
>
> "Can you identify the occasion on which you signed blank taxation returns?---No, I couldn't.
>
> "On how many occasions?---Once or twice, I think.
>
> "When was the most recent occasion on which you signed a blank taxation return?---Oh, early in the sixties. 1959, 1960 or 1961. Thereabouts."

The last question on that page:

> "Do I understand that you acknowledge that

you signed the declaration required of you on the face of each of the income tax returns that the information contained in it was true and correct in every particular?---If you put it that way, yes."

There was in fact a letter from your solicitors which confirmed that it was agreed that that was the case for the purposes of the partnership action. I ask you whether you now agree that the documents before you are extracts from your taxation returns which you certified as being true and correct?---Yes, these are the documents but as you can see from the 30th June 1966 it had to be put in "please adjust".

MR MALCOLM: That was on account of your share in W.A. Bulldozing Co. Was it not that "please adjust" was on account of the share in W.A. Bulldozing Co?---Because we didn't have any document to fill it in with.

THat was for the year ended 30th June 1966?---Yes.

But apart from whatever qualifications were contained in the returns themselves are they not extracts from your taxation returns, which taxation returns you agree you certified as being correct? - whatever qualifications might have been contained inside the document about adjustments?---You look here - 1968 - there is no income, nothing at all to be adjusted.

BURT J: We will follow this further after lunch, Mr Malcolm.

LUNCHEON ADJOURNMENT

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

UPON RESUMPTION:

MR SMITH: My learned friend was concerned as to possible confusion arising out of the evidence of this witness as to the sequence of events in 1961 and was minded to call the secretary of the company to formally prove under the Companies Act the minutes which are in fact in evidence as exhibits to the second respondent's affidavit and were proved in accordance and given the force of whatever s.148 gives to them that they shall be evidence of what they say and it simply says:

> "Where any minute so entered purports to be signed as provided in sub-s.(1) of this section is evidence of the proceedings to which it relates effectively until the contrary is proved."

We have no desire to put him to the bother of calling the secretary to give whatever formal proof is necessary for that section to take effect. He also wished to call through the secretary evidence of the allotment, the signing of applications by all share-holders for the shares including the petitioner and the posting of the share certificates to the second respondent who held them on behalf of all shareholders. We are prepared to concede those documents without formally calling the secretary.

BURT J: Where are the documents? Are they in?

MR SMITH: I think my learned friend is about to put them in.

BURT J: Do you have them, Mr Malcolm?

MR MALCOLM: Yes, your Honour. The first three documents which my learned friend referred to are 14, 15 and 16, the exhibits SC2, SC3 and SC4. They are the relevant minutes but I now formally tender a bundle of documents which comprises four forms of application for shares dated 22nd August 1961, a carbon copy of an amended return of allotment in relation to the shares allotted to Mr Caratti, Mrs Caratti and Mr Zampatti that amended return being dated 31st August 1961 and a letter from A.B.Pearce & Co. signed by Mr F. A. Hume, the then secretary of the company, dated 27th September 1961 which forwarded all the share certificates and reported that the necessary returns of allotment had been lodged at the Companies Office.

BURT J: Within that bundle is there the letter which I think I have marked exhibit 31?

MR MALCOLM: That is the application by Mr Zampatti?

BURT J: Yes.

MR MALCOLM: That was included on the file from which these documents have been extracted.

BURT J: It may be better then to add that letter to that bundle and I will mark the whole bundle exhibit 31.

MR MALCOLM: That would be convenient, your Honour. I formally tender those additional documents, sir, as part of exhibit 31.

BURT J: The allotment then was made but what is the date of it, Mr Malcolm? Is it an agreed date that the shares were in fact allotted on this date in August?

MR MALCOLM: 22nd August 1961 being the date of the resolution allotting the shares is I now understand an agreed date.

MR SMITH: The date appears in the share register and the petitioner is in no position to challenge that as the date of allotment.

MR MALCOLM: You will notice, your Honour, on the form of amended return of allotment the date recited at the top of the form as the date of the allotment is 22nd August 1961.

BURT J: I am just wondering how I reconcile this with para.5 of the petition and with the amended return.

MR SMITH: Perhaps I should clarify what the situation is at least as the petitioner understands it; that we are agreeing to those documents going in without the necessity of calling the secretary of the company and we agree that the share register shows the allotment of the shares on 22nd August without cluttering the record with that and we are also prepared to agree to the letter which I do not think has been specifically mentioned by my learned friend going in as if proved by the writer of it, Mr Hume.

The petitioner of course says, "I don't remember receiving that letter - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR SMITH (continuing) - - - letter. All we are really trying to do is shorten the time of calling another witness to just get those documents into evidence. As to what the effect of them is on allegations in the petition, I suppose may well be the subject of debate at some later point of time.

BURT J: You see the difficulty I am having, Mr Malcolm. There are applications here by Sergio Caratti for 3375 shares, also for his wife there's a like number, and an application by John for a like number, and Alan for a like number, so those applications were - - and they have got share numbers allotted to them.

? (1350 on tape) ? You have 13500 shares, and four shareholders. Then it is followed by an amended return, which shows Sergio Caratti as holding 10,125 shares.

MR MALCOLM: Yes, the application was made by Caratti as trustee for John Caratti and as trustee for Alan Bruce Caratti.

BURT J: Well, the company wouldn't be worried about that, would they? You don't have a trust - -

MR MALCOLM: Not so far as the register is concerned, but they would accept the application from him. It would be irrelevant to them that he had disclosed that he held the shares as trustee.

BURT J: Yes, but the applications are not from him. The applications are from the individuals.

MR MALCOLM: Well, he signed as trustee and the resolution of allotment which is the other document Exhibit 16 SC4, deals with those applications and deals with the applications in the name of John Caratti and Alan Bruce Caratti as applications by Sergio Caratti and have allotted the shares accordingly.

BURT J: And then I look at the amended return, do I, of the 22nd of August, which purports to be an accurate statement of how the register then stood?

MR MALCOLM: Yes; and it does conform to the register.

BURT J: Well if it does, it is rather unfortunate from your client's point of view, isn't it, because his governor director's share has disappeared? That is if it is an accurate statement of the register it has.

MR MALCOLM: No, because that was a return of allotment and - -

BURT J: No, that is why I asked you; it doesn't purport to be an accurate statement of how the register then stands.

MR MALCOLM: Insofar as the shares allotted on that date were concerned.

BURT J: Yes, as to that allotment.

MR MALCOLM: As to that allotment, but it has already been - - It is common ground that the two subscriber'sshares : one was subscribed for by Sergio Caratti, one by Edwardes and the one subscribed for by Sergio Caratti and allotted in July 1960, is entered in the register as the life governor's share.

BURT J: Yes.

MR MALCOLM: That, I think, is the reconciliation between them, your Honour. The two shares had been issued prior to the allotment in August of 1961. One of those was a life governor's share, the other one is the other subscriber's share allotted to Mr Edwardes and the balance of the shares which make up fifteen thousand were allotted on the 22nd of August, giving a total issued capital of 15,002 shares of which No. 1 is the life governor's share.

BURT J: Yes. This is an amended return. There is presumably an earlier one that was wrong? 10

MR MALCOLM: Yes, there was an earlier return which was wrong which showed 6,750 shares allotted to Mr Caratti, 6,750 to Mrs Caratti and 1500 to Mr Zampatti. That is also dated the 31st August 1961 and it seems that no sooner had it been put in, somebody noticed it was wrong and put in an amended return.

BURT J: Well that is pre-dating it. You say it is dated the 31st August?

MR MALCOLM: 1961. 20

BURT J: Well this is dated the 22nd.

MR MALCOLM: The reference to the 22nd August I think is at the top of the document recording the date of the allotment.

BURT J: Yes, I see what you mean.

MR MALCOLM: The date of the document itself is the 31st of August.

What is entered in the return of allotment is reflected in allotments on the 22nd of August - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR MALCOLM (Continuing): - - - 1971 in the register of members.

BURT J: Thank you.

MR MALCOLM: The only other document, your Honour, was the document which was Exhibit 13 in the partnership action, a letter dated 17th August 1971 from A. B. Pearce & Co. to the petitioner, forwarding the application for shares. I understand from my learned friend that that letter may be tendered without formal proof as if it has been identified by the secretary of the company as a letter written by him, and he having done that on a previous occasion.

BURT J: And attach it to this exhibit? They all relate to the same transaction.

MR MALCOLM: They all relate to the same transaction.

BURT J: I will allow it simply on that basis.

MR SMITH: Thank you sir.

BURT J: Perhaps we will provide a photocopy of that to keep the other file intact.

BURT J: Yes, thank you.

MR MALCOLM (TO WITNESS): Mr Zampatti, just before the luncheon adjournment, we were looking at page 6 of Mr Forbes' affidavit which was sworn 1st May 1975. It is a separate document if you have it there, and ledger cards, copies of ledger cards which were referred to in that affidavit. I think you will recall that you accepted the payments referred to there as being on account of income tax as having been made on your behalf?---Yes.

You also accepted that the amount on 26th February 1965 as a loan of $1902.60 represented income tax which had been paid on your behalf. I want to move now to the item, December 1965 which refers to a loan of $600?---Yes.

Do you agree that you received that amount in December 1965?---I do not think so. I do not know that I have.

Do you deny that you received that amount in December 1965?---Until it is proven to me that it has, I do deny it, yes.

You have had access to these ledger cards and records and the balance sheets and financial statements and so forth, have you not?---Yes.

Prior to these proceedings you have never queried any of these amounts?---Not through the ledger cards, no.

What about the item, August 1966 loan of $100?---It seems strange but it is there. I have got no reason to know why it is there.

I am instructed that that represented a cheque made out to cash and paid to you on account of incidentals in August 1966? ---I find it very hard to believe.

Do you deny it?---Made out in cash to pay for incidentals?

Yes?---I would deny it, yes.

MR MALCOLM: Let us look at June 1971. There is a notation there, "June 1971, hire of plant, dozing C.P. block $3208" and it says "By bulldozing 1967 up to September 1969. I am instructed that the C.P. block referred to - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR MALCOLM (Continuing): - - - to is your conditional purchase land at Ongerup?---Yes.

You do have conditional purchase land at Ongerup, do you not? ---That is correct. That is right.

That was the land which you applied to the Lands Department for in 1961 - -?---That's correct.

- - and took up and have developed and farmed every since?---All that was done was a small amount of chaining and one dam put down and it's almost gone back to bush. The $3,208 would be far in excess of cost of such clearing.

There is an entry, Mr Zampatti, in the journal of the company for 30th June 1971 which covers a number of items being charges raised through the holding company from Caratti Bulldozing 1967. Was it not the fact that Caratti Bulldozing 1967 was, prior to 30th June 1971, carrying out from time to time farm clearing and development work on the farming properties of the holding company?---Of the holding company?

Of the holding company?---Yes.

Did they not also carry out farm clearing and development work on your CP block at Ongerup?---Yes.

On the same day as an entry was made which raised an amount of $3,208 charged to you"to improvement farming properties" being adjusted entry, amount not relating to the company. There is an entry in relation to the Beacon Farm, "improvements to farming property $21,243.35 charge accepted by the holding company". The charges which have been raised against the holding company are amounts which subsequently find their way into the - - in relation to reductions to the debenture between Caratti Consolidated and the holding company as do the charges raised against you personally?---Yes.

Do I understand that you are asserting that these charges were raised against the holding company and farms of the other companies, but you reject the charges which are raised against you? ---All I am saying is that the $3,208 is far in excess than what the work was done on my property.

I see. You do not dispute the fact that the charge was raised along with similar charges raised against the other farms?---No.

Turn to the entry in Mr Forbes affidavit - the note in Mr Ford's affidavit, September 1st 1971 "To amounts paid on settlement with Landall Holdings, due by B.Zampatti?---Yes.

My instructions are that these amounts here - general bulldozing $1,000; Mount Barker $600; Caratti Australia $348 represented amounts which were owing by you to Caratti Australia or Landall. Let us take the reference to Mount Barker $600 first?---Yes.

Do you agree that in September 1971 you were indebted to Caratti Australia in the sum of $600 for the sinking of a dam on your property at Ongerup?---I do.

I think that is the $600 referred to in the invoice attached to your affidavit - - -

MR MALCOLM: (Continuing) - - - affidavit sworn in these proceedings dated 23rd June 1975 as exhibit Y to the affidavit and which is exhibit No.6 in these proceedings. Is that the same document?---The $600 is correct.

For dam sinking on your property?---Yes.

When was that work carried out?---I think it was done by Mt Barker in 1971 - or it must have been 1970.

Late 1970 or early 1971?---Yes.

It was after Caratti Australia had come into the picture and was operating the business?---That's right.

I suggest to you that you never paid that amount yourself?---No.

It was paid on your behalf at the settlement which took place between Caratti Holding Co., Landall and the receiver on 15th September 1971?---That's right.

And that the same applies to the other amounts there - the reference to General Bulldozing $1,000, that was an account owing by General Bulldozing Co.(which was by that time your business)to Caratti Australia?---I fail to see why. I don't know why.

I am instructed that it related to amounts which were owed by that company pursuant to arrangements which you had made concerning plant and equipment with the receiver of Caratti Australia?---The receiver and I did all the transactions directly. We didn't have to go through Caratti to do that.

Would you look at this document which is a deed of settlement dated 1st September 1971 between Landall Holdings Ltd, Sergio Caratti, Caratti Holding Co. Pty Ltd and others and I have marked the page in the schedule toward the end of the document? Now Mr Zampatti I am instructed this is a schedule prepared by or on behalf of the receiver and manager of Caratti Australia setting out debtors' accounts in your name?---Yes, I can see that but I still don't know what it is for.

Do you deny that these amounts were owing by you or your business, General Bulldozing Co. to Caratti Australia?---I would have to because I haven't got any document to say that I owe this money.

Mr Zampatti, we heard quite a lot yesterday about the various loan accounts including a loan account in the name of W.A. Bulldozing Co. and there are a number of matters which are referred to in the loan account ledger card of W.A. Bulldozing Co. forming part of the records of the holding company and one of the debit items in that loan account is a debit item dated 30th June 1970 referring to Journal 312 in the company's journal which refers to "work done for B. Zampatti $5,708". I am instructed that that is in relation to work done on your property at Ongerup in the year ended 30th June 1970?---All you have to do is go down and have a look at it - - -

WITNESS (Continuing): - - at it. All that was ever done on the property was 1300 acres of chaining.

MR MALCOLM: There is a journal entry made on 30th June 1970 in the company's journal which reads: "L2 loan account, W.A.. Bulldozing Company"and the debit is $5708 and there is a credit to "L9 Caratti Debenture $5708". and it says "Being work done for B. Zampatti by 1967 company transferred to W.A. Bulldozing Company"?---When was that work done?

Prior to June 30th 1970?---In addition to this.

Yes?---I deny it.

You deny the work was done?---Yes.

You do not deny the charge was raised?---I did not know that it was raised.

And that it was raised in the same way as charges raised against the other companies in relation to work done by Caratti Bulldozing 1967, for them?

MR SMITH: With respect, sir, the witness could not answer that question.

BURT J: No, he cannot.

MR MALCOLM: I am about to embark on another aspect. I did hand a bundle of correspondence to my learned friend some time ago which relates to the account.

The documents I refer to are a bundle of correspondence which passed between Mr Zampatti's accountants and A.B.Pearce & Co.; subsequently between Mr Zampatti's solicitors and the solicitors for the company,Mr Caratti, relating to the company accounts. They are all documents which have been discovered and which I understand there is no question as to their authenticity.

MR SMITH: I do not know what degree of relevance a whole bundle of correspondence has, but I have no objection to it going in.

MR MALCOLM: The point about it is, sir, that it indicates the first time that a request was made for balance sheets and accounts of the company. It records when they were received, the terms under which they were received and so on. I thought it would, perhaps, short-circuit matters if one simply put them in as a bundle,rather than seek through cross-examination to establish dates times and places.

BURT J: What do they establish? It is all right putting in bundles.

MR MALCOLM: They establish this: at least from 15th May 1973 the petitioner and his advisers have been in possession of the accounts for the year ended 30th June 1971; from 22nd May 1973 they have been in possession of the accounts from 30th June 1961 to 30th June 1970, except for the years 62, 65 and 66 which were supplied subsequently that year. At that time they being not available on account of the death of Mr. A. B. Pearce. From that point of time to the issue of the petition there has been no communication about any matter disclosed in the accounts.

BURT J: If that is what the bundle discloses it will be on the transcript. Is not that enough?

MR SMITH: If my learned friend would add, for the purposes of the transcript, as the bundle of correspondence discloses, that it took two years and a writ to get any accounts at all.

MR MALCOLM: The purpose of my seeking to put in the bundle is that it gives through the correspondence a story that might take an hour to tell.

BURT J: I know, It may take a couple of hours to read, too. Nevertheless, I will take it as exhibit 34.

EXHIBIT EXHIBIT 34 .... Bundle of correspondence described on previous page relating to the obtaining of company accounts.

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR MALCOLM : Mr Zampatti, it is a fact is it not that since you obtained copies of the company accounts, you have also had available to you the services of professional accountants to advise you regarding the contents of those accounts?---Yes.

Is it not also a fact that since you obtained these accounts you have not raised any question about the contents of the accounts to the secretary of the holding company, or Mr Caratti, at any time prior to the issue of the petition in these proceedings?---(no audible response).

You have not asked the secretary of the company or Mr Caratti any question about the accounts which were supplied to you prior to the issue of your petition?---Well, we were having the whole partnership dealt with and all this bundle came forward with the partnership action.

The partnership action was heard in October/November 1974 and the accounts for every year to the 30th June 1970, so far as the company was concerned, and 1971, were made available to you (the bulk of them) in May of 1973. Is it not the fact that prior to the issue of your petition neither you nor anyone on your behalf has raised with Mr Caratti or with the secretary of the company or anyone else representing the company, any question, complaint or query, regarding any of the accounts of the company?---They weren't complete so there was hardly - -

Insofar as they were complete, do you agree with what I have just said - that it was the case?---Well, it is hard for me to agree because - -

Let's take it bit by bit. You never asked Mr Caratti or the secretary of the company or anyone else connected with the company any question regarding the accounts after they had been received by you, did you?---Not personally, no.

And did you instruct anyone on your behalf to ask any questions or raise any complaints or queries concerning the accounts, after you had received them?---No.

And in fact prior to June 1971 when you asked O.L. Haines & Co. to write to Mr Pearce for copies of the accounts, you had not yourself at any time since you became a shareholder, asked to see any of the accounts of the company?---I didn't know what they meant.

Whether you knew what they meant or not, isn't it a fact that you did not at any time prior to June 1971, ask to see any of the accounts of the company?---I asked the secretary, I asked Caratti, how the company was going.

Yes, you asked people how the company was going in a general sense, but you did not ask to see any accounts?---Well, to me to ask how the company was going is, I understood it, as to ask almost for an account.

Well, if you ask somebody how is the company going, what was the answer you got?---Going very well. What are you worrying about?

MR MALCOLM: Were you satisfied with that form of answer?---Well, I could see that we were buying farm, we were developing, we were going forward at all times. I would have had to be satisfied.

One of the complaints (I understand it has been a complaint) which you make in your petition is that you did not attend any meetings of the company and you didn't receive any notices of meetings of the company?---That's correct.

Prior to the issue of the petition, did you ever complain to anyone connected with the company that you hadn't received notices of meetings, or hadn't attended any meetings of the company?---Well, knowing the company as it is now, I believe it is up to the secretary of the company to advise the member of the company to attend meetings, is it not?

But that's not the answer to my question, Mr Zampatti, which is simply this: Did you at any time prior to the issue of the petition, make a complaint to anyone connected with the company, that you hadn't attended meetings and hadn't been invited to attend meetings?---No, because I didn't know any better.

Is it not the fact that you were quite satisfied with the arrangement that you had with Mr Caratti whereby you shared the day-to-day running of the business of the company?---To me it was a partnership and a family company and everything was going along real well and I was assured by Mr Kitson that everything was going well when we sold to Latec and there was dealing getting done to becoming public so everybody could get their shares out and their money and I was quite satisfied with those events; yes.

You were quite satisfied with the way in which the affairs of the company were being conducted - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

MR MALCOLM: (Continuing) - - - conducted until the receiver and manager of Caratti Australia told you that your employment had to be terminated. Is not that the position?---No. I was dissatisfied as from straight after the Landall sale was made.

You were dissatisfied as from straight after the Landall sale was made. That would be June 1970, would it not? ---I am not sure of the exact date; no.

I think the rest of us know that the Landall sale was made in June of 1970 and I think the evidence is that the discussion at Mr Caratti's house with Mr Kitson took place in May of 1970?---Yes.

You say that you became dissatisfied after the sale of Landall. Did you complain to anyone? Did you raise your dissatisfaction with anyone?---Yes, I rang you once and asked you, "Now that the sale has gone through would it be proper if when the money is coming through from Landall could the 10 per cent be paid down to me and be bought out?" and your answer was that you would talk to your client, Mr Caratti, and see what his feeling was.

Yes but you were not complaining about anything then, were you? ---No, I was asking if the money was coming through from Landall as a shareholder.

That was shortly after the sale took place, was it not?---Yes.

And we all know that early in 1971 Landall commenced litigation against Mr Caratti and Caratti Consolidated Pty Ltd. Do you recall that?---Yes.

Those proceedings were the proceedings ultimately settled by the deed of settlement dated 1st September 1971 to which I referred some time ago. From early 1971 until 15th September 1971 were you not aware that detailed and complex negotiations with Landall were being carried on with a view to the settlement of the litigation?---Yes.

Were you not informed by Mr Caratti during that time that nothing could be worked out regarding the state of affairs of the company until the Landall settlement had been negotiated and implemented?---Yes.

I put it to you again that apart from this particular conversation which you referred to did you - - Not apart from it. I put it to you again: Did you prior to the issue of this petition raise with Mr Caratti or anyone connected with the company any complaint about the conduct of the affairs of the company?---Many times to Mr Caratti himself.

What kind of complaints?---In 1964 when I explained to you that we spent hours under the tree in Fauntleroy Avenue; in 1967 again and he always assured me that we were going very nicely, that we were expanding, we buying farms, we buying bulldozers.

These were general discussions about the general financial state of affairs and success or wellbeing of the company, were they not?---That was my ability of general discussion of the company.

Mr MALCOLM: You had long discussions about the state of affairs of the company?---Yes.

Mr Zampatti, I suppose you recall the Full Court giving judgment in the matter of the appeals against the injunctions concerning the transfer of your shares to Mr Caratti?---Ye

I think it was Monday 19th May, was it not, that the Full Court gave its decision?---If you say so, yes.

On the 20th May you issued another writ - - -

MR MALCOLM (Continuing): - - - writ - you caused another writ to be issued against Mr Caratti---Correct.

In action 5581 of 1975?---Correct.

Those proceedings seek an injunction restraining Mr Caratti from taking any further steps under article 32 of the Articles of Association, unless he consents to judgment for an amount equivalent to 10 per cent of the net value of the assets of the company. Is that the claim that you make in the proceedings commencing by the writ issued on 20th May 1975?---I believe that is what it means, yes.

In other words, you are saying that Mr Caratti can have your shares if he pays you an amount equal to 10 per cent of the net value of the assets of the company? That is the relief that you seek in those proceedings?---Yes.

You would be quite satisfied if, as a result of this new action you have commenced, you were successful in obtaining that relief, would you?---If that's what the relief asks for, yes.

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti XXN

RE-EXAMINED BY MR PULLIN:

MR PULLIN: Could you run through quickly the history of your occupation of the premises at Koojan Avenue - who you first made the arrangements with?---With the receiver/manager of Caratti Australia.

Right. What was the first business that you established and ran from Koojan Avenue?---Crushing limestone rubble for the Balcatta company.

Was this with Consolidated Bulldozing, was it?---No, for myself only.

After that?---After that I thought that Caratti come to an agreement that all the plant was - - it was coming through Landall as a part payment who would transfer it to a new company /is called Consolidated Bulldozing and that /the reason I formed that company.

Were any shares issued to John Caratti - you mentioned him?---Yes.

Why did you stop trading as Consolidated Bulldozing?---Because none /the of those promises come to any effect - - all/ plant that come from the settlement with Landall went to Caratti and stayed there.

Did John Caratti pay for his shares?---No.

What happened to that company in the end?---At the moment it's ready to be liquidated.

How did you then carry on business?---With/a new company called General Bulldozing Company Pty Ltd.

Where did you get the machines from to run your business?---I bought the first D9 from a finance company by giving personal guarantee and mortgaged my house and my property, and some other plant I bought from the receiver/manager.

MR PULLIN: You were asked about a machine which was said to have been leased to you or given to you - I am not quite sure - a D9 in which you entered into an arrangement with Caratti. Do you remember that?---Yes.

You gave an explanation and said that - - could you just explain what the arrangement was once again with Caratti? ---The arrangement was that whatever that machine produced in the quarry I would give him 22 cents per cubic yard off figures given to me by Balcatta that the machine produced.

Less any deductions I think?---Less deduction of fuel, wages, repairs.

Could you have a look at these documents? They are copy documents. What are they?---They are invoices to Caratti charging the difference between what the machine produced and the repairs that are done to some of his machines that I had in the workshop.

I think the top document is a summary of the various invoices? In any event it is a summary of what is finally the position between yourself and Caratti?---Thats correct.

I tender that bundle of documents - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13
B. Zampatti RXN

MR PULLIN: (Continuing) - - - bundle of documents.

BURT J: Yes, Mr Malcolm?

MR MALCOLM: I have not had the chance of seeing this document, sir, and I am instructed that it has not been discovered.

BURT J: I am not sure now why you are tendering it or what it relates to. I remember the cross-examination but did the cross-examination really only go to credit?

MR PULLIN: I understood the cross-exmination to be directed to the benefit that Mr Zampatti is said to have received from Mr Caratti.

BURT J: Caratti personally?

MR PULLIN: Just using the word "Caratti" and I understand it to be Caratti or any of his companies. Of course it has been established that so far as the premises are concerned there is a debt owing by Mr Zampatti or his companies for a large sum of money and it was attempted through cross-examination to show that he had received benefit through the use of this bulldozer. This is to explain it in sequence.

BURT J: I do not think it is mentioned anywhere in the affidavits, is it?

MR PULLIN: No, sir. That is why the documents were not discovered of course. It was only raised on cross-examination.

BURT J: I do not know that it is really worth pursuing any more. It was put to him that he hired a bulldozer and he said "Well, it was a hire in a sense pursuant to a particular arrangement." He was asked to pay 22 cents a cubic yard but the outgoings on the machine really swallowed up the yardage and that's that.

MR PULLIN: The result is, I think, that Caratti in fact is indebted to Mr Zampatti rather than the other way round as a result of that machine - the use of that machine.

BURT J: I do not feel strong enough to follow that sort of an issue to its final destination.

MR PULLIN: I agree, sir.

BURT J: The evidence is uncontradicted so far. You may tender it later if it is opened up again.

MR PULLIN: You were asked questions related to the acquisition or the various farms and you were told by Mr Caratti that everything was going well, you were acquiring farms and the business was going well.

So far as the acquisition of the farms is concerned were you ever involved in the inspection of properties before they were purchased?---Always.

What about the Chapman Valley property? Were you involved in any way with regard to that?---Yes, we went up with an aeroplane to inspect the property before it was bought

and we had a good look around. We came back and discussed it and eventually bought it, as far as I thought, as a family company farm.

MR PULLIN: What about Bullfinch? Were you consulted with regard to that - -

BURT J: That is on the Chapman, is it, Mr Zampatti? It is on the Chapman River, is it?---It is out of Yuna - about 22 mile out of Yuna so I am not sure if it is the Chapman River or not.

It is a very skinny little river by the time it gets to Yuna? ---There is a river alongside. I am not sure if it is called Chapman River. It is called Chapman Valley.

How many acres in that property approximately?---25 or 28 or thereabouts, thousand.

What about Bullfinch? Were you consulted with regard to the acquisition of that property?---Yes, we went up to Bullfinch to have a look at a lease farm which we bought and the lease was only for three years. In the meantime while the lease was expiring the whole farm was developed; the Lands Department took it all back because the lease expired and paid Caratti the money for the improvements.

Was this some other property at Bullfinch?---That is an early part of Bullfinch.

As far as work which was carried out on these various farms and the machines used in developing them, where were these machines repaired?---Always at the workshop of the bulldozing company at 517 Great Eastern Highway. All machinery, tractors, trucks, everything was always repaired there and wages paid from that office. It has always been one bank account.

What about the other properties - the Freehold property (that is Caratti Freehold Pty Ltd) and the farms owned by the other companies which have been referred to?--- Referring to Kent River was the first one that we bought. We bought it in Mt Barker about 1961. I arranged for the sale of the timber for $4,000. I did all the clearing because I was at the branch at the time and the branch manager and that was about 5,000 acres of real heavy type clearing. All the fencing was done from Mt Barker and paid through the Mt Barker office. I arranged to build a house on it and a shed, paid from the Mt Barker office. I went to an auction sale and bought another property called Olsen's property and the same thing happened there. We developed all that and paid through the Mt Barker office.

I bought another farm called Milson for 500 pounds.

Alright. In a general sense you worked - - what about the Caratti Freeholds property - - -

MR PULLIN (continuing) - - - property - was that a farm?---I don't know what Caratti Freehold is.

Alright, we will just leave it at the Bullfinch, the Chapman Valley and the Kent River farms and explain generally the development work that was done and your involvement in the acquisition. When did you first learn that you didn't have any interest or any shares in the farms?--- I think I first learned from Mike Golding.

And who is Mr Golding?---My accountant for General Bulldozing Company.

Yes, and when did you learn that?---When I first went to him about early 1970, I believe.

Early 1970? Since 1970 anyway?---Since 1970.

Just referring on to your involvement once again with the running of the company, you remember the Landall transaction, were you consulted with respect to that? The Landall transaction?---Yes, I was consulted through Mr Kitson when he called a meeting and even the same day that the deal was made and signed, Mr Caratti rang me from Sydney to explain, to make sure that I was completely happy with the sale and I said : "Yes, I'm happy."

So far as the settlement was concerned, were you involved in any way with the preparation of the settlement deed which has been shown to you?---No.

So far as your farm is concerned at Ongerup, can you estimate the value of work that was carried out on that property, excluding the dam?---Well, from experience around that area, there was roughly 1,300 acres done and it is light land. When you chain it it usually runs out to a dollar an acre and about 300 acres had been ploughed, which you could call it three dollars an acre, and that is roughly the value of the improvements done on the land.

When was that done?---Well, the first initial chaining was done back in 1962 and the dam was done when Landall took over.

Moving on to your tax returns, who used to prepare your taxation returns?---Well, for the first few years, Mr A.B. Pearce did.

When did O.L. Haines start acting on your behalf?---Well, about 1970 because I was three years behind filling in my return because I didn't have any group certificate and I went to Mr Edwardes new office (Ted Edwardes was a partner - originally - of A.B. Pearce) and he refused to do it because there was too much involved in it with Caratti.

Alright, so you retained O.L.Haines and they prepared taxation returns for the years before that hadn't been prepared?---That's correct - for three years before.

Was it possible to disclose your income in those returns?---No, there was no group certificate; nothing.

Did you ever get the group certificates for the missing years?---No.

Did you instruct the accountants to write to ask for them - to ask for the information?---Yes, I asked the accountant to try and get them and find out what my income was and they never come alight.

BURT J: Yes, Mr Malcolm?

MR MALCOLM: If your Honour pleases, I submit this evidence is really quite irrelevant to the position in relation to the holding company. It relates to a time when he was employed by somebody else who had an obligation to provide group certificates.

BURT J: I think you are probably right, Mr Malcolm. I have heard a lot of irrelevant evidence in the last day and a half.

MR PULLIN: I think this has probably been answered, Mr Zampatti, but just to clarify the position; you were asked various questions about and referred to ledger cards and journals and various references were made to a lot of documents in your cross-examination. When did you first see the records which are now spread out in the court? When were you first able to inspect them?---Well, the first portion was on the partnership action and now there's another lot there that I don't know what they are.

And that was a result of obtaining discovery of documents in those proceedings?---That's correct.

I think in the partnership action, there was a document entitled "mock dissolution" produced in court, was it not?---Written in pencil?

Just have a look at that and see if you did see that document at the time - - -

In the
Supreme Court

Petitioner's
Evidence

No. 13

B.. Zampatti RXN

MR PULLIN (Continuing) - - - time?

BURT J: What page is he looking at?

MR PULLIN: I think it is about the second-last page of the smaller volume, sir.
(TO WITNESS) What page is it, Mr Zampatti?---Page 445. It does not mean much to me, though.

Did you see that before it was tendered?---Yes.

I think the only thing to which I want to refer you is the reference to the amount of taxation which was said to have been paid on your behalf. It is in the smaller volume which the associate has.

BURT J: What am I to get out of it?

MR PULLIN: I am not sure, sir, whether he did - - -?---The $17,317?

Yes. And is that amount charged against any amount or deducted from any amount due to you?---Yes. It reads "30/6/73 due to me $8917, plus book debts, 1974/75 of $4839 - -?

Do not read it through. Just tell his Honour is that amount deducted from any amount due?---Yes.

And, just moving on to a conversation you said you had with Mr Kitson, you referred to, when he said you could get your money out through the Landall transaction - did he say what your share was worth?---$500,000, but he said before the Landall transaction took place - - I saw Mr Kitson before, about 1967 and he said, "We are going to go public and your share on debentures from the Caratti Consolidated is worth $500,000. As soon as we go public you will be able to make a will."

What was Mr Kitson to the Caratti group? Was he advising generally or was he involved?---He was the financial adviser; at the tim I think he was auditing the books for the public company.

Thank you, Mr Zampatti.

WITNESS WITHDREW

In the
Supreme Court

Petitioner's
Evidence

No. 13

B. Zampatti RXN

ORAL EVIDENCE OF

AUBREY SHEPHERD

CROSS-EXAMINED BY MR MALCOLM:

MR MALCOLM: In 1968 you were appointed joint secretary of the holding company with Mr Peter Forbes?---Yes, that's correct.

Prior to that you had been employed by the firm of Messrs A.B. Pearson & Co who were responsible for the preparation of the taxation returns and other accounting work of the company?---That's correct.

Either in your capacity as an employee of A.B.Pearson & Co or as a secretary of the company, you were responsible for the maintenance of the ledgers and other books of account of Caratti Holding Co Pty Ltd?---That is true, yes.

Perhaps in order to assist his Honour, could you confirm from your recollection of the ledgers of the holding company, that they recorded that as at 30th June 1961 the land and buildings and plant of the former S & M Caratti (WA) Bulldozing Co partnership were transferred to the holding company?---There was a transfer made. I am not certain if it was1961, but it was around that - - almost as early as that, transferring the assets of the partnership to the holding company - the fixed assets.

There was a further transaction as at 1st July 1964, was there not between the partnership - that is both the bulldozing company and S & M Caratti-and Caratti Holding Company Pty Ltd? ---That is correct.

Would you agree with me that that transaction involved the purchase of the holding company of the book debts of the partnership as of that date?---That is so.

In other words, consideration paid represented the difference between the debtors and creditors so far as the partnership was concerned?---Correct.

That really completed the total acquisition by the company of the former partnership business?---No, the partnership still retained its bank account and funds.

Yes, but so far as the company was concerned, it had purchased the land and buildings, the plant and the difference between the creditors and debtors?---Yes.

The partnership bank account was maintained?---Plus the partners capital and current account.

Plus the partners capital and current accounts, and there was no consideration apparently paid for goodwill?---Not for goodwill, no.

The goodwill of the partnership was simply taken on by the company from 1st July 1964 to 30th June 1965 when the earth moving and contracting business previously carried on by the partnership was carried on by the company?---That is so.

BURT J: How was the purchase price paid, Mr Shepherd?---It was paid by instalments over a period of 10 years, sir, by journal entry between the partnership and the holding company.

Paid in cash over a - -?---No, no, just by journal entry - - the loan accounts between the two. There was a loan account created in the WA Bulldozing Co to the holding company and a loan account created in the holding company for WA Bulldozing Co and on 1st July each year I would put through a figure equivalent to one-tenth of the purchase price by journal. There was no cash that changed hands.

MR MALCOLM: Will you look at that document which is a copy of exhibit 11, Mr Golding's affidavit?---Yes.

That is the summary of information from Caratti Holding Company Pty. Ltd. balance sheets?---Yes.

Have you seen that document before today?---Yes.

Are you familiar with it?---Yes, I am reasonably familiar with it.

I think you probably assisted in its preparation, did you not? ---In a small way, yes.

If you look at the lower section which shows loan accounts of the holding company in which the creditor is a member of the Caratti group, I think there are a series of entries showing amounts due by the holding company to WA Bulldozing Co?---Yes.

Is it correct that those amounts represent the balance of the purchase price relating to the difference between debtors and creditors - - -

In the
Supreme Court

Petitioners'
Evidence

No. 14

A. Shepherd XXN

MR MALCOLM (continuing) - - - creditors from the partnership?---Yes, that is so, Mr Malcolm. Could I just have a moment? I think there's one other thing.

Yes?---That would represent the reduction in the purchase price of the book debts by annual instalments and there could possibly be some entries, perhaps, for amounts paid by the holding company on behalf of the partners which was fed through in there, too, but they wouldn't be very considerable at that stage.

Would they not go through the loan account which was going in reverse - the one noted at the top?---Yes, but at the time of the takeover by the holding company of the book debts, they took the book debts over and from my memory the partnership owed the holding company some money too for leasing of plant for the three years. I don't know whether that is involved in this bottom figure or the figure at the top.

I don't know that it is important, but I can check it quite easily? ---No, I don't think it is.

(Could you dig out Exhibit 40 in the partnership action please? It is a green ledger card that will be on its own).

BURT J: While you are looking for that, Mr Shepherd, you will have to understand that I am almost completely ignorant about these figures and find it difficult?---Yes, sir.

Looking down on the first column under the 30th June 1961 under B and W.A. Bulldozing $11,131, presumably owed to the bulldozing company by the holding company at that date? ---Yes.

Then it jumps in the following month to $120,000. Does that represent the purchase price payable by the holding company to the partnership for all the assets taken over by the holding company?---Yes, I would say it would represent plant - -

Not only book debts, but plant and - -?---No, no. The book debts weren't taken over until the 1964 column, sir.

Well, that represents plant then, does it?---It would represent land and plant; yes.

Now it jumps in the following year by $19,000 nearly. How would that happen?

MR MALCOLM: Your Honour, it may assist the witness. Here is the ledger card which covers the position from the 1st of July 1961 to the 30th June 1963. It covers the transactions.

BURT J: Well, let him have that.

MR SMITH: Your Honour may also perhaps not be appreciating at the moment that they are pounds,up to 1966.

BURT J: Oh, yes. They are pounds until 1966.

MR SMITH: That is a jump by $38,000.

BURT J: (TO WITNESS): Can you tell me what the increase of the nineteen thousand pounds is?---Yes, it is a transfer. There was another card, sir, in this ledger. I don't know if it has been exhibited, but there was another card

styled "Loan Account - Holding Company" and this eighteen thousand six hundred and twenty nine pounds was transferred across from that in total. This card does not give details of the amount.

BURT J: Was it further assets that the holding company had bought from the partnership?---I couldn't say, sir.

Well then it goes up the next year again, doesn't it, if you look back. It goes up to $145,000?---That I think would be the book debts, sir. This card ends in 1963. I can't - -

And then it goes down the following year and jumps up again in the next year. No, it goes down again, I am sorry, because we have transferred into dollars, but goes up again in 1967.

MR SMITH: No, it doesn't.

WITNESS: It goes down in 1967, yes.

BURT J: Down, yes, and what happened then in 1967/68?---Well, from this statement from the 1st August 1967 which was the date of the holding company sale of assets to Caratti Consolidated and the creation of the debenture in the holding company and Caratti Consolidated, from the 1st July 19 - - the first of August, 1967, any amounts drawn by the Caratti family would have been paid by the Bulldozing 1967 or Caratti Consolidated and fed back through the debenture, back into the holding company, and back out to W.A. Bulldozing. You are looking at the top line now, aren't you, sir?

Yes?---These amounts on the top line - - -

In the
Supreme Court

Petitioner's
Evidence

No. 14

A. Shepherd XXN

WITNESS (Continuing): - - line now, are you?

MR MALCOLM: Yes?---These amounts on the top line from 68 right through to 74 represent amounts drawn relating to the Caratti family and reduction of the debenture.

BURT J: Drawn from consolidated?---The funds could have come from Caratti Bulldozing, 1967, which was the operating company but in any event it would not matter whether it came from consolidated or from the 67 company. It would have wound its way back in a debenture, eventually.

I think I understand it but without any great degree of confidence.

MR MALCOLM: At all events, from the ledger card which you have there relating to the loan account for the holding company, in the holding company of the partnership from 1st July 1961 to 30th June 1963, does that reflect the sale of land, plant and buildings to the holding company as at 1st July 1961?---Yes, it does.

And then there are various amounts set off, are there not against - - What is the amount shown as the consideration for the sale of the land, plant and buildings, from the ledger? ---It is not - I would say £174,262-pounds.

Then there is a set-off, is there not?---Yes, for hire purchase. No that was a net amount, Mr Malcolm. There is a set-off for hire purchase agreements, sundry loans unpaid vendors and amount owing to the Lands Department and /pounds a credit of 13,000/ for investments - I do not know what that represents.

But, at all events, the transaction on 1st July 1974 whereby the holding company acquired the difference between the debtors and creditors of the partnership, the amount involved - could you tell us what it was approximately? ---For the book debts?

Yes?---I did not give an amount, Mr Malcolm.

Do you recollect what the amount was?---I think it was something like - I am guessing - 118,000-pounds I think it was.

Yes. I think you are right. And that was payable by instalments over a term of years?---Over ten years.

And the payments were simply made by way of journal entries?---That is correct.

BURT J: The total purchase price was payable over ten years, not just the book debts?---No, I am sorry, sir, only the book debts.

MR MALCOLM: That was gradually reducing the amount which was shown on the loan account in favour of W.A.Bulldozing Company in respect of a debt due to it by the holding company? ---That is so.

On the other hand there was a loan account, the loan account which runs from the 30th June 1968, which is the one at the top of Exhibit 11, the summary of information prepared by Mr Golding. That swung into a credit in favour of

the holding company from the year ended 30th June 1968. You notice that it cuts off in the bottom half where the balance is in favour of the bulldozing company?---Yes.

MR MALCOLM: And from 30th June 1968 - if you look at the top line you start getting a credit balance in favour of the holding company?---Yes. Actually you are looking at a debit balance because this is a holding company schedule. It is an asset to the holding company.

It is an asset to the holding company?---Yes. That would be the difference. These figures in this schedule, I understand, are only just the difference in totals from year to year so that amount of 22,068 would just be the difference between what - - - 10

In the
Supreme Court

Petitioner's
Evidence

No. 14

A. Shepherd XXN

WITNESS: (Continuing) - - - between what their loan account was and what was drawn off the debenture in that year.

MR MALCOLM: Would you look at these ledger cards for the W.A. Bulldozing Co. loan account? There are three ledger cards folios 1-6 inclusive covering the period from June 1968 until 30th June 1973 and when you look at them would you tell me whether, apart from the initial typewritten entries at June 1968, who made the entries down to 30th June 1971?---I made all of the entries between - - You said 1967 was it or 1968?

All the entries from June 1968 down to 30th June 1971?---I made nearly all the entries for the whole of that period apart from seven entries.

Apart from seven entries?---The last seven entries, yes.

Are they the entries in handwriting with which you are familiar? ---Yes.

Can you identify that handwriting?---It is Mr Peter Forbes'.

Mr Peter Forbes' handwriting?---Yes.

At that time of course you and he were the joint secretaries of the company?---That is so.

I think after your handwriting stops and his starts all of the entries to 30th June 1973 are in his handwriting are they not?---That is so.

So far as the entries which you made I assume that they were entries which you made upon the basis of information in your possession as secretary and accountant to the company?---Yes.

That ledger card shows all transactions on the W.A. Bulldozing Co. Loan Account which is covered by the period 30th June 1968 to 1973? Do you get to 1973 on those cards? ---Yes, that is correct.

I think in fact the final figure agrees with the figure at 30th June 1974 - $853,859?---That is the figure shown here in pencil at the end of June 1973 - $853,859.19.

Does a figure $839,376 appear?---I am sorry?

Does the figure $839,376 appear for 1973?---No.

What is the figure for 1973?---At the end of June 1973 there is a pencilled figure here of $853,859.19.

What is the figure shown for 1972? Can you pick that up, Mr Shepherd?---Again it is in pencil - $732,013.52.

How much was that again?---I am sorry, it is a bad figure. It is $732,017.52.

What does the ledger show as at 30th June 1971?---$706,736.06.

If your Honour pleases, I will tender that bundle of ledger cards.

BURT J: I want to make sure I understand it. Mr Shepherd, is it too naive to say that this document which you have seen which is related to those ledger cards - - that as at the end of say 1971 that W.A. Bulldozing (which was a partnership) owed the holding company something just over $700,000?---Yes.

Who was W.A.Bulldozing?---W.A.Bulldozing was the partnership of Sergio and Madeline Caratti,(Sergio Caratti as trustee for his two sons)and Bernardo Zampatti. It was S. & M. Caratti and B. Zampatti trading as W.A. Bulldozing.

Those people then had borrowed that amount of money from - - -

In the
Supreme Court

Petitioner's
Evidence

No. 14

A. Shepherd XXN

BURT J (continuing) - - - money from the holding company? I know you say it was fed in through the partnership, but I am not concerned how it was fed in - they borrowed it? ---That's right.

Do you know what then happened to it?---Well, I understand there has been an affidavit signed by Mr Caratti to the effect that he has, on the 3rd October last year, repaid this amount of money and it is stated in affidavit somewhere but - -

In what way was it being - - You see it is going out in sizeable annual lumps, isn't it?---Yes.

Two hundred and seventy - - A quarter of a million in a year?--- Yes.

But what is happening to it?---What was it used for?

Yes?---Well, from my memory it was used for the purchase of shares in the days of the share boom, there was purchase of land - -

MR MALCOLM: Mr Shepherd, what I am putting to you is that you recorded the purposes for which the money was used in the ledger?---Yes.

Of the loan account?---Well, really, yes.

BURT J: Now if I have a look at those it may - -

MR MALCOLM: The document I put to you records the purposes for which the money was used. That is the object of tendering the document, your Honour.

BURT J: Number 35, now. Let me see them. (Perusing ledger cards)

TO WITNESS: Well, most of it seems to have been simply drawn out by members of the Caratti family?---That is so, sir.

And mainly by Mr Caratti Snr?---Yes, sir.

MR MALCOLM: If your Honour pleases, could the bundle of documents be handed back to the witness?

BURT J: Yes.

MR MALCOLM: (TO WITNESS): In conjunction with those documents, would you look at this document (it's rather tatty at this stage). The document being produced to you is Exhibit 30 from the partnership action, which sets out details of the amended assessments for the partners of W.A. Bulldozing and S. & M Caratti for the years ended the 30th June 1962, 63 and 64, following a tax investigation?---Yes.

Do you recall that tax investigation?---I do.

Was substantially the result of it that the partners were taxed on the difference between the debtors and creditors?---That is right.

Because prior to that all the returns had been on a cash receipts basis?---Correct.

MR MALCOLM: And they were they taxed additional tax on an earnings basis?---That is so.

As a result of the investigation being completed in 1967 - is that correct?---That's correct.

And that resulted in an amount - the total figure on my copy (which is at p.415, your Honour) is a bit unclear. It looks like approximately a hundred and thirty - it could be more?---It is $180,488.08.

One hundred and eighty thousand, four hundred and eighty eight dollars and eight cents, and I put to you that payment of these amounts - - - 10

In the
Supreme Court

Petitioner's
Evidence

No. 14

A. Shepherd XXN

MR MALCOLM (Continuing): - - - amounts is reflected in the entries which you made in the ledger covering the period from June 1968 to 1971?---You mean it should be on these cards?

Yes, the payments made to the Deputy Commissioner for taxation?---Yes. /made for the payment?
I think there was a terms arrangement/---There was. $4000 a month.

And that the payments which were made were debited to the loan account of the bulldozing company with Caratti Holding Company between 1968 and I think about 1971, or it might even have been later?---Yes.

But the whole amount of that tax was paid by that means, was it not? ---Yes.

And that included an amount of $17,317 on behalf of Mr Zampatti? ---It would have included that, yes.

BURT J: And the balance appears to have been school bills, distributions to the children and so on.

MR MALCOLM: There are some regular amounts of $268 and $260 in relation to J.M. Caratti and A. B. Carrati. Can you tell his Honour whether those payments were made in respect of life insurance premiums on life policies over the lives of those two children?---They were. There was also some money contributed to sundry mining syndicates.

Was the position that substantially, irrespective of what company was involved, there was in reality one bank account in the name of S&M Caratti?---There were several bank accounts in the name of S&M Caratti.

Yes, but the bulk of the operations, whether they were operations on behalf of the holding company or any other company, the moneys received or paid,was substantially received or paid through one or other of the bank accounts in the name of S&M Caratti?---There was a break in this. The S&M Caratti account virtually became fairly inactive after 30th June 1964, but then after the sale to Latec, and when Mr Caratti started to virtually trade again, after theyfinalised a deal with Landall, the S&M Caratti account became alive again in a small way. There were several S & M Caratti accounts: there was the No. 2 account, wages accounts and all sorts of things.

Yes, but the purpose of this loan account was to reconcile moneys which were paid on behalf of members of the Caratti family, charges which had been raised against Mr Zampatti, and moneys paid on behalf of Mr Zampatti and accounting for moneys received by members of the Caratti family which should have been paid or should have been accounted for to the holding company?---That is right. It would not have mattered which company the funds came from if it was for the Caratti family it would wind its way back onto this card eventually; whether it came from Consolidated Caratti Bulldozing 1967, or from one of the farm accounts, or anything, it would eventually drift its way into here. That was the way it was all recorded.

It was your job to prepare the necessary reconciliation, write up all the reconciliations in the company journal and make the entries on the ledger?---That is right.

MR MALCOLM: So, in fact, it would not be true to say that there was any attempt to disguise what was going on but that everything was recorded in the books, ledgers, journal of the company?---I would only state that up until the end of 1971, Mr Malcolm.

Yes, so far as the time when you were in charge of the records was concerned.

BURT J: This may be too simplistic, Mr Shepherd, I think. You were not trying to disguise something, you were trying to make it obvious?---That is right.

Is this not really what was happening? I am looking at this sheet and it shows there were a number of loans from a number of companies and the money all being lent by Caratti Holdings. Would I be accurate in saying that that necessarily means that there was a period of time at which Caratti Holding Company had or had control over the money which was shown to have been lent by it to each of these individual companies or partnerships. The money was there at some time?---Yes, sir, up until the end of 1966,

It is increasing after 1966, is it not - - -

In the
Supreme Court

Petitioner's
Evidence

No. 14

A. Shepherd XXN

BURT J: (Continuing) - - - not, and these loans are going up? ---Yes, but the actual transaction in the holding company from 1968 on those transactions were done by journal entry, not on a cash basis. It was simply debiting the W.A. Bulldozing Company with the amount that they had borrowed (or used) and crediting the debenture and reducing the debenture in the holding company's ledger. The money would possibly have flowed out in cash not from the holding company but either from Consolidated or from Caratti Bulldozing '67.

Yes but I am just picking this at random really. The increase in the apparent loan from Bullfinch between 1968 and 1969 goes from $39,000 to $126,000?---Yes.

If that transaction or a number of transactions resulting in that increase had not taken place would the holding company have had more money? It appears to have been money lent by the holding company to Bullfinch?---The holding company would have had more - - If this transaction had not taken place the holding company would have been owed $126,000 more by Consolidated on the debenture.

MR MALCOLM: Perhaps I could suggest this to you, Mr Shepherd: that whether the figures were accurate or not charges were raised by Caratti Bulldozing 1967 in respect of what was said to be farm clearing and development work and these charges were raised in respect of work carried out on the various farming properties or work said to have been carried out on the various farming properties?---Yes.

The amount of that work was charged by the operating group, Caratti Consolidated or Caratti Bulldozing 1967 against the amount owing by Caratti Consolidated under the debenture?---That is so.

Thereby reducing the amount of the debenture and increasing the amount of the indebtedness of the farm companies to the holding company?---Correct.

So that to that extent there would be no cash flow anywhere? ---Not in hard currency; no.

It was not a question of cash flowing into the holding company which then flowed out because somebody made an interest free loan?---Would you please repeat that?

I said, it was not a case of cash flowing into the holding company which somebody then lent out as an interest free loan. It was a question of a book entry being made by Caratti Bulldozing 1967 or Caratti Consolidated?---Yes.

Charging certain things to the farm companies which amounts were deducted from the amount owing under the debenture given by Consolidated to Caratti Holding Co.with a further entry being made in Caratti Holding Co. increasing the loan account of the farm company in question?---Yes.

BURT J: That is why I say you didn't want to conceal it, you wanted to make it obvious so that the holding company did not generate income, did it? It did not make a profit? ---I had nothing to do with the policy of the company.

BURT J: No, I am not criticising in any way, I am just wanting to see - - These things were not done by accident. There is a good or a bad or indifferent philosphy underlying what was happening and is it not fairly central to it that the holding company was not to make a profit - the people involved in this seemed to be rather sensitive to income tax. So wasn't that the first movement?---The accounts - every year when I did the accounts we always endeavoured to keep the tax position down as low as possible. Everybody does that.

Yes, of course and the effect of doing it this way was to reduce the profitability of the holding company from a tax point of view?---I don't see how it would reduce the profitability.

Alright, well let us say it would leave that neutral - leave that the same, would it? It would have no effect on it? ---No, these transactions here would have no effect on the profitability of the holding company.

The people who were interested in or owned these companies to whom the loans are said to have been made, they would through that company enjoy money's worth - work done?---Yes.

And the benefit that they derived would not come to them as income either, it would come as a loan?---When we were talking of this farm work in that the work done - through here and debited to the farms, that would reduce the income tax liability of the farm therefore giving the shareholders of the farming company an indirect benefit through the saving of income tax.

That is right and hence if you have a - - ?---But the holding company got no benefit at all because it was just owed the money.

That's right, so if you had the holding company and a stranger (let us say Pearson and Burt carrying on business as farmers) if we had gone in under this arrangement - - -

BURT J: (Continuing): - - - arrangement it would be really money for nothing, would it not?---It would, because the farms may have repaid some small amounts with wheat advances, but the money virtually goes out free of interest. The farming companies get the benefit via taxation and the holding company gets no income or nothing - - All it gets is a pain in the neck to keep the records of it.

All of which is all right so long as, in the case of an incorporated borrower - one of these people down here - it is all right provided you have an identical shareholding as between the holding company and the borrowing company?---And the farms, yes.

But as soon as you have someone who is not involved, who is involved in the holding company and not in the farm company, he is just out in the cold to that extent is he not?---Very true, sir.

You follow that up, Mr Malcolm.

MR MALCOLM: Thank you, your Honour.
(TO WITNESS) Mr Shepherd, the position was that the moneys repayable under the consolidated debenture were interest free were they not? There was no interest payable by Caratti Consolidated on the moneys or the balance of moneys owing from time to time on the debenture of originally 5.23 million?---I don't know, Mr Malcolm. I don't recall seeing any interest payment going through.

There is no interest payment so far as I am aware recorded in the books of records of the company and nothing reflected in the statements of income and expenditure attached to the accounts which are before the court?---As I say, I cannot recollect entries going through the books but I am not very familiar with the actual debenture deed itself. It is quite a big document - - -

It was your responsibility for the relevant period from - certainly /1972 from 1968, 1969, 1970 to 30th June/to maintain the books and records of the state of accounts between the holding company and Caratti Consolidated?---No, not Caratti Consolidated. I opened the books of Caratti Consolidated.

I am not saying that you maintained the books of Caratti Consolidated, but the accounts of the holding company so far as the debenture was concerned?---Yes.

I am simply suggesting to you that there was in fact no interest paid or payable under the debenture given by Caratti Consolidated to the holding company?---I would have to say that is correct, although, as I say, I can only say that because I would not have seen any interest go through. To be quite frank I have not even read the debenture deed and I do not know whether there is an interest clause in there.

You never raised - we had that before us, your Honour, and I think the position is that there is no provision for interest.

BURT J: No. Is there still money owing on this debenture?

MR MALCOLM: Yes. I think it was about 1.7-million - - Something over a million dollars as at 30th June 1974.

BURT J: It could be, could it not? You could have the holding company - it was not the fact but it could have been the fact that its only asset would be the debt owed to it by Consolidated, secured by the debenture.

MR MALCOLM: Yes.

BURT J: Then the debenture is paid; the debt is paid in this indirect way so that every time you have it credited to these various, or these smaller companies who are borrowing it and the asset in the books of the holding company remains constant as a debt, but you have a new debtor.

MR MALCOLM: That is it.

BURT J: When you transmogrify the whole of the debenture debt in that way you could simply put the holding company into liquidation and that is that. You would then not bother to sue if you contrdled the company - nobody would sue to recover the debts - and that is a sufficiently morbid note upon which to adjourn until half past ten in the morning.

HEARING ADJOURNED UNTIL 10.30 A.M.

THURSDAY, 26TH JUNE 1975

In the
Supreme Court

Petitioner's
Evidence

No. 14

A. Shepherd XXN

AUBREY SHEPHERD

CROSS-EXAMINED BY MR MALCOLM (Continuing):

BURT J: Yes, Mr Malcolm?

MR MALCOLM: Mr Shepherd, would you look at these two ledger cards which I am instructed are the ledger cards of Caratti Holding Co. Pty Ltd. They are headed up, "Caratti Debenture". Do you identify those cards as being the cards relating to the amount owing from time to time by Caratti Consolidated to the holding company under the debenture given in 1967?---Yes, I do.

I think you were responsible for making the bulk of the entries on that card, were you not?---Yes, I was.

Would you look to the entries for the year ended 30th June 1972? ---Yes.

There are a series of entries there, are there not, which relate to the property and land including plant which was brought back into the holding company as a result of the settlement with Landall Holdings Ltd in September 1971?---That is correct.

The position was that as a result of the sale to Landall in the end what came into the company was what is recorded there?---Yes.

Could you explain to his Honour what is recorded there?---It says, re the metropolitan workshop $269,000.

Do you know what property that represents?---I would assume it would be the Redcliffe workshop at 515 Great Eastern Highway. There is an entry for $64,400 which says "country properties".

Would that be the workshop property at Merredin and the workshop property at Mt Barker?---I couldn't say without referring to the journal, Mr Malcolm. The next entry says, "unencumbered real estate $99,900". There is an entry for "plant items $30,000", an entry for "preference shares $100,000", an entry for "debenture stock"of $700,000 and an entry which simply says, "settlement $76,940".

There are also some debit entries which says, "Caratti Consolidated $21,198.20; Delbar $33,801.77 and Landall $5,000".

Do you know what the explanation is for those last three entries? ---No, I don't.

But the entries relating to the assets coming in were all made by you?---I can't remember. They were certainly entered on the card by me but I don't know if I passed the journal entry or not.

Could you give me the journal reference?---Yes, journal 337, 338, 339 and 340.

Perhaps you could just look at the journal and you could tell us

whether you did make the journal entries?---No, I did not make any of the entries. I would have merely posted the ledger from the journal.

MR MALCOLM: Thank you, Mr Shepherd.

BURT J: What on the face of it was happening there, Mr Shepherd? Was the holding company gaining assets - - -

BURT J (Continuing): - - - assets at a value which was then deducted from the debt which was secured by the debentures?---Sir, I didn't have a great deal to do with the Landall settlement but I understand that - - 10

It is credited to the - - that is what is happening, is it not?---Yes.

The mortgage debt is being reduced by the value of the items mentioned? ---Yes, sir. I understand there was a dispute in the purchase price and some of the plant and buildings which Landall had originally purchased were handed back to the company as part of the purchase price, so the items went out of the company and were returned back to the company under the purchase price. That is how I understand it.

It came off the debenture debt - off the debt owed by Consolidated? ---Yes. 20

RE-EXAMINED BY MR SMITH:

MR SMITH: After that settlement, what did the debenture debt stand at?---The balance there is - - this is at June 30th 1973. The balance in pencil is $1,310,078.89.

Does the card go on after that?---No.

Could I have those cards? Do you recall being asked by my learned friend yesterday questions in relation to the loan to the W.A. Bulldozing Company?---Yes.

The operations on the ledger card in relation to that loan?---Yes.

I think you said that various payments had been made to the Tax Department?---Yes.

Which apparently related to the tax following upon the investigation and re-assessment?---That is so.

Apart from those payments (looking at the cards - I don't know whether you need them again to answer this), could you say whether Zampatti received the benefit of any payment made?---I would like to see the card again.

(Could the witness have the cards? It is exhibit 35)?---The only entry that appears to relate to Mr Zampatti apart from the payment of $4000 a month (or his share of the $4000 a month in tax)--there are regular entries going through each year for the holding company's instalment on the purchase of book debts from the partnership.

What is the amount of that? What was the annual amount of that? ---The annual amount was $24,199. Mr Zampatti's share would have been $2,419. There are several entries made on this card by Mr Forbes. They have been done in total. It just says: "Sundries - $119,887." There is an entry passed here by Mr Forbes which just says: "B. Zampatti loan account $3,908." There is another entry called: "Sundries $37,136", another one for "Sundries $70,848." I could not say whether Mr Zampatti features in those entries or not.

MR SMITH: Can you say in general terms what the cards indicate as to the entries generally made?---In the main, the entries relate to the Caratti family.

Would it be fair to describe it as a private account for the meeting of the indebtedness of the Caratti family?---Yes.

My learned friend has given you the balance of the ledger cards. Those cards on the W.A. Bulldozing account go up to what date?---30th June 1973.

At that stage, the amount of the loan by the holding company to the bulldozing company was what?---Was $853,859.19.

Is there any other card - -

BURT J: Is that to June 1973, Mr Shepherd?----Yes, sir.

Eight hundred and - -?---$853,859.19.

On this sheet, that is the debt as at June 1974?---It possibly is the same.

No, the 1973 debt is shown on this sheet to be $839,376?---Yes, but that would only be the Caratti family portion. This is the card in total including some items for Mr Zampatti.

MR SMITH: Could you tell his Honour what those cards show the debt to be - - -

In the
Supreme Court

Petitioner's
Evidence

No. 14

A. Shepherd RXN

MR SMITH: (Continuing) - - - at 30th June 1972?---The total debt of the W.A. Bulldozing partnership to the holding company at 30th June 1973 is $853,859.19.

BURT J: It seems to be odd, Mr Smith.

MR SMITH: Yes, there is something wrong.

WITNESS: The statement you are looking at, sir, is the balance which was paid by the Caratti family.

BURT J: No, but what is odd about it apart from that is the figure you have given me for 1973 is precisely the figure shown in this paper for 1974. That is all? ---I see. Possibly the - - I haven't got a 1974 card here, sir.

I think you prepared this, didn't you?---I helped to prepare it but it was prepared - -

You can see what I mean, I think?---Yes. The 1974 figures inserted in here were prepared from a draft balance sheet. It was a draft only and they weren't prepared from these cards.

That is the figure you have given me from the card?---Yes, I realise that but I am saying that the figure on this statement was taken from a draft balance sheet produced to us. They weren't taken from these cards. This figure must appear in the draft balance sheet which was given to us from which this statement was prepared but perhaps the balance sheet isn't correct. I couldn't say.

Alright, let me have it back so I can follow what you are saying.

MR SMITH: Those are the balance sheets (or copies of them) which were attached to Mr Golding's affidavit and are now exhibit 11 from which that statement which his Honour was showing you were prepared. What does that show the debt by W.A. Bulldozing Co. to the holding company to be as at 30th June 1973?---At 30th June 1973 the amount owing by W.A. Bulldozing according to this balance sheet is $839,376.

So that the balance sheet for that year does not accord with the cards that are before you?---That is correct.

And the debt was in fact $854,000?---According to the ledger, yes.

Is there any card there in relation to that debt for the year ended 30th June 1974?---No, no card.

Would you have a look through those?---There is no card relating to 1974.

Would it be necessary to have a record of the operations on that ledger card to prepare a balance sheet for 30th June 1974?---It would if I prepared it, yes.

Perhaps I could inquire from my learned friend, sir. I asked him to give me such ledger cards as he had. Could I ask if there are any other ledger cards?

MR MALCOLM: There is no separate ledger card for the year ended 30th June 1974 and it does seem from a reading of that particular ledger card that the last entry shown as 30th June 1973 is an incorrect entry. The date should be 30th June 1974 because there seems to be two sets of entries for 30th June 1973 on the card and on that explanation the card tallies substantially with the balance sheet figures recorded in exhibit 11.

BURT J: What alterations do I make to exhibit 11 to give effect to that?

MR MALCOLM: None.

MR SMITH: . Exhibit 11 of course simply is an extraction of the figures from the balance sheet.

TO WITNESS: Perhaps , Mr Shepherd, do those cards show the operations on the account of the loan to W.A. Bulldozing between 1st July 1973 and 30th June 1974?---No, the card moves from 30th June 1972 to 30th June 1973 and that's where it ends.

MR SMITH: That is where it ends?---Yes.

And it ends with a debt of $853,859?---Yes.

BURT J:That is the debt of the - - You did say a little earlier, I think, that that was the Caratti family debt but it is the partnership debt of W.A. Bulldozing, is it not?---That is so, sir.

It is not simply any Caratti element of it: It is the whole partnership debt?---Yes, sir.

MR SMITH: There is nothing in those records, in any event, to indicate what the operations in the account have been since 30th June 1973?---That is right.

Is there anything there to indicate there has been any repayment of that amount?---No.

Thank you, sir.

WITNESS WITHDREW

In the
Supreme Court

Petitioner's Evidence

No. 14

A. Shepherd RXN

In the Supreme Court

Petitioner's Evidence

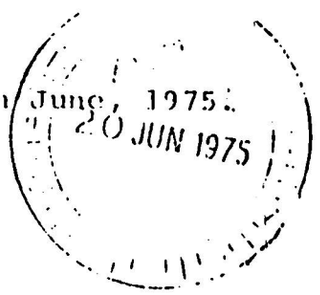
No. 15
Admissions by Respondents (Appellants)
20th June 1975

LETTER AND SCHEDULE OF ADMISSIONS MADE BY RESPONDENTS (APPELLANTS)

MUIR WILLIAMS NICHOLSON & CO

Messrs. Northmore Hale
Davy and Leake,
Barristers and Solicitors,
Law Chambers,
Cathedral Square,
PERTH W.A. 6000

20th June, 1975.



Dear Sirs,

re: Zampatti and Caratti Holding Co. Pty.Ltd.

We refer to your letter of the 18th June, 1975.

Admissions

Regarding the admissions requested in your two letters of 18th June, 1975, the company admits that the facts set out in the sheet which you sent us are correct and have remained the same from the date of incorporation to the present time subject to the following:

(a) Mr. A.B. Pearce died on 20th September, 1972.

(b) The admission regarding Albany Forts Freeholds Pty. Ltd., cannot relate back to the date of incorporation but only from a time when the company was taken over.

(c) The date of incorporation of Caratti (Kent River) Pastoral Co. Pty. Ltd., is subject to confirmation.

We also admit that Mr. A.B. Pearce held any shares in the companies mentioned in the sheet on trust for Sergio Caratti.

SHEET REFERRED TO IN LETTER OF 20 JUNE 1975 FROM MUIR WILLIAMS NICHOLSON & CO. TO NORTHMORE HALE DAVY & LEAKE

	Date of Incorporation	Issued Capital	Shareholders	Directors
LBANY FORTS FREEHOLDS TY. LTD.	31st July, 1963	$18,004.00 in $2.00 shares	9001 shares Sergio Caratti 1 share G.R. Mauger	Sergio Caratti A.B. Pearce
ARATTI (BULLFINCH) PTY. TD.	29th May, 1964	$2.00	1 share Sergio Caratti 1 share A.B. Pearce	Sergio Caratti A.B. Pearce
ARATTI (CHAPMAN VALLEY) TY. LTD.	28th May, 1964	$2.00	1 share Sergio Caratti 1 share A.B. Pearce	Sergio Caratti A.B. Pearce
ARATTI FREEHOLDS TY. LTD.	29th May, 1964	$2.00	1 A Class share to Sergio Caratti 1 B Class share to J.J. Lalor M. Caratti A.B. Pearce	Sergio Caratti
ELBAR INVESTMENTS PTY. LTD.	27th June, 1958	$8.00 $2.00 each	1 share Sergio Caratti 1 share Maddeline Caratti 1 share John Caratti Investments Pty. Ltd. 1 share Allen Caratti Investments Pty. Ltd.	Sergio Caratti
CARATTI (KENT RIVER) PASTORAL CO. PTY. LTD.	6th August, 1964	$2.00	1 share Sergio Caratti 1 share A.B. Pearce	Sergio Caratti A.B. Pearce

In the Supreme Court

Respondents' (Appellants') Evidence

No. 16
Affidavit of S. Caratti.
18th February 1975

AFFIDAVIT OF SERGIO CARATTI

I, SERGIO CARATTI of 202 Williams Road Gooseberry Hill in the State of Western Australia, Earthmoving Contractor, make oath and say as follows:

1. I am the Second Respondent herein. I am also the Governing Director of Caratti Holding Co. Pty. Ltd. (hereinafter called "the Company") and I am duly authorized to make this Affidavit on its behalf.

2. I have read what purports to be true copies of the Petition herein and the Affidavit of FERNANDO ZAMPATTI sworn on 3 December 1974 and filed herein.

3. I admit the allegations contained in paragraphs 1, 2, 3 and 4 of the Petition.

4. I admit the allegations contained in paragraph 5 of the Petition and say that of the 10,126 shares registered in my name, 3,375 of such shares are held by me as trustee for my son JOHN MICHAEL CARATTI and a further 3,375 such shares are held by me as trustee for my second son ALLEN BRUCE CARATTI.

5. As to paragraphs 6 to 16 inclusive of the Petition exhibited hereto marked "SC1" is a true copy of the

Memorandum and Articles of Association of the Company.

6. I admit the allegations contained in paragraph 17 of the Petition.

7. As to paragraph 18 of the Petition I refer to the Memorandum and Articles of Association of the Company for their full terms and effect.

8. I admit the allegations contained in paragraph 19 of the Petition.

9. As to paragraph 20 of the Petition I say that from about 1953 to 30 June 1960 I carried on the business of Bulldozing and Earthmoving Contractors in partnership with my wife MADDELEINE CARATTI trading as "S. & M. CARATTI" and "W.A. BULLDOZING CO."

10. As to paragraph 21 of the Petition from 1 July 1960 to 30 June 1961 I carried on the business of Bulldozing and Earthmoving Contractors in partnership with my said wife and myself as trustee for my said sons pursuant to a Deed of Partnership between us dated 29 July 1960. I crave leave to refer to the said Deed of Partnership which was tendered in evidence as Exhibit 52 in Action No.2361 of 1973. I was as the Petitioner at all material times well knew the managing partner of the said partnership of which the Petitioner was an employee.

11. As to paragraph 22 of the Petition the fixed assets of the said partnership comprising land plant and buildings were sold by the partners therein to the Company on 30 June 1961 on the basis that the same were to be leased back to the partnership which .

In the Supreme Court

Respondents' Evidence

No. 16

Affidavit of S. Caratti 18th February 1975

continued to carry on the said business under the two names referred to above but otherwise I admit the allegations contained in the said paragraph.

12. As to paragraph 23 of the Petition I deny that I conducted the affairs of the Company to the exclusion of the Petitioner. The Company was a family company of which I was Governing Director. The Petitioner was employed by the partnership and had been so employed for some time prior to 1 July 1961 as Manager of the Mt. Barker branch of the operations. The operations of the partnership were centered upon Collie where I lived and worked and Mt. Barker where the Petitioner lived and worked. After 1 July 1961 and until after 30 June 1964 the Company played no part in the business of the partnership other than as Lessor of land, plant and equipment. The Company was engaged in farming and other business activities about which I consulted the Petitioner and which I discussed with him from time to time.

13. As to paragraph 24 of the Petition I admit that in late 1960 or early 1961 I discussed with the Petitioner the acquisition by him of a 10% interest in the Bulldozing and Earthmoving business previously referred to herein. This discussion took place at the Petitioner's residence in Mt. Barker. The Petitioner agreed to take a 10% interest in the business but no terms and conditions were discussed or agreed. I told the Petitioner that I would need to discuss the matter with the Accountants of the existing partnership Messrs. A.B. Pearce and Co. who would work out how the Petitioner could be brought in as a 10% partner. The Petitioner knew that there was a family partnership and I told him that there was also a family company.

In the Supreme Court

Respondents' Evidence

No. 16

Affidavit of S. Caratti 18th February 1975

14. As to paragraph 25 of the Petition I repeat paragraph 13 hereof.

15. As to paragraph 26 of the Petition I repeat paragraph 13 hereof and say that on 2 August 1961 at the offices of Messrs. A.B. Pearce and Co. 32 Beaufort Street Perth, a meeting took place which was attended by myself, the Petitioner, the late Mr. A.B. Pearce and Mr. F.L. Edwardes. Messrs. Pearce and Edwardes were partners in the said firm of A.B. Pearce and Co. At that meeting the basis on which the Petitioner was to become a 10% partner in the partnership and a shareholder in the Company was discussed. The function of the Company as the holding company of the assets used by the partnership was explained to the Petitioner in my presence. The meeting on 2 August 1961 was a meeting of the Company. At the meeting verbal agreement was reached with the Petitioner on the financial terms upon which he would become a 10% partner in the partnership trading as "S. & M. CARATTI" and "W.A. BULLDOZING CO." and a shareholder in the Company. Exhibited hereto marked "SC2" and "SC3" respectively are true copies of the Minutes of meetings of the Company held on 30 June 1961 and 2 August 1961 at which I was present and signed such Minutes as a correct record. I say that the Minutes correctly record what was agreed to by Mr. Zampatti and that he understood the nature of such agreement. The Petitioner subsequently applied for and was allotted 1,500 shares in the capital of the Company. Exhibited hereto marked "SC4" is a true copy of a resolution by myself as Governing Director dated 22 August 1974 whereby shares in the Company were allotted pursuant to the verbal agreement reached on 2 August 1961 and recorded in

In the Supreme Court

Respondents' Evidence

No. 16

Affidavit of S. Caratti 18th February 1975

the Minutes of the meeting on that date.

16. As to paragraph 27 of the Petition I say that the Petitioner is my cousin and that in 1961 I had known him for many years. The Petitioner emigrated to Australia from Italy in 1949. He was employed by me in the Bulldozing and Earthmoving Business for a short period in or about 1953 and commenced permanent employment in the said business in 1955 as a bulldozer driver. By 1961 and for some time before then he had been employed as Manager of the Mt. Barker branch of the business. I deny that at that time his command of written English was minimal. From my knowledge of the Petitioner he had sufficient command of spoken English to carry out negotiations in the course of business and manage the business. He read English without much difficulty and understood matters which were explained to him. To my knowledge the Petitioner read newspapers and documents in the English language. The Petitioner and I are cousins. Our native language is Italian in a dialect spoken in the North of Italy where we were born. However, even in 1961 we conversed mostly in English and only spoke in Italian when there were Italian speaking persons present who could not understand English or when we wanted to keep a conversation confidential.

In the Supreme Court

Respondents' Evidence

No. 16

Affidavit of S. Caratti 18th February 1975

17. As to paragraph 28 of the Petition I admit that the Petitioner arrived in Australia from Italy in 1949 but do not know and cannot admit whether he received any schooling thereafter.

18. As to paragraph 29 of the Petition I do not know and cannot admit the facts alleged therein.

19. As to paragraph 30 of the Petition I deny that the Petitioner has not received any moneys whatsoever or howsoever from the Company save and except as to salary for one year ending approximately 30 June 1965 and say that as recorded in the books and records of the Company the Petitioner received certain moneys and benefits and certain moneys were paid on his behalf between April 1963 and September 1971 in the sum of $18,345.10 set off against the sum of $585.00 on account of a dividend declared for the year ended 30 June 1962.

20. As to paragraph 31 of the Petition the Petitioner was credited in the books of the Company as having received the sum of $585.00 on 30 April 1963 being the amount of a dividend declared by me as Governing Director for the year ended 30 June 1962. I have not declared any other dividends or distributions out of the profits of the Company because in my opinion sufficient trading profits were not earned by the Company.

In the Supreme Court

Respondents' Evidence

No. 16

Affidavit of S. Caratti 18th February 1975

21. I admit the allegation contained in paragraph 32 of the Petition but say that no member of the Company has received notices of any general meeting of the Company. On the basis of advice which I had received I always understood that as Governing Director I was entitled to exercise all the powers of the Company. Such meetings were held as Messrs. A.B. Pearce and Co. or the Secretary of the Company from time to time advised.

22. As to paragraph 33 of the Petition formal general meetings of the Company have been held as recorded in the Minute Book of the Company but apart from

formal meetings there were numerous informal meetings between the Petitioner, myself and others regarding the day-to-day affairs of the Company and important changes which took place. For example:

(a) In 1964 Messrs. A.B. Pearce and Co. recommended to me that for tax reasons the partnership should cease carrying on the Bulldozing and Earthmoving Business through the partnership as previously. It was proposed to sell the business to the Company for the difference between the debtors and creditors with the amount involved being paid by instalments over ten years. I explained this transaction to the Petitioner who appeared to understand it. The transaction was implemented. From 1 July 1964 to 30 June 1965 the business was operated by the Company which employed the Petitioner and paid him a salary. The amount paid to the Petitioner by way of salary in the year ended 30 June 1965 was $7,178.00.

(b) In June 1965 the Company acquired the issued capital of Glenfalloch Contractors Pty. Ltd. which was a company with accumulated losses. I was advised by Messrs. A.B. Pearce and Co. that for tax reasons the Bulldozing and Earthmoving business should be operated by Glenfalloch Contractors Pty. Ltd. using land, plant and equipment leased to it by the Company. I discussed this proposal with the Petitioner and he appeared to understand it and approve of it. The proposal was implemented and from 1 July 1965 to 31 July 1967 the business was operated by Glenfalloch Contractors Pty. Ltd. the name of which was

changed to Caratti Bulldozing Co. Pty. Ltd. The Petitioner was employed by the latter company which paid him a salary of $7,394.00 in the year ended 30 June 1966 and $9,486.00 in the year ended 30 June 1967.

(c) Early in 1967 I commenced negotiations with Mr. Phillip Malouf representing Latec Investments Limited (hereinafter called "Latec") concerning the acquisition by Latec of a 50% interest in the Bulldozing and Earthmoving Business then being carried on by Caratti Bulldozing Pty. Ltd. This transaction was implemented principally under the terms of a Deed dated 31 July 1967 between the Company and Latec and others. The transaction involved the formation of a new company called Caratti Consolidated Pty. Ltd. (hereinafter called "Consolidated") which would own the assets used in the business and operate the business through a structure of loss companies to be made available by Latec. The shares in Consolidated were to be held 50% by the Company and 50% by Latec. I did not understand all the details of the transaction myself, but the essence of it was explained to me by Mr. A.B. Pearce of Messrs. A.B. Pearce and Co., Mr. J.A. Mazza who acted as Solicitor for the Company and Mr. H.M. Kitson a member of the firm of Hendry Rae and Court, Chartered Accountants who was acting as an adviser. The negotiations with Latec went on for some months. During the time of the negotiations the Petitioner was working at the Redcliffe office where the office of the Company and related companies was situated. From time to time during the course of the

negotiations with the Petitioner at informal meetings at my office. I was present on at least two occasions when Mr. A.B. Pearce explained the Latec transaction to the Petitioner. The Petitioner understood the Latec transaction at least as well as I did. The Petitioner and I were told by Mr. Pearce that from 1 August 1967 the Bulldozing and Earthmoving Business would be carried on by a partnership comprising Consolidated and the loss companies made available by Latec, namely, Carbul 1 Pty. Ltd., Carbul 2 Pty. Ltd., Carbul 3 Pty. Ltd. and Carbul 4 Pty. Ltd. It was explained to us that the purchase price payable by Consolidated for the assets being acquired and for the goodwill of the business would be secured by a debenture and that the Company would be paid out of the operating profits of Consolidated. The price payable by Consolidated was $5,230,000.00 for the following assets:

In the Supreme Court

Respondents' Evidence

No. 16
Affidavit of S. Caratti
18th February 1975

(i)	For Land and Buildings.	$200,000.00
(ii)	For plant (subject to hire purchase in the sum of $352,002.49)	700,000.00
(iii)	For shares in Caratti Bulldozing Pty. Ltd., covenants in restraint, leasing agreement, goodwill and all other covenants contained in the Deed (less any reduction in hire purchase commitments since 31 December 1966.	4,682,002.49
		$5,582,002.49
(iv)	Less reduction therein since 31 December 1966	352,002.49
		$5,230,000.00

The payment of the $5,230,000.00 was secured by a Debenture granted by Consolidated, myself and Delbar Investments Pty. Ltd. (hereinafter called "Delbar") and another or others. Based upon the advice which I received I concluded that this transaction with Latec was for the benefit of the Company and its shareholders as a whole. The Petitionerin discussion agreed with me. From and after 1 August 1967 the Petitioner was employed by Consolidated or the partnership known as Caratti Bulldozing (1967).

(d) In 1967 and afterwards it was my intention based on advice which I received to form a public company to operate the said Bulldozing and Earthmoving business. I was advised that the business required more shareholders funds to provide working capital as too much of the business was financed by short term borrowings. I was further advised and verily believed that if portion of the said business could be sold there would be a cash flow of capital to the Company for the benefit of all its shareholders. I explained my intentions to the Petitioner in various discussions with him between 1967 and 1969. Mr. A.B. Pearce visited the Redcliffe office during this period and I can recall the Petitioner being present when these matters were discussed. The Petitioner told me that he thought it would be a good idea to go public. In furtherance of this objective Consolidated of which I was a Director formed Caratti Australia Limited which was incorporated as a public company on 30 September 1969. However, in the light of prevailing economic

conditions the public flotation of the new company was not proceeded with and the name was changed to Caratti Australia Pty. Ltd. (hereinafter called "Caratti Australia") and the Company converted to a proprietary company on 27 October 1969. Caratti Australia was a wholly-owned subsidiary of Consolidated. As from 1 October 1969 certain land and buildings together with shares in the subsidiaries of Consolidated and certain plant and equipment representing portion of the assets of the Bulldozing and Earthmoving business were sold by Consolidated to Caratti Australia for $3,517,574.00. The object was to utilize the portion of the assets sold as the basis of a public float or a sale to raise additional capital. I discussed this transaction with the Petitioner and explained it to him to the best of my ability. He appeared to understand it and told me he thought it was a good idea. Thereafter the Petitioner was employed by Caratti Australia.

(e) Early in 1970 negotiations commenced with Landall Holdings Limited ("Landall") for the sale to Landall of the whole of the issued capital of Caratti Australia in lieu of a public float. I was advised that the prevailing market conditions were not appropriate for a public float. In May and June 1970 negotiations proceeded with Landall and from time to time during the course of negotiations I had discussions with the Petitioner at Redcliffe concerning the progress of negotiations and explained to him to the best

In the Supreme Court

Respondents' Evidence

No. 16
Affidavit of S. Caratti
18th February 1975

of my ability what was involved. By a Deed dated 30 June 1970 between Consolidated as Vendor, Landall as Purchaser, myself and Caratti Australia, Landall agreed to purchase from Consolidated all of the issued capital of Caratti Australia for the sum of $2.50 as at 30 June 1970. It was a condition of the agreement with Landall that:

(i) Consolidated had transferred to Caratti Australia prior to 30 June 1970 certain land and buildings together with shares in the subsidiaries of Consolidated and certain plant and equipment for a net consideration of $3,517,574.00. The sale of the items referred to was expressed to have taken effect from 1 October 1969.

(ii) The purchase price of $3,517,574.00 was to be satisfied as follows:

(a) the issue by Caratti Australia to Consolidated of Debenture Stock to the value of $2,000,000.00 to be secured under a trust deed;
(b) payment by Caratti Australia to Caratti Consolidated of the sum of $1,000,000.00;
(c) payment by Caratti Australia to Consolidated of the balance, namely $350,000.00 not later than 30 September 1970.

(iii) In addition to the purchase price Caratti Australia was to pay Consolidated, on or before 1 July 1971 a further sum as and by way of interest at the rate of 5% of the sum of $3,500,000.00 from 1 October 1969 to 30 June 1970.

It was also provided that immediately after completion on 30 June 1970 Landall would lend Caratti Australia the sum of $500,000.00 to be secured by the issue of Debenture Stock secured in accordance with the terms of a Debenture to be granted by Caratti Australia to Landall. Before the agreement with Landall I had discussions with the Petitioner and explained the

transaction as well as I could. In late May or early June 1970 we held an informal meeting at my house at 67 Fauntleroy Avenue Redcliffe. The meeting was attended by Mr. H.M. Kitson who was advising me on the transaction. The other persons present were the Petitioner, my father-in-law Mr. Jack Pannizza who was trustee of a settlement for my two sons, my son John and Mrs. Caratti. I explained that the meeting was called to discuss the proposition from Landall and get their views on it. I said that if the transaction went through there would be a flow through of cash to the Company which I proposed to distribute to shareholders. I said the meeting was called because I thought that the transaction was the most important one involving the Company and its shareholders since the Company was established. I introduced Mr. H.M. Kitson to those present and asked him to explain the transaction. I then explained that I was leaving the meeting in order that there could be a free discussion. The meeting lasted approximately three hours. When the discussion had finished I went back to the meeting. I asked the Petitioner what he thought of the proposition and he told me he thought it was a good idea and we should go ahead with it. After that meeting negotiations were concluded with Landall in terms of the said Deed dated 30 June 1970. By 24 July 1970 the consideration payable by Caratti Australia to Consolidated had been satisfied to the extent of $3,167,574.00.

In the Supreme Court

Respondents' Evidence

No. 16 Affidavit of S. Caratti 18th February 1975

23. As to paragraph 33 of the Petition I do not know and cannot admit that the Petitioner was unaware of general

meetings of the Company however it is the fact that the Petitioner did not attend formal general meetings of the Company after 2 August 1961 and nor was he invited to attend. Apart from recording the formal business at the Annual Meeting there were no or very few general meetings of the Company. The meetings held generally were Directors' meetings attended by me as Governing Director. I repeat paragraph 22 hereof.

24. As to paragraph 34 of the Petition I admit that whenever the Petitioner and I discussed his shareholding in the Company we spoke of it in terms of a shareholding of 10% or approximately 10% but I deny that I ever held out to him that he was entitled to his 1,500 shares "absolutely" or "without limitation or inhibition" or otherwise to similar effect. I am not quite sure what is meant by "holding out" but I am advised by my Solicitors and verily believe that it involves representing or endeavouring to create an impression in a person's mind as to a state of affairs. Prior to 1971 or 1972 I never referred to Article 32 in discussions with the Petitioner because I was not aware of or did not appreciate the implications of Article 32 so far as the Petitioner's shares were concerned. However, I do recall that when the Company was formed in 1960 Mr. A.B. Pearce advised me that in the event of divorce or family disagreements and similar matters, I should have the power to acquire the shares of any member of the family who was a shareholder of the Company. It was not until late 1971 or early 1972 that Mr. A.B. Pearce reminded me of the powers contained in Article 32 of the Articles of Association in so far as the Petitioner's shares

In the Supreme Court

Respondents' Evidence

No. 16
Affidavit of S. Caratti
18th February 1975

were concerned.

25. As to paragraph 35 of thePetition I say that Action No.2361 of 1973 was commenced by Writ issued by the Petitioner as Plaintiff on 26 March 1973 and otherwise admit the allegation contained in the first sentence of such paragraph. I deny each and every allegation contained in the second sentence of such paragraph and say that it was put to the Petitioner in the course of such proceedings that the power had not been exercised. I further deny that I ever gave instructions to my Solicitors or Counsel in the said action to hold out that I would not exercise the power contained in Article 32.

26. I admit the allegation contained in paragraph 36 of the Petition.

27. As to paragraph 37 of the Petition I say that after the conclusion of the hearing in Action No.2361 of 1973 I sought advice from my Solicitors as to what the Petitioner's next action was likely to be and as a result of such advice which was to the effect that the Petitioner was likely to issue a Petition for a winding up of theCompany and other relief or commence other proceedings, I instructed my Solicitors to give the notice in the form set out in the Schedule which had been prepared some time previously but which had not been given in the hope that my dispute with the Petitioner could be settled by agreement. I gave the notice because I wanted to bring matters to a head. I admit the allegations contained in paragraph 37 of the Petition.

In the Supreme Court

Respondents' Evidence

No. 16
Affidavit of S. Caratti
18th February 1975

28. As to paragraph 38 of the Petition I admit that the allegation referred to therein was made by

Counsel for the Defendants in Action No.2361 of 1973 but say that such allegation was made on the basis of a draft dissolution statement prepared by Mr. P. Forbes, Public Accountant who gave evidence in the action for the Defendants.

29. As to paragraph 39 of the Petition I did ask Mr. P. Forbes, the Secretary and Accountant of the Company to prepare a valuation of the Company and determine the value of the Petitioner's shares without regard to Article 32. I have been endeavouring to find the valuation and am continuing to do so but so far I have been unable to locate it.

30. As to paragraph 40 of the Petition I say that early in 1972 I had a discussion with the Petitioner who told me that he wanted me to take over his interest in the partnership and purchase his shares in the Company. I told him that the conversation was without prejudice. I asked him what figure he had in mind or what he wanted for his interest. He said that he wanted me to put a figure on his shares. He said he would take 10% less than the full value and that he would accept a 10% liability for all pre-existing debts of the Company including taxation. I said that if I paid him out the full value of his shares even less 10% it may leave the Company without the necessary funds to carry on and fulfil its obligations as the money to buy him out would have to come out of the Company. He asked me to put a figure on it. I told him that in my opinion when everything was checked and investigated the Company would not be worth more than $2,000,000.00. I asked him how $200,000.00 would sound for him to be "out of everything". The Petitioner laughed at me; I told him that it would not matter what

I offered him the amount would never be right so far as he was concerned. I maintain that in the circumstances the conversation was a privileged conversation. I am advised by my Solicitors and verily believe that in view of the contents of paragraph 40 of the Petition and the Petitioner's Second Affidavit verifying the same it is necessary for me to put the facts of the matter before the Court to have my claim that the conversation was privileged determined.

31. I deny paragraph 41 of the Petition and refer to the Articles of Association of the Company for their full terms and effect.

32. I admit the allegations contained in paragraph 42 of the Petition.

33. As to paragraph 43 of the Petition I admit that I never discussed the balance sheets and financial statements of the Company with the Petitioner as such, but we often had discussions about the general state of affairs of the Company. I found it difficult to understand the balance sheets and accounts of the Company. I am still unable to analyse and understand a balance sheet and have to rely on advice. I answered to the best of my ability whatever queries the Petitioner had about the state of affairs of the Company. The Petitioner had keys to the office premises of the Company and had access to the books and records of the Company. In 1972 Mr. A.B. Pearce was in possession of many of the documents relating to the affairs of the Company and it took considerable time to get together the documents required by the Petitioner. Mr. A.B. Pearce died in September 1972

In the Supreme Court

Respondents' Evidence

No. 16
Affidavit of S. Caratti
18th February 1975

and shortly afterwards Mr. A. Shepherd who had been employed by the Company as an Accountant since 1964 left the employ of the Company and I had difficulty in locating relevant documents including accounts.

34. As to paragraph 44 of the Petition I do not know and cannot admit the allegations contained therein as I do not understand what is meant by the terms "assets" or "intangible assets".

35. As to paragraphs 44 to 48 of the Petition I do not know and cannot admit the allegations contained therein and I have retained the services of an Accountant to advise me regarding these matters.

36. I admit the allegations contained in paragraphs 50 to 53 inclusive of the Petition but say that I do not have at present a detailed personal knowledge or recollection of the transactions involved and have retained the services of an Accountant to investigate and advise me concerning these matters. Since 30 June 1970 Delbar Investments Pty. Ltd. has held approximately 50% of the shares in Consolidated having acquired the same from Latec.

In the Supreme Court

Respondents' Evidence

No. 16
Affidavit of S. Caratti
18th February 1975

37. I admit the allegations contained in paragraphs 54 to 56 of the Petition.

38. As to paragraph 57 of the Petition I am not at present in a position to answer the allegation contained therein except to deny that I received or obtained any personal benefit from any of the transactions referred to. I have retained the services of an Accountant to investigate all transactions between W.A. Bulldozing Co. and the Company to enable me to further answer the

allegations contained in the said paragraph.

39. I admit the allegation contained in paragraph 58 of the Petition and say that as at 3 October 1974 W.A. Bulldozing Co. was indebted to the Company in the sum of $771,805.00 and that I was indebted to W.A. Bulldozing Co. in the sum of about $762,000.00 or thereabouts based on information given to me by Mr. P. Forbes. On or about 3 October 1974 I paid $762,000.00 to W.A. Bulldozing Co. and caused W.A. Bulldozing Co. to pay $761,805.00 to the Company in reduction of the aforesaid indebtedness.

40. As to paragraph 59 of the Petition I do not understand the reference to $875,410.00 and I deny that I received or obtained any personal benefit from the transactions referred to. I have retained an Accountant to advise me regarding these matters.

41. As to the allegations contained in paragraphs 60, 61 and 62 of the Petition I deny that I obtained any personal benefit from any of the transactions referred to. I at present have no detailed personal knowledge or recollection of the specific transactions involved and I have retained the services of an Accountant to advise me concerning these allegations. I do say that a significant portion of the indebtedness referred to related to bulldozing clearing and farm development work carried out on farms owned by those companies out of season to maintain the work force of the organisation. The Petitioner was well aware of the work which was being done. Similar work was carried out on a farm of about 4,000 acres at Ongerup belonging to the Petitioner.

In the Supreme Court

Respondents' Evidence

No. 16
Affidavit of S. Caratti
18th February 1975

42. As to paragraph 63 of the Petition the balance sheet and financial statements of the Company for the year ended 30 June 1973 were prepared in the week ending 14 February 1975 and copies thereof forwarded by the Accountant of the Company to my Solicitors on that date with instructions to provide a copy to the Petitioner's Solicitors. I have not yet had an opportunity to peruse such accounts. The accounts for the year ended 30 June 1974 have not yet been completed.

43. I deny each and every allegation contained in paragraph 64 of the Petition and say that at all times I have conducted the affairs of the Company for the benefit of the Company as a whole. It is still my objective to form a public company to take over the business of the Company for the benefit of the Company and its shareholders as a whole.

44. I deny each and every allegation contained in paragraph 65 of the Petition and say that I exercised the rights which I was advised I had under Article 32 of the Articles of Association for the reason already stated and because of the actions of the Petitioner which had affected the operations of the Company to the detriment of the Company and other shareholders. Since early 1972 the Petitioner has been carrying on business on his own account under the name "General Bulldozing Co." and through various companies in direct competition with Consolidated which is approximately 50% owned each by the Company and Delbar. Consequently I do not believe that it is in the interests of the Company as a whole that the Petitioner continue as a shareholder thereof.

45. I deny each and every allegation contained in paragraph 66 of the Petition and say that dividends and profits have not been paid or distributed (apart from for the year ended 30 June 1962) because the Company has not traded profitably and the necessary cash has not been available. In relation to the giving of the notice referred to I repeat paragraph 44 hereof.

46. I admit the allegations contained in paragraphs 67 and 68 of the Petition and say that I have always exercised the powers referred to with the object of advancing the interests of the Company.

47. I deny each and every allegation contained in paragraph 69 of the Petition.

48. As to the allegations contained in paragraph 64 of the Second Affidavit of the Petition verifying the Petition herein (hereinafter called "the Second Affidavit") I admit the first sentence thereof. As to the second sentence thereof I deny that any of the conversations took place late in 1960 or early in 1961 as alleged or at all. On numerous occasions after the Petitioner became a shareholder in the Company in August 1961 we discussed his shareholding in the Company, the state of affairs of the Company, my plans for the future of the Company and other matters related to his position in the Company as previously set out in this my Affidavit. I deny that the conversations referred to in 1971 or 1972 took place as alleged or at all. Early in 1971 Landall appointed a Receiver and Manager of Caratti Australia under a debenture held by Landall over the assets of Caratti Australia and

In the Supreme Court

Respondents' Evidence

No. 16
Affidavit of S. Caratti
18th February 1975

the Petitioner told me shortly afterwards that his employment with Caratti Australia had been terminated. I told him that Landall had commenced legal proceedings against Consolidated and myself arising out of the Landall transaction previously referred to. The Petitioner asked me about his 10%. I told him that nothing could be done until the Landall proceedings were resolved. He asked me to buy his shares. I told him I was not in a position to do so because the affairs of the Company were in a mess and would remain so until the Landall matter was resolved. In the meantime I helped him set up in business as General Bulldozing Co. using workshop premises of the Company at Koojan Avenue South Guildford. I had to re-organize the Earthmoving and Bulldozing business of Consolidated without premises until we leased a workshop at Welshpool from D.F.D. Rhodes Pty. Ltd. I arranged for Consolidated to hire the Petitioner bulldozing and other equipment to get started in business. The Petitioner continued and continues to reside in a house at 73 Great Eastern Highway South Guildford which was owned by the Company and in respect of which rates, taxes and insurance have been paid by the Company. The Petitioner has not paid rent for the General Bulldozing Co. workshop premises or the plant and equipment. The plant and equipment was returned in 1972 but the Petitioner continues to occupy the said workshop premises. I have discussed with the Petitioner the payment of rent for the premises and charges for the hire of equipment but he has denied any liability to pay because he is a shareholder of the Company.

In the Supreme Court

Respondents' Evidence

No. 16 Affidavit of S. Caratti 18th February 1975

49. I do not know and cannot admit the allegations

contained in paragraphs 65 to 68 inclusive of the Petitioner's said Affidavit.

50. As to paragraph 69 of the Petitioner's said Affidavit the contractual relationship was reduced to writing after 2 August 1961. Exhibited hereto marked "SC5" is the original of the engrossed Partnership Agreement which was prepared by the Solicitors for the partnership late in 1961. The Petitioner and I had discussed the terms of the partnership earlier in 1961 as being on similar terms and conditions as the previous family partnership and the proposed Deed of Partnership was prepared on that basis. I recently discovered the engrossment and duplicate of the proposed Deed during a search of my papers. I cannot recollect precisely why the Deed was not signed but to the best of my recollection I simply overlooked having the Deed signed.

In the Supreme Court

Respondents' Evidence

No. 16
Affidavit of S. Caratti
18th February 1975

51. As to paragraph 70 of the Petitioner's said Affidavit I did not give evidence in the said action because I was advised by my Counsel that it was unnecessary for me to do so. I was present in Court throughout the hearing of the action and was prepared to give evidence.

52. As to paragraphs 71 and 72 of the Petitioner's said Affidavit I am not qualified to express an opinion on the matters referred to therein.

53. I crave leave to give further evidence relating to the affairs of the Company when I have received the results of the examination of the books, records and accounts of the Company regarding the matters alleged against me. I further crave leave to give further

evidence relating to events from late 1970 to date regarding the affairs of the Company in respect of which I have as yet been unable to give instructions to my Solicitors.

SWORN by the Deponent at Perth in the State of Western Australia this 18th day of February 1975. Before Me:

S. CARATTI

G. M. RATTIGAN

A Commissioner of the Supreme Court of Western Australia for taking Affidavits.

In the Supreme Court

Respondents' Evidence

No. 16
Affidavit of S. Caratti
18th February 1975

In the Supreme Court

Respondents' (Appellants') Evidence

No. 17
Affidavit of S. Caratti
8th April 1975

AFFIDAVIT OF SERGIO CARATTI

I, SERGIO CARATTI of 202 Williams Road Gooseberry Hill in the State of Western Australia, Earthmoving Contractor MAKE OATH AND SAY:

1. I am the second Respondent herein. I am also the Governing Director of Caratti Holding Co. Pty Ltd (hereinafter called "the Company") and I am duly authorised to make this affidavit on its behalf.

2. I have read what purports to be a true copy of an affidavit of Bernardo Zampatti sworn on 3 April 1975 and filed herein (hereinafter called "Zampatti's affidavit").

3. I refer to paragraphs 2, 10, 11 and 12 of Zampatti's affidavit. I am informed by my solicitors and truly believe that on 19 February 1974 the matter of the adjournment of the petition was argued at length before the Honourable The Chief Justice who directed that the petition be listed for hearing as soon as possible after the appeal was due to be heard and that on 24 March 1975 the Honourable Mr Justice Burt indicated that if he were available he would hear the petition on 29 April 1975 after the sittings of the full court in April when the appeal would be heard.

4. My solicitors inform me and I truly believe that there has been nothing to prevent the petition being

listed for hearing in May or being included in the callover list for May and the petitioner's solicitors have not done so.

5. As to the possibility of a further appeal to the High Court (if the appeal to the Full Court is unsuccessful) I have been advised not to consider such an appeal. In any event, this petition has had a serious disruptive effect on the business of the Company and with respect to other businesses with which I am connected and I would not wish to unduly prolong the dispute.

6. I refer to paragraphs 14, 15, 16 and 17 of Zampatti's affidavit. I do not understand the criticism made. It is in the interest of Caratti Holding Co. Pty Ltd and its shareholders that the amount shown in the balance sheet as being secured by the debenture be reduced. Over the period from 1968 to 1973 total shareholders funds as shown in the balance sheets of Caratti Holding Co. Pty Ltd increased. Now produced to me marked "SC6" is a "Dissection of Shareholders Funds" prepared by PETER FORBES former secretary and accountant to the Company. I am informed by him and truly believe that the amounts shown therein are a true and accurate record of transactions of the Company as shown in its books.

7. I refer to paragraph 18 of Zampatti's affidavit. The allegation that the petitioner has never received a dividend nor any other moneys (other than minor amounts referred to in the petition) from the Company is not true. I am informed by Peter Forbes and truly believe that the books of the Company show the following transactions with the petitioner whereby he has received a financial benefit from the Company:

April 30, 1963	Credit of dividend declared	$	585.00
June 30, 1963	Loan		40.00
Sept 30, 1964	Income tax payment		865.50
Feb 26, 1965	Loan		2400.00
Feb 26, 1965	Income tax payment		1902.60
Mar 29, 1965	Income tax payment		1976.40
June 1965	Income tax payment		4744.60
Dec 1965	Loan		600.00
June 1966	Loan		600.00
Aug 1966	Loan		100.00
June 1971	Hire of Plant		3208.00
Sept 1, 1971	Paid to Landall Holdings in reduction of monays due by petitioner re:		
	General Bulldozing		1000.00
	Mt Barker		600.00
	Caratti Australia		348.00

The net total of these benefits is $17,760.10. I also refer to the matters set out in paragraph 40 of my affidavit sworn on 18 February 1975.

8. I refer to the second sentence in paragraph 18 of Zampatti's affidavit. When the petition was presented I was advised by my solicitors not to sell or dispose of any of the assets or undertaking of Caratti Holding Co. Pty Ltd other than through normal trading transactions in the ordinary course of business. I have complied with the advice given. I am also willing to give an undertaking not to sell or otherwise dispose of any of the Company's assets other than in the ordinary course of business.

9. I refer to paragraph 19 of Zampatti's affidavit. Caratti Holding Co. Pty Ltd owns farms at Mt Barker and Beacon and two workshops. The Company and its shareholders would be prejudiced and would suffer loss if a provisional liquidator were appointed.

10. I refer to paragraph 20 of Zampatti's affidavit. The appointment of a provisional liquidator will have

no affect whatsoever on the amounts paid to the Company under the debenture. Now produced to me marked "SC7" is a true copy of the debenture. I have been advised by my solicitors and truly believe that under its terms the only person who can call up the moneys secured under it is myself (while I am alive).

11. There are other allegations in Zampatti's affidavit which require denial or qualification. I will not do so in detail but seek leave to refer generally my affidavit sworn 18 February 1975 and filed herein. 10

SWORN by the said)
SERGIO CARATTI)
at Perth)
this 8th day of)
April 1975)

S. Caratti

Before me,

D. Lloyd

A Commissioner of the Supreme Court of Western Australia for taking Affidavits.

In the
Supreme Court

Respondents'
Evidence

No. 17
Affidavit of
S. Caratti
8th April 1975

In the Supreme Court

Respondents' (Appellants') Evidence

No. 18
Affidavit of S. Caratti
20th June 1975

I, SERGIO CARATTI of 202 Williams Road, Gooseberry Hill in the State of Western Australia, Earthmoving Contractor, MAKE OATH AND SAY as follows :

1. I am the Governing Director of Caratti Holding Co. Pty. Ltd (hereinafter called "the company") and I am duly authorised to make this affidavit on its behalf.

2. Now produced and shown to me marked "SC6" is the minute book of Caratti Holding Co. Pty. Ltd.

3. I identify the minutes therein. In particular, I identify the minutes of a meeting of the company held at 9 a.m. on 3 June 1975 which minutes are contained at pages 89 and 90 of the said minute book.

4. Such meeting took place on the day and at the time set out and the record of the business as set out in the minute is correct.

5. On 3 June 1975 I signed the minute as Governing Director of the company.

SWORN by the said)
SERGIO CARATTI at)
Perth)
this 20th day of)
June 1975)

S. Caratti

Before me,

A Commissioner of the Supreme Court of Western Australia for taking affidavits.

In the Supreme Court

Respondents' (Appellants') Evidence

No. 19
Affidavit of P. Forbes
1st May 1975

I, PETER FORBES of 16 Sulman Avenue, Salter Point in the State of Western Australia, Public Accountant, MAKE OATH AND SAY as follows:-

1. I am a Public Accountant. From November 1964 or thereabouts until May 1973 I was employed by Caratti Holding Co. Pty Ltd (hereinafter called "the Company") as an accountant. In June 1968 I became the Secretary of the Company and also of all other Companies in the Caratti Group. I remained as Secretary of the Company and all other Companies in the Caratti Group until May 1973.

2. I have read what purport to be true copies of the petition herein, the affidavit of Bernardo Zarpatti sworn on 3 December 1974 and filed herein, and the affidavits of Sergio Caratti sworn on 18 February 1975 and 8 April 1975 and filed herein.

3. Paragraphs 1 to 19 inclusive of the petition are correct. I do not know of my own knowledge whether the facts set out in paragraphs 20, 21 and 22 of the petition are correct or not.

4. As to paragraph 23 of the petition, when I first began to work for the Company as an accountant in November 1964 one of my jobs was to prepare salary cheques for staff members of the Company. From my own knowledge I am able to attest that from November 1964 until 30 June 1965 or thereabouts the petitioner was receiving a salary from the Company. Thereafter the petitioner received a salary from

Caratti Bulldozing Co. Pty Ltd (until 31 July 1965), then from Caratti Bulldozing Co. (1967) (until 30 September 1969). At the request of the petitioner I used to post his salary cheque to his bank account at the Commonwealth Bank, Guildford branch. I am also aware that from November 1964 to September 1969 the Company which paid the petitioner's salary in each case paid all his telephone accounts and gave him free petrol and maintenance with respect to the petitioner's vehicle. From 1968 the petitioner occupied rent free a house at 73 Great Eastern Highway, South Guildford which house was owned by Caratti Consolidated Pty Ltd until it was sold to Landall Holdings Ltd in June 1970.

5. After September 1969 the petitioner used to continue to receive a salary from Caratti Australia Pty Ltd but the sum was paid to him by cheque by the Paymaster for the Group, Patrick William Mountain. He was then paid weekly instead of monthly. I am aware that the petitioner continued to receive a salary through the Paymaster because of my general knowledge of the Company's business being its Secretary and Accountant.

In the Supreme Court

Respondents' Evidence

No. 19
Affidavit of P. Forbes
1st May 1975

6. From November 1964 when I first began to work for the Company at least until February 1967 or thereabouts the petitioner was employed as assistant to Sergio Caratti and was responsible principally for operations and movement of bulldozing and other plant. He and Sergio Caratti worked at the same place namely 515 Great Eastern Highway, Redcliffe. The petitioner was regarded by myself and everyone as the assistant manager to Sergio Caratti who was generally responsible for the management of the business of the Company. If decisions had to be made regarding operations and if Sergio Caratti was not available, the matter would be referred to and a decision made by the petitioner. At night the switchboard night switch put the

Company line through to the homes of both Sergio Caratti and the petitioner. People ringing the Company after hours would reach the number of either Sergio Caratti or the petitioner. In addition, there was a direct telephone link between the office, the homes of Sergio Caratti and the petitioner and the workshop manager. In my opinion the reason why the bulldozing side of the Caratti Group was so successful in the 1960's was the close communication between the petitioner and Sergio Caratti and the fact that one or either of them was available at all times to deal with any problems.

7. As to the financial side of the business, small day to day transactions were handled by the office staff and Sergio Caratti. As to capital expenditure such as the purchase of bulldozers or other items of plant, from my knowledge of the business of the various Companies with which Sergio Caratti was connected (hereinafter called "the Caratti Group") and the way in which the decisions were made, I am able to attest that it was the usual practice for such decisions to be made by Sergio Caratti after consultation with the petitioner. The same applied to large items of expenditure on major repairs. It was the practice of Sergio Caratti and the Petitioner to discuss such items of expenditure before they were made.

In the Supreme Court

Respondents' Evidence

No. 19
Affidavit of P. Forbes
1st May 1975

8. As to major decisions between the petitioner and Sergio Caratti, I have no first hand knowledge of such decisions prior to November 1964. I seek leave to refer to sub paragraphs (a) to (e) of paragraph 22 of the affidavit of Sergio Caratti sworn on the 19th February 1975 and filed herein. The events set out in such sub paragraphs are the major business decisions which were made by the Caratti Group from 1964 to 1970.

9. As to sub paragraph (b) thereof, from my general recollection of discussions with the petitioner I am certain

that Zampatti was aware of the proposal to acquire the issued capital of Glenfalloch Contractors Pty Ltd and change its name to Caratti Bulldozing Co. Pty Ltd and operate the bulldozing and earthmoving business through such Company for taxation purposes. However, I do not remember any specific discussions with Zampatti at the time.

10. Between 1965 and 1967 the Caratti Group began contracting work in a dition to agricultural work. For the purpose of organising all its activities, a general manager and engineer were appointed. After the appointment of a manager in or about 1966 there was a discussion between Sergio Caratti and the petitioner at which I was present in which it was agreed that the operations centre for bulldozing and agricultural work which at the time was run by the petitioner in conjunction with Sergio Caratti would be moved to a new workshop to be built in Koojan Avenue, South Guildford.

11. In early 1967 the new workshop was completed and the petitioner took charge of bulldozing and agricultural operations within 100 miles radius of Perth and headed in the name "General Bulldozing Co". After this shift, the petitioner continued to remain in close contact with the old office. He visited the main office and had discussions with Sergio Caratti almost every day. The day to day financial dealings for the side of the business which was run by the petitioner still carried on at the Main Office.

12. I refer to sub paragraph (c) of paragraph 22 of the said affidavit of Sergio Caratti. From my conversations with the petitioner in 1967 I am able to attest that he was generally aware as to the nature of the negotiations with Mr Phillip Malouf regarding Latec Investments Ltd.

13. After 1 August 1967 or thereabouts when all the plant which had been formerly owned by the Company had been sold

In the Supreme Court

Respondents' Evidence

No. 19
Affidavit of P. Forbes
1st May 1975

to Caratti Consolidated Pty Ltd the bulldozing operation of the Caratti Group were controlled by the Board of Directors of Caratti Consolidated Pty Ltd. I was the Secretary of Caratti Consolidated Pty Ltd. Sergio Caratti was the Managing Director and the other directors were T. Malouf, T.W. Wright, J.A. Mazza and A.B. Pearce. After this time the petitioner was not involved in major decisions made by the Directors but he was informed after they had been made.

14. I refer to sub paragraph (d) of paragraph 22 of the said affidavit of Sergio Caratti. I recollect telling the petitioner myself of the decision to form a public Company at some time in the future, though the Company would in the meantime be operated as a proprietary Company.

15. After 1 July 1965 the Company carried on only two activities. Firstly, it was the owner of all the plant used by the Caratti Group and it leased such plant to the operating Company namely Caratti Bulldozing Co., Pty Ltd until 31 July 1967. It also carried on farming operations on properties owned by the Company. After 31 July 1967 the Company only carried on farming operations on farms it owned at Beacon and Mt Barker or leased such farms to other persons.

16. I refer to sub paragraph (3) of paragraph 22 of the said affidavit of Sergio Caratti. I was present at several discussions between Sergio Caratti and the petitioner at which Sergio Caratti explained to the petitioner and myself the stage at which negotiations had reached with Landall Holdings Ltd.

17. I refer to paragraph 30 and 31 of the Petition. Now produced to me marked "PF1" is a bundle of copies of general ledger cards in respect of transactions involving the Company and the petitioner. From the notation on the ledgers and from my experience as an Accountant the

In the Supreme Court

Respondents' Evidence

No. 19
Affidavit of P. Forbes
1st May 1975

transactions shown by the ledger cards are as follows:

	Dr.	Cr.
April 30 1963 Credit of div. declared		$585
June 30 1963 To Loan	40.00	
Sept 30 1964 Income tax	865.50	
Feb 26 1965 Loan	2400.00	
Feb 26 1965 Loan	1902.60	
Mar 29 1965 Income tax	1976.40	
June 1965 Income tax	4744.60	
Dec 1965 Loan	600.00	
Aug 1966 Loan	100.00	
June 1971 Hire of Plant, dozing C.P. block	3208.00	
By Bulldozing (1967) up to Sept 1969		
Sept 1 1971 To amounts paid on settlement with Landall Holdings due by B. Zampatti		
General Bulldozing	1000.00	
Mt Barker	600.00	
Caratti Australia	348.00	
Total :-	$18,345.10	$585.00

In the Supreme Court

Respondents' Evidence

No. 19
Affidavit of P. Forbes
1st May 1975

10. I do not have any first hand knowledge of the transactions referred to in the ledger card except for the last transaction mentioned. The entry on the card in respect of the sum of $3208 was written in my own handwriting. The sum of $3208 was for the hire of plant by the petitioner.

19. The Petitioner has occupied two premises since they were purchased by the Company in May 1971. One of such premises is the said house at 73 Great Eastern Highway, South Guildford. Another property is the new workshop referred

to previously in this affidavit in Koojan Avenue, South Guildford. Also, the petitioner has used plant owned by the Company. No invoices have ever been raised by the Company in respect of these items except for rent.

20. I refer to paragraphs 38 and 39 of the Petition. In 1972 I prepared a "mock" dessolution statement of the partnership S. and M. Caratti trading as W.A. Bulldozing Co. Ibelieve this document is exhibit 78 in action No. 2361 of 1973. I also prepared a rough valuation of the Company. This was prepared in my own handwriting and given to Sergio Caratti. The valuation which I prepared was based upon my own guess of the values of assets and was only to be used to assist in negotiations with the petitioner so that the parties to such negotiations would have some idea as to the assets owned by the Company and my guess as to their values.

21. I refer to paragraph 42 of the Petition. I seek leave to refer to the affidavit of Sergio Caratti sworn 8 April 1975 and filed herein. Exhibit "SCC" thereto is a document entitled "Dissection of shareholders funds" which I prepared. This document sets out the correct amount for shareholders funds from the balance sheets for the Company for the financial year ended 30th June 1961 to 30th June 1972 respectively, and which shows how such amounts are calculated. The figures shown are bookkeeping figures only based on amounts shown in ledger cards, and do not represent actual values.

22. Now produced to me marked "PF2" is a copy of the balance sheet and profit and loss account for the Company for the year ended 30th June 1973. This has been prepared on the basis of ledger cards and the figures do not represent the values of the assets set out therein.

23. During the whole of the time that I was employed by the Company as its Accountant I do not recollect any instance

In the Supreme Court

Respondents' Evidence

No. 19
Affidavit of P. Forbes
1st May 1975

when the petitioner asked me if he could look at books of account or financial statements of the Company.

24. If he had asked me I would have shown them to him. I had no instructions from Sergio Caratti to the effect that I could not show the petitioner any books of account.

25. Paragraph 44 of the Petition is correct. As to paragraph 45 of the Petition, the amount shown does not represent the value of the plant and equipment owned by the Company or the cost less depreciation of such plant and equipment. The amount shown is derived from the ledger card of the Company and the amounts on the ledger cards of the Company arose as a result of the transactions with Landall Holdings Ltd set out in sub paragraph (e) of 22 of the affidavit of Sergio Caratti sworn 18 February 1975. In such transactions the amounts placed against items of plant and equipment were arbitrary only and did not have any relation to the value of the equipment. It is not possible to say that the amounts placed against each item of plant and equipment represent the cost of the equipment because the transactions with Landall Holdings Ltd involved the overall settlement of a number of contingent claims which had no relation to plant and equipment.

26. The same remarks apply with respect to the figure shown as the cost of land and buildings referred to in paragraph 47 of the Petition.

27. I refer to paragraph 58 of the Petition. I also refer to paragraph 39 of the said affidavit of Sergio Caratti sworn 18 February 1975. I am aware from my own knowledge of the transactions and facts set out therein. I am able to attest that on 3 October 1974 Sergio Caratti paid $762,000.00 to W.A. Bulldozing Co and caused W.A. Bulldozing Co to pay $761,305.00 to the Company whereby the debt owing by W.A. Bulldozing Co to the Company was fully discharged.

In the Supreme Court

Respondents' Evidence

No. 19
Affidavit of P. Forbes
1st May 1975

SWORN by the said)
PETER FORBES at)
Perth this 1)
day of May)
1975)

P. Forbes

Before me,

Ian D. Tenby

A Commissioner of the Supreme Court
of Western Australia for taking
Affidavits.

In the
Supreme Court

Respondents'
Evidence

No. 19
Affidavit of
P. Forbes
1st May 1975

THIS AFFIDAVIT was filed and served the day of
1975 by Messrs Muir Williams Nicholson & Co of Law Chambers
Cathedral Square, Perth, W.A. 6000

NO. 20

In the Supreme Court

Respondents' (Appellants') Evidence

No. 20
First Affidavit of P. Forbes
18th June 1975

FIRST AFFIDAVIT OF PETER FORBES

I, PETER FORBES of 16 Sulman Avenue, Salter Point in the State of Western Australia, Public Accountant, MAKE OATH AND SAY as follows :

1. I refer to my affidavit sworn in this matter on 1 May 1975 and filed herein.

2. Now produded and shown to me marked "PF10" is a draft balance sheet and profit and loss account for Caratti Holding Co. Pty. Ltd for the year ended 30 June 1974. These statements have been prepared by me on the basis of ledger cards and the figures do not represent the values of the assets set out thdrein.

3. Moreover, the statements are drafts only as financial statements for other companies in the Caratti group of companies have not been completed for the same period.

4. Subject to possible adjustment after the accounts of other companies in the Caratti group have been prepared, the said financial statements represent a true and correct summary of the transactions of Caratti Holding Co. Pty. Ltd for the year ended 30 June 1974 as shown in the ledger cards of that company.

SWORN by the said PETER FORBES at Perth this 18th day of June 1975

P. FORBES

Before me,

Graham Young

A Commissioner of the Supreme Court of Western Australia for taking affidavits.

In the Supreme Court

Respondents' (Appellants') Evidence

No. 21
Second Affidavit of P. Forbes
18th June 1975

SECOND AFFIDAVIT OF PETER FORBES

I, PETER FORBES of 16 Sulman Avenue Salter Point in the State of Western Australia, Public Accountant, MAKE OATH AND SAY as follows :

1. This affidavit is supplementary to an affidavit sworn by me on 1 May 1975 and filed in this matter.

2. I am able to attest to the statements made by me in this affidavit based upon my own knowledge of the business and affairs of Caratti Holding Co. Pty. Ltd and all other companies in the Caratti group as accountant, secretary or former accountant or secretary of such companies. All statements contained in this affidavit are true to the best of my knowledge information and belief.

3. I refer to paragraphs 59 to 64 of the Petition.

4. Now produced and shown to me are the following documents marked with the following respective letters and numbers:

Details of loan account for Caratti (Kent River) Pastoral Co. Pty. Ltd	"PF3"
Details of loan account for Albany Forts Freeholds Pty. Ltd	"PF4"
Summary of details of loan account of Caratti (Chapman Valley) Pty. Ltd	"PF5"
Summary of details of loan account of Caratti (Bullfinch) Pty. Ltd	"PF6"
Details of loan account of Caratti Freeholds Pty. Ltd	"PF7"
Details of Delbar Investments Pty. Ltd of loan account in accounts of Caratti Holding Co. Pty. Ltd	"PF8"

Each of these documents has been prepared by myself based upon the ledger cards and in some cases also the journal entries of Caratti Holding Co. Pty. Ltd. Each document represents a true and accurate summary of transactions between Caratti Holding Co. Pty. Ltd and the other respective companies based upon such ledger cards and journal entries. In each case the balance shown at the end of the summary represents the amount owing by the respective company to Caratti Holding Co. Pty. Ltd as at 30 June 1973.

4. As to Caratti (Kent River) Pastoral Co. Pty. Ltd the statement marked "PF3" shows an analysis of the items appearing in the loan account for that Company. Most of the payments made by Caratti Holding Co. Pty. Ltd for or on behalf of Caratti (Kent River) Pastoral Co. Pty. Ltd were made between 1 July 1964 and 30 June 1965 when Caratti Holding Co. Pty. Ltd was the operating company for the group of companies. By this I mean that Caratti Holding Co. Pty. Ltd owned and operated most of the earthmoving machinery for the Caratti group of companies.

5. All such items of expense or services rendered were regarded as loans by Caratti Holding Co. Pty. Ltd to Caratti (Kent River) Pastoral Co. Pty. Ltd. Interest was not charged on such loans because to do so would increase the income and therefore the income tax payable by Caratti Holding Co. Pty. Ltd. Such a liability would have substantially reduced the liquidity of the Caratti group as a whole.

6. The land used by Caratti (Kent River) Pastoral Co. Pty. Ltd was land owned by or shown in the accounts as being owned by Caratti Holding Co. Pty. Ltd. As most of the items of expenditure related to the development of such land, Caratti Holding Co. Pty. Ltd was benefiting in that its property was increasing in capital value.

7. The reason why the land was farmed or leased by Caratti (Kent River) Pastoral Co. Pty. Ltd was that this company

had accrued losses and any income which it earned was not taxable or was not taxable to the same extent as would have been the case had Caratti Holding Co. Pty. Ltd farmed the land itself.

8. From May or June 1966 Caratti (Kent River) Pastoral Co. Pty. Ltd sub-leased the land to third persons. The rent was received by Caratti Holding Co. Pty. Ltd in reduction of the loan.

9. As to Albany Forts Freeholds Pty. Ltd, this Company is the owner of certain land near Albany. Again, most of the items shown in the statement which make up the loan from Caratti Holding Co. Pty. Ltd to Albany Forts Freeholds Pty. Ltd were incurred from 1 July 1964 to 30 June 1965 when Caratti Holding Co. Pty. Ltd was the operating company for the group.

10. As was the practice with the Caratti group of companies, various companies in the group would use plant and equipment of the operating company when there was no demand for such plant and equipment from outside parties. This meant that the plant and equipment of the operating company was being used to the maximum which was of advantage to all companies in the Caratti group. If associated companies did not use such plant and equipment, then they would have remained idle.

11. The land which was owned by Albany Forts Freeholds Pty. Ltd was undeveloped and it was always intended that the moneys paid by Caratti Holding Pty. Ltd would be repaid when the property was developed.

12. In or about 1972 the land was sold but was sold to a purchaser who later defaulted. In the meantime some interest payments had been received and these have been applied in reduction of the loan by Caratti Holding Co. Pty. Ltd to Albany Forts Freeholds Pty. Ltd.

13. As to Caratti (Chapman Valley) Pty.Ltd, the land farmed by this company was acquired in or about June

In the Supreme Court

Respondents' Evidence

No. 21
Second Affidavit of P. Forbes
18th June 1975

1964. For the first year of its operation, all money which was required for its operation was provided by Caratti Holding Co. Pty. Ltd as the then operating company.

14. From time to time Caratti (Chapman Valley) Pty. Ltd has paid to Caratti Holding Co. Pty. Ltd various amounts in reduction of the loan account which items are shown in the summary.

15. Caratti Holding Co. Pty. Ltd has also received other benefits or advantages from Caratti (Chapman Valley) Pty. Ltd. When the land farmed by Caratti (Chapman Valley) Pty. Ltd was acquired, that company also acquired a number of items of plant. In the financial year ended 30 June 1965 such plant was used rent free by Caratti Holding Co. Pty. Ltd. No charge was made by Caratti Chapman Valley) Pty. Ltd for the hire of such plant. Such plant was subsequently sold by Caratti Holding Co. Pty. Ltd to Caratti Consolidated Pty. Ltd.

16. In or about March 1966 Caratti (Chapman Valley) Pty. Ltd granted a second mortgage to Mutual Acceptance Ltd as collateral security for the balance unpaid under hire purchase agreements with such plant. This was of indirect benefit to Caratti Holding Co. Pty. Ltd.

17. I refer to the remaining summaries in respect of which the same comments apply. On 31 July 1967 various agreements were entered into between companies in the Caratti group of companies including Caratti Holding Co. Pty. Ltd and Latec Investments Ltd. One of such agreements was the debenture a true copy of which marked "SC7" is exhibited to the affidavit of Sergio Caratti sworn 8 April 1975 and filed herein. I respectfully seek leave to refer to such debenture. I also respectfully seek leave to refer to paragraph 22 (c) of the affidavit of Sergio Caratti sworn 18 February 1975 and filed herein.

In the Supreme Court

Respondents' Evidence

No. 21 Second Affidavit of P. Forbes 18th June 1975

Such affidavit explains the nature of the transaction with Latec Investments Ltd.

18. After the said debenture and associated transactions were entered into, the operating body for the group was a partnership of companies which had accrued losses which partnership was called Caratti Bulldozing Co. (1967). Such an arrangement was of benefit to all companies in the group including Caratti Holding Co. Pty. Ltd

19. From August 1967 any cash which was available from the operating company or any of the farms in the Caratti group (including Caratti Holding Co. Pty. Ltd) was used to further develop and improve such farms (including the farms owned by Caratti Holding Co. Pty. Ltd).

20. It was agreed with Latec Investments Ltd that all such transfers of funds from and services rendered by the operating company would be shown in the books as transfers to Caratti Holding Co. Pty. Ltd in reduction of the debenture and then as loans by Caratti Holding Co. Pty. Ltd to the farming company concerned. Caratti Holding Co. Pty. Ltd became the company through which most inter company transactions were recorded. For accounting purposes this arrangement was also the simplest.

21. Such an arrangement was also of benefit to Caratti Holding Co. Pty. Ltd in that it was the owner of approximately 50% of the issued shares in Caratti Consolidated Pty. Ltd. The reduction of the amount owing under the said debenture reduced the liabilities of Caratti Consolidated Pty. Ltd increasing the value of the shares in that company.

22. After 31 July 1967 it was not possible for funds to flow back from the various farming companies to Caratti Holding Co. Pty. Ltd because of a dispute with Latec Investments Ltd regarding the overdraft of Caratti Holding Co. Pty. Ltd. No written agreement had been made in 1967 regarding the reduction of the overdraft of

In the Supreme Court

Respondents' Evidence

No. 21 Second Affidavit of P. Forbes 18th June 1975

Caratti Holding Co. Pty. Ltd of approximately $250,000. However I am informed by Sergio Caratti and truly believe that it had been orally agreed between one Malouf of Latec Investments Ltd and Sergio Caratti on behalf of Caratti Holding Co. Pty. Ltd that Latec Investments Ltd would agree to Caratti Consolidated Pty. Ltd taking over liability for the overdraft. Subsequently Latec Investments Ltd would not permit Caratti Consolidated Pty. Ltd to take over liability for the overdraft.

23. As a result, I advised Sergio Caratti not to operate the bank account of Caratti Holding Co. Pty. Ltd or to receive any further payments to Caratti Holding Co. Pty. Ltd other companies in the Caratti group because to do so would prejudice negotiations with Latec regarding the overdraft.

24. Now produced and shown to me marked "PF9" is a true copy of an agreement dated 30 June 1970 between Sergio Caratti and Latec Investments Ltd. I refer to clause 4 thereof.

SWORN by the Deponent)
at Perth in the said)
State this 6th)
day of June 1975)

P. FORBES

Before me,

Graham Young

A Commissioner of the Supreme Court of Western Australia for taking affidavits.

In the Supreme Court

Respondents' Evidence

No. 21
Second Affidavit of P. Forbes
18th June 1975

AFFIDAVIT OF HENRY MAXWELL KITSON

In the Supreme Court

Respondents' (Appellants') Evidence

No. 22
Affidavit of H.M. Kitson
23rd June 1975

I, HENRY MAXWELL KITSON of 33 Gardner Street Como, Company Director, MAKE OATH AND SAY:

1. In 1970 in my capacity as a Chartered Accountant I was a partner of Henry Rae & Court, Chartered Accountants, which firm had been asked by Sergio Caratti to advise him in his capacity as a Director of Caratti Consolidated Pty. Ltd and Caratti Holding Co. Pty. Ltd.

2. I respectfully seek leave to refer to paragraph 22 (e) of the affidavit of Sergio Caratti sworn 18 February 1975 a copy of which paragraph I have read. I was involved in the transactions referred to in the subparagraph.

3. I refer to the "informal meeting" at 67 Fauntleroy Avenue Redcliffe referred to in the said paragraph 22 (e). From my diary I am able to attest that in early June 1970 at the request of Sergio Caratti I attended a meeting at 67 Fauntleroy Avenue Redcliffe which I understood to be Sergio Caratti's home. Present at the meeting were members of Sergio Caratti's family who were all known to me. I knew that they were the shareholders of Caratti Holding Co. Pty. Ltd.

4. What Sergio Caratti swears that he said and did at such meeting as set out in the said paragraph 22 (e) is true and correct.

5. After Mr Caratti left the meeting I explained the proposed takeover of part of the operations of the Caratti group of companies by Landall Holdings Limited. I explained that:

(a) In October 1969 Caratti Australia Pty Ltd (which was a wholly owned subsidiary of Caratti Consolidated Pty. Ltd) had agreed to acquire or had acquired the whole of the land plant and equipment owned by Caratti Consolidated Pty. Ltd for the price of approximately $3.5 million. This sum had not yet been paid or secured.

(b) Landall Holdings Limited proposed to purchase the shares in Caratti Australia Pty. Ltd for a nominal sum.

6. I spent most of the meeting explaining the arrangements for payment by Caratti Australia Pty. Ltd to Caratti Consolidated Pty. Ltd of the sum of $3.5 million (or thereabouts) and the security therefor. I explained that Caratti Australia Pty. Ltd was to issue to Caratti Consolidated Pty. Ltd debenture stock to the value of $2 million. I explained the nature of debenture stock and the security of a floating charge over all assets of Caratti Australia Pty. Ltd and the right on default to appoint a receiver and manager. I explained that the $2 million was to be paid by instalments and I elaborated on the terms for payment.

7. I explained that there was to be a further payment by Caratti Australia Pty. Ltd to Caratti Consolidated Pty. Ltd of $1,150,000. Of this sum $1 million was to be paid to Landall Holdings Limited in payment for 1 million redeemable cummulative preference shares paid to $1.00 each. Such shares were to be redeemed over three years with the first redemption on 1 July 1973. The holders of the preference shares were also to be granted options over 666,666 ordinary shares of 50 cents each in Landall Holdings Limited for an exercise price of $1.50 per share.

8. I explained that there was to be a further payment of $350,000 not later than 30 September 1970.

9. I explained that interest was payable on the balance

owing from time to time.

10. The meeting lasted several hours. I remember a lot of questions being asked by those present mainly with regard to the security arrangements and the value of the preference shares.

11. I left the meeting with the impression that those present understood and also agreed to the proposals as I had outlined them.

SWORN by the Deponent)
at Perth in the said)
State this 23rd)
day of June 1975)

H.M. Kitson

Before me,

Riddell J.P.
Justice of the Peace

In the
Supreme Court

Respondents'
Evidence

No. 22
Affidavit of
H.M. Kitson
23rd June 1975

NO. 23

AFFIDAVIT OF ROBERT GARTON SMITH

In the Supreme Court

Respondents' (Appellants') Evidence

No. 23
Affidavit of R.Garton Smith
11th April 1975

I, ROBERT GARTON SMITH of 8 Viking Road Dalkeith in the State of Western Australia, Solicitor, MAKE OATH AND SAY:

1. I am an associate member of Messrs Muir Williams Nicholson & Co of Law Chambers Cathedral Square Perth Solicitors for the Respondents in this matter.

2. On Thursday 10 April 1975 I conducted a search of the Register at the Companies Office in respect of the Company Caratti Holding Co, Pty. Ltd.

3. The Register disclosures that on 19 July 1965 a Charge was registered (being Charge No. 1) in respect of the Company in favour of the Commonwealth Trading Bank of Australia. I inspected the Charge which is constituted by an equitable mortgage dated 30 July 1962 between the Company as mortgagor and the Commonwealth Trading Bank of Australia.

4. Clause E (2) of the said equitable mortgage says:

'The moneys hereby secured shall not only be payable on demand as aforesaid but also at the option of the Bank and notwithstanding any delay or previous waiver of the right to exercise such option shall immediately become payable without any demand or notice in each or any of the

following events:

(a) If a petition is lodged or an order is made or a resolution is passed for the winding up of the mortgagor or if any meeting be convened for the purpose of considering any such resolution'.

5. Clause E (3) of the said equitable mortgage says:

'At any time after the moneys hereby secured become payable or after this security shall have become enforceable the Bank or an authoirsed officer of the Bank may appoint in writing any person to be receiver of the mortgaged premises or any part thereof.....'

6. It is also said in the said equitable mortgage that the mortgage is security for 'certain cash credit accommodation' by the Commonwealth Trading Bank of Australia to the Company.

7. I am informed by Sergio Caratti and truly believe that the said equitable mortgage is still in force as security for a loan of approximately $100,000 from the Commonwealth Trading Bank of Australia to the Company.

8. The property effected by the said equitable mortgage is as follows:

'All and Singular the mortgagorsundertaking property and all its assets whatsoever and wheresoever both present and future including its uncalled capital for the time being being a fixed charge as regards all real and leasehold property uncalled capital engines machinery plant books of account securities bond and store warrants as therein described and the goods therein mentioned and being a floating security as regards all other assets of the mortgagor'.

9. I am of the opinion that if a provisional Liquidator is appointed in respect of the Company it is probable

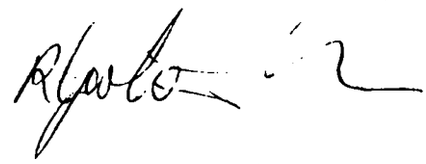
In the Supreme Court

Respondents' Evidence

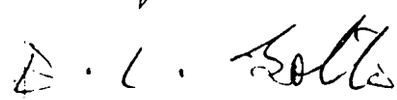
No. 23
Affidavit of R. Garton Smith
11th April 1975

that the Commonwealth Trading Bank of Australia will appoint a receiver in respect of all the property and undertaking of the Company under the said equitable mortgage to secure its said loan to the said Company and there will be no assets for a provisional Liquidator to seize. Moreover, such a course of action would severely prejudice the standing of the Company with the Commonwealth Trading Bank of Australia which would be detrimental to the Company and its shareholders generally.

SWORN by the said)
ROBERT CARTON SMITH)
at Perth this 11th)
day of April 1975)



Before me,



A Commissioner of the Supreme Court of Western Australia for taking Affidavits.

In the
Supreme Court

Respondents'
Evidence

No. 23
Affidavit of
R. Garton Smith
11th April 1975

NO. 24

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE BURT

In the Supreme Court

No. 24

Reasons for Judgment of Burt, J. 4th September 1975

This is a contributory's petition presented by Bernardo Zampatti, called in these reasons "Zampatti", on 3rd December 1974 for the winding up of a limited liability company named Caratti Holding Co. Pty. Ltd., in these reasons called "the company". Zampatti in the alternative seeks an order under s.186 of the Act. Sergio Caratti was as will appear the "founder" of the company and he was joined as a respondent to the petition at the hearing; he is referred to in these reasons as "Caratti".

The prayer in the petition is in the following terms:

"1. That Caratti Holding Co. Pty. Ltd. be wound up by the Court under the provisions of the Companies Act 1961;

2. That it be declared that Article 32 of the Articles of Association is void and of no effect or alternatively that the Company by itself, its directors and servants and agents be restrained from registering or purporting to register any transfer or purported transfer of shares held by the petitioner in the capital of the company pursuant to Article 32 without the consent in writing of the petitioner first had and received;

3. Alternatively to the first order sought herein, that the second respondent (Caratti) be ordered to purchase from the petitioner shares held by the petitioner in the capital of the company at such price as to this honourable Court seems just;

4. Alternatively to the first and second orders sought herein, either that the capital of the company might be reduced by the payment to the petitioner of an amount equal to 1,500 out of 15,002 parts of its shareholders' funds as and by way of consideration of the cancellation of the said 1,500 shares held by the petitioner, or that it be declared that Article 32 of the Articles of Association does not grant to the second respondent the right to obtain the transfer of the shares held in the capital of the company by the petitioner unless the second respondent shall first have caused the company to declare, distribute and pay by way of divident the whole of its distributable reserves existing at date of exercise;

5. Such further or other order as to this honourable Court may seem just."

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;

(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.

It is a long and complex story, the facts as I find them being as follows :

During the years 1953 to 30th June 1960 Caratti carried on the business of bulldozing and earthmoving contractors in partnership with his wife Maddeline Caratti, trading under the firm name of "S. & M. Caratti" and W.A. Bulldozing Co". During the year 1st July 1960 to 30th June 1961 Caratti carried on the same business in partnership with his wife and with himself as trustee for his two sons John Michael Caratti and Allen Bruce Caratti pursuant to a deed of partnership dated 29th July 1960. In terms of that agreement Caratti was the managing partner and "in the event of any dispute between the partners as to management, control, direction or policy of the partnership business, his decision shall be binding and conclusive on the partners".

The company was incorporated on 6th June 1960 with a nominal capital of $200,000 divided into 100,000 shares at $2 each. The subscribers to the Memorandum of Association were Caratti for one Life Governor share, and Frederick Lawley Edwardes for one ordinary share.

By Clause 4 of the Memorandum of Association: "The capital of the company is £100,000 divided into 100,000 shares at £1 each with the power to increase or reduce the said capital and to issue any part of its capital, original or increased, with or without any preference priority or special privilege or subject to any postponement of rights or to any conditions or restrictions and so that unless the conditions of issue shall otherwise expressly declare every issue of shares whether declared to be preference or otherwise shall be subject to the power hereinbefore contained."

The Articles of Association contain the following articles:

Article 6 : "The share for which Sergio Caratti (hereinafter called "the Founder") subscribes the Memorandum of Association of the company shall be numbered 1 and is called "the Life Governor's share". The Founder whilst he is the registered holder of the Life Governor's share and on his death his personal representative whilst the Life Governor's share is registered in the name of the Founder or in the names of his personal representatives shall be entitled to have and exercise the special rights and powers in respect to the Life Governor's shares conferred by these Articles SUBJECT ALWAYS to the provisions of any article as to special rights and powers which are expressly stated to be only exercisable during the lifetime of the Founder. On the death of the Founder his personal representative shall be deemed to hold the Life Governor's share until they shall sell it or transfer it to the beneficiary entitled thereto under the Founder's Will or in the distribution of his estate, and wherever in these Articles it is stated that rights may be exercised by the personal representative of the Founder, such articles shall be read and construed subject to this Article. Thereafter the rights conferred by these Articles in respect of the Life Governor's share shall terminate and it shall thereupon no longer retain its identity

as the Life Governor's share and shall thereafter rank as an ordinary share".

Article 32: "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 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 moneys 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".

Article 65: "Sergio Caratti shall be the Governing Director of the Company and shall hold that office until he resigns or dies or ceases to hold the Life Governor's share and whilst holding office by virtue of this provision shall be called Governing Director".

Article 67: "The government and control of the Company shall be vested in the Governing Director and he may exercise all the powers, authorities and discretions hereby expressed to be vested in the Governing Director, and all those expressed to be vested in the Directors by these Articles".

It will be seen that Caratti held an entrenched position of control in both the partnership and the company, although it is to be noted that the partnership deed conferred upon him no power similar to that conferred upon him by Article 32. It can also be observed in passing that Article 32 was inserted in the Articles, in the words of Caratti, so "that in the event of divorce or family

disagreements and similar matters, I should have the power to acquire the shares of any member of the family who was a shareholder in the company". It was not inserted in the articles to reflect any agreement or understanding as between Caratti and Zampatti, it not being at that time contemplated that Zampatti would ever become a shareholder. The company when incorporated was in the strict sense a "family" company and as Caratti expressed it the power contained in Article 32 was conferred upon him primarily to meet a situation which would be created upon some matrimonial breakdown or disagreement within the family. As he puts it in his affidavit "I did not appreciate the implications of Article 32 so far as the Petitioner's shares were concerned".

Zampatti and Caratti are cousins. The former migrated to Australia from Italy in 1949 and in 1955 he was employed by the partnership as a bulldozer driver. For some time immediately prior to 1st July 1961 he was the manager of that part of the partnership business then being carried on in the Mt. Barker area and he was living at Mt. Barker. The Mt. Barker branch was a very important and significant part of the partnership business and Zampatti as its manager was a key man.

It is common ground when expressed in general terms that late in 1960 or early in 1961 Caratti suggested to Zampatti that he, Zampatti should acquire a 10 per cent interest in the business. The company had then been formed but was not operating and the suggestion put to Zampatti is to be understood, and by both Caratti and Zampatti it was understoood, as meaning that Zampatti should acquire a 10 per cent interest in the business as it was then being carried on by the partnership. By an amendment made to his petition Zampatti alleges that a firm agreement was then reached between himself and Caratti, as follows :

1. That Zampatti should become a 10 per cent partner in the bulldozing and eathmoving business operated by Caratti and others;
2. That Zampatti should take up shares to give him a 10 per cent shareholding in the company which company had been incorporated on 6th July 1960; and
3. In consideration of the interest in the partnership and for his shares in the company the petitioner

would forego bonuses and arrears of wages.

It is then pleaded that it was an implied term and condition of that agreement that there would be "no limitation or inhibition on the petitioner's absolute ownership and control of the 10 per cent interest or 10-per cent shareholding", and that pursuant to that agreement "and upon its inducement on or about 1st July 1961 Zampatti became a 10 per cent partner and on 21st August 1961 he applied for and was allotted 1,500 shares in the capital of the Company". 10

As to that matter, my finding is that there was no concluded agreement reached at Mr. Barker. At that time it was no more than a suggestion put forward by Caratti that Zampatti take a 10 per cent interest in the business, and Zampatti then expressed his willingness to do so. It went no further than that. No terms were agreed and specifically no mention was made of Zampatti becoming a shareholder in the company. As to that there is now no dispute. As Zampatti told me upon his cross-examination:

> "It (the company and his becoming a shareholder in it) was not discussed at Mt. Barker." 20

The suggestion made at Mt. Barker by Caratti to Zampatti was not motivated by generosity nor by family considerations. Nor was it made as a reward for past services. Zampatti was as I have said, a "key" man in Caratti's business and Caratti's idea was, in my judgment, to lock him in.

Caratti's financial adviser at this time was a man named A.B. Pearce, an accountant practising under the name of "A.B. Pearce & Co.". He was the accountant for the 30 Caratti partnership and the secretary of the company.

On 2nd August 1961 a meeting was held in Perth at the office of A.B. Pearce & Co. Caratti, Zampatti, Pearce and Edwardes attended. Zampatti's evidence is that he attended that meeting "to sign up the partnership" and that "we discussed the partnership", and that no reference was then made to the company or to Zampatti taking shares in the company. He says that he did not at that time sign an application for shares and did not know that he had become a

shareholder in the company, and indeed he had no knowledge of the existence of the company until 1964.

Caratti on the other hand says that: "At that meeting the basis on which the petitioner was to become a 10 per cent partner in the partnership and a shareholder in the company was discussed. The function of the company as the holding company of the assets used by the partnership was explained to the petitioner in my presence. The meeting on 2nd August 1961 was a meeting of the company. At the meeting verbal agreement was reached with the petitioner on the financial terms upon which he would become a 10 per cent partner in the partnership trading as 'S. & M. Caratti' and 'W.A. Bulldozing Co.' and a shareholder in the company." Caratti then makes reference to the minutes of the meeting held on 2nd August 1961 and of those he says that "the minutes correctly record what was agreed to by Mr. Zampatti and that he understood the nature of such an agreement".

My finding upon the conflict thrown up by that evidence is that the central matter discussed at the meeting held on 2nd August was not the issue of shares to Zampatti in the company but the admission of Zampatti as a partner in the partnership of "S. & M. Caratti" and "W.A. Bulldozing Co." It was this partnership which then carried on the business. This was the matter of immediate importance, and I accept Zampatti's evidence that in his understanding that was all that he was then concerned with. As a fact Zampatti was then, and as from 1st July 1961, admitted to that partnership with a 10 per cent share both as to profits and capital, and the other members were the shareholders in the company holding, as will appear, in like shares, that is to say:

Caratti personally, 22½ per cent,
Maddeline Caratti, 22½ per cent,
Caratti as trustee for his son John, 22½ per cent,
Caratti as trustee for his son Allen, 22½ per cent.

Caratti was to be the managing partner of the partnership business but it was not a term of the partnership agreement that Caratti should have any right to acquire the shares of any other partner in the terms of Article 32 of the articles of the company or at all.

In the Supreme Court

No. 24

Reasons for Judgment of Burt, J. 4th September 1975

I also find that at or before that meeting it was decided that the company would as hereafter appears purchase the assets of the partnership and lease them back. Zampatti was not a party to that decision. It was made by Caratti and by Pearce, but having been made, and to give effect to the agreement that Zampatti would have a 10 per cent interest in the business, it was decided to issue to Zampatti 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. To achieve that result 13,500 shares were to be issued to the members of the Caratti family and 1,500 shares were to be issued to Zampatti. The minutes of that meeting were put in evidence and they record that 1,500 £1 shares were to be issued in the company to Zampatti and "that the shares to be allocated to the Caratti Family Group to be limited to £13,500 and that the sale of shares of Zampatti be controlled in accordance with the Articles of Association", and it was also there recorded "that all the assets of the Caratti Family be purchased by the Company in consideration for the payment of £13,500 £1 shares for their respective interest and that any balance of money due to be credited to the respective loan accounts" and further "that B. Zampatti be allotted 1,500 shares in part payment of bonus moneys due to him as outlined above, and for future services to be given a similar right to contribute up to not more than 10 per cent of the issued capital of the Company". There was also put in evidence a "resolution of governing director under Article 96" signed by Caratti as follows: "Issue of shares: In order to carry out the resolution carried at a meeting held on 2nd August 1961 the following fully paid-up shares be and are hereby allotted:

3375 ordinary shares	...	Sergio Caratti
3375 ordinary shares	...	Maddeline Caratti
3375 ordinary shares	...	Sergio and Maddeline Caratti as trustee John M. Caratti(minor)
3375 ordinary shares	...	Sergio and Maddeline Caratti as trustee Allen B. Caratti(minor)
1500 ordinary shares	...	Bernardo Zampatti."

That resolution is dated 22nd August 1961 and preceding it and dated 21st August 1961 is a copy letter signed by Zampatti,

omitting formal parts, in the following terms:

> "I hereby apply for 1,500 ordinary shares at £1 each. I agree to accept the said shares and to be bound by the Memorandum and Articles of Association of the company."

Zampatti told me that he had no recollection of having signed that document. Nevertheless it does bear his signature and although I believe him when he says that he has now no recollection of having signed it, I find that he did, and that he did so on or about the date that it bears. Furthermore, and notwithstanding the minute that was put in evidence, I believe Zampatti when he says that he did not then understand that 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 per cent interest in Caratti's business. He was not concerned to know whether it was to be carried on by the partnership or by a company. These comments apply very much to Caratti as well. He had no, and still has no head for these things. As he says as at 1975: "I am still unable to analyse and understand the balance-sheet and have to rely on advice". The advice at that time came to him from Pearce, and in my opinion the decisions and subsequent decisions of like kind which as will appear were made, were made in fact by Pearce, and they were made for the most part for tax reasons. The minutes to which I have referred are a record not of any consensus but of Pearce's decisions.

Thereafter and for accounting purposes as from 30th June 1961 until 1st July 1964 the business was carried out by the partnership, its plant, land and buildings having been sold by it to the company for £174,262. Thereafter the partnership hired these assets from the company. No money passed. The purchase price was posted to a loan account. In 1964 the partnership sold its entire business to the company, the purchase price being the difference between debtors and creditors amounting to $118,00 which was payable over ten years. Nothing was paid for good will. The price was paid, as Mr. Shepherd told me, by "journal entry between the holding company and the partnership. No cash passed." For the year 1st July 1964 until 30th June 1965 the business was then carried on by the company, and

Zampatti was employed by the company. To that point of time no meeting of shareholders of the company had been held although numerous informal discussions were had between Caratti and Zampatti relative to the affairs of the company and to the purchase by the company of the partnership business. Whatever was done was done by Caratti on the advice of Pearce and it was done by Caratti upon his understanding that he was totally in charge of the business affairs of both the company and of the partnership. He was not concerned with the legal source of his power, that is to say, whether it came from the articles of the company or from the partnership agreement. It is however important to appreciate that it was never suggested that any change made in the manner in which the business was to be carried on, that is to say, whether it was to be carried on by the partnership or by the company or by the partnership hiring its equipment from the company or otherwise, in any way altered Zampatti's standing in the business. Zampatti's 10 per cent share in the business remained unaffected. Each, Zampatti and Caratti understood that to be the case. Each change was motivated entirely by tax considerations.

In the year ended 30th June 1962 the company sustained a small loss - £10.15.9; for the year ended 30th June 1963 it made a profit of £4,343.3.8 from which it declared a dividend amounting in all to £2,925. Zampatti's dividend amounted to £272.10.0 and this was credited to his loan account. For the year ended 30th June 1963 the company sustained a loss of £97.17.0. For the year ended 30th June 1964 which was the year during which it carried on the former business of the partnership, it sustained a loss of £7,278.5.2.

In June 1965 the company acquired the issued capital of Glenfalloch Contractors Pty. Ltd. - a tax-loss company. The bulldozing business thereafter and during the years 1965, 1966 and 1967 was carried on by that company, the name of it having been changed to Caratti Bulldozing Co. Pty. Ltd. That company leased its plant and machinery from the company and Zampatti was employed by it. The balance-sheet of the company as at 30th June 1967 shows a debt owing by

it to Caratti Bulldozing Co. Pty. Ltd. of $667,000 which it is fair to assume represents the trading profit earned by Caratti Bulldozing Co. Pty. Ltd. during the years 1966 and 1967 and paid by it - loaned by it - to the company.

By 1967 the tax losses of Caratti Bulldozing Co. Pty. Ltd. had, it seems, been "absorbed" and in that year and pursuant to an arrangement made between the company and Latec Investments Ltd. a company known as Caratti Consolidated Pty. Ltd. - hereinafter referred to as "Consolidated" - was incorporated in the A.C.T. The shares in this company were held 50 per cent by the company and 50 per cent by Latec. The assets of the company being land, plant and the shares in Caratti Bulldozing Co. Pty. Ltd. were then sold by it to Consolidated for $5,230,000, reaslising a capital profit of about $4,500,000. This debt was secured by a debenture dated 31st July 1967, the "lenders" being the company John White Constructions Pty. Ltd., Caratti personally and Delbar Investments Pty. Ltd. The debt was payable on demand and free of interest. Thereafter Consolidated carried on the business through a number of tax-loss companies made available by Latec. These companies traded in partnership under the name "Caratti Bulldozing Co. (1967)".

Caratti says that he explained this transaction to Zampatti but I am quite confident that it was not fully understood by either of them. What was done was done on the advice of Pearce and no doubt it was his scheme. Thereafter and in the manner to be described moneys were year by year paid to the company by Consolidated in reduction of the debt secured by the debenture, and those moneys again, oneassumes, represented something less than one-half of the trading profits made by the tax-loss companies. The amount so paid in the years 1968, 1969 and 1970 amounted to about $2,220,000. The total amount received by the company in this way including the moneys received by it from Caratti Bulldozing Co. Pty. Ltd. during the years 30th June 1966 to 30th June 1970 inclusive was $2,890,000. Some of this was used to take up shares in Consolidated, and the balance was treated in the books of the company as a capital reserve. It was in fact the partial realisation of the capital profit to which I have referred. As at

30th June 1970 the debenture debt stood at $3,008,968 and the shares taken up by the company in Consolidated at $628,431. As at 30th June 1974 the debt was $1,310,079.

During the years 1963 and 1964 Caratti incorporated a number of proprietary companies, most of them two-dollar companies, and in each case the share capital was owned by Caratti and by members of his family. Zampatti had no interest in these companies except that until some time in 1971 the company owned the shares in Albany Fort Freeholds Pty. Ltd. The companies referred to and the date of their incorporation were as follows:

Albany Fort Freeholds Pty. Ltd., 31st July 1963,
Caratti (Bullfinch) Pty. Ltd., 20th May 1964,
Caratti (Chapman Valley) Pty. Ltd., 20th May 1964,
Caratti Freeholds Pty. Ltd., 20th May 1964,
Caratti (Kent River) Pastoral Co. Pty. Ltd., 6th August 1964,

and in addition he had on 27th June 1958 incorporated Delbar Investments Pty. Ltd. These companies are collectively referred to as "the Caratti group".

The manner in which Consolidated repaid to the company the debt secured by the debenture appears to have been as follows:
Development work would be carried out by Consolidated or by Caratti Bulldozing (1967) for one or other of the Caratti family companies and this, one assumes, would be done by Consolidated or by Caratti Bulldozing (1967) at the request of the company, which is to say, at the request of Caratti. The work would be valued and the amount would be deducted from the debt secured by the debenture and would appear in the books of the company as a debt owed to it by the family company concerned. The expenditure would of course in many instances reduce the income tax liability of the Caratti family company. In addition the company purchased livestock, paid wages and carried out capital works for these companies, the money so spent being shown in its books as a loan. It also made substantial advances, shown as such to Delbar Investments Pty. Ltd. The details to varying dates can be seen in Exhibits 106 to 110. The debts were to be free of interest and payable, one assumes, on demand. In the result for tax reasons and by design the company made

substantial capital gains but no trading profit. This appears clearly from Exhibit 92. Balance sheets since 1972 show some trading profit but in terms of percentage it is minimal. The moneys owing by each family company increased more or less year by year.

the amounts owing as at 30th June 1974 being as follows:

Albany Fort Freeholds Pty. Ltd.	..	$49,908.00
Caratti (Bullfinch) Pty. Ltd.	..	$209,654.00
Caratti (Chapman Valley) Pty. Ltd.	..	$218,261.00
Caratti Freeholds Pty. Ltd.	..	$40,030.00
Caratti (Kent River) Pastoral Co. Pty. Ltd		$16,638.00
Delbar Investments Pty. Ltd.	..	$511,755.00

The total indebtedness of the Caratti family group to the company as at 30th June 1974 was $1,881,067. The details appear in Exhibit B to the affidavit of Golding sworn on 20th June 1975 - Exhibit 58. In addition, it seems, Caratti had the company lend money to the partnership which was then spent in paying partners' income tax, in meeting debts of members of the Caratti family and in speculation by Caratti on the Stock Exchange. The details were never explained. The amount said to be owing on 30th June 1974 was $853,859. Of recent times it is said that Caratti has repaid to the partnership $761,805.

It now becomes necessary to retrace one's steps in point of time. By 1969 Caratti decided that Consolidated should "go public", as they say. To this end, Caratti Australia Ltd. was incorporated on 30th September 1969. This idea was not proceeded with and on 29th October the name of that company was changed to Caratti Australia Pty. Ltd. and the company was converted to a proprietary company. The company was a wholly owned subsidiary of Consolidated. On 1st October 1969 land and buildings and shares in the subsidiaries of Consolidated and plant and equipment being portion of the assets of the bulldozing and earthmoving business were sold by Consolidated to Caratti Australia Pty. Ltd. for $3,517,574. By a deed dated 30th June 1970 between Consolidated as vendor and a company named Landall Holdings Ltd. as purchaser, Landall agreed to buy all the

issued capital in Caratti Australia Pty. Ltd. for $2.50 per share. It was a condition of that agreement that Consolidated had transferred to Caratti Australia Pty. Ltd. the assets previously mentioned. It was also a term of this somewhat complex arrangement that Landall would lend Caratti Australia Pty. Ltd. the sum of $500,000 to be secured by a debenture to be granted by Caratti Australia Pty. Ltd. to Landall. Caratti says that in May or June of 1969 these transactions were explained in detail to Zampatti and that Zampatti understood what was being done and that he concurred in it.

I find that this explanation was made although it was not made by Caratti personally but by a Mr. Kitson who was a chartered accountant. But whether in fact it was understood by Zampatti I am unable to say but I think it somewhat unlikely.

The transaction with Landall very quickly ran into trouble and early in 1971 Landall appointed a receiver and manager of Caratti Australia. It did this pursuant to the power conferred upon it by the debenture to which I have referred. Landall, so it seems, took proceedings against both Consolidated, and Caratti personally. This litigation was settled in September 1971. The terms of the settlement do not appear to matter except to say that assets - real estate, plant, debentures and stock and cash - were returned to the company. It also resulted in Zampatti who had been employed by Caratti Australia losing his job. He set up in business as a contractor on his own account and occupied, and since that time he has continued to occupy, land belonging to the company and for which he has paid no rent. From mid-1971 onwards Zampatti was trying without success to obtain access to the accounts of the company and of the Caratti family companies so that he could calculate or form an opinion as to the value of his "10 per cent interest in the Caratti group". In or about March 1973 he issued a writ, the purpose of which was to force Caratti to produce those accounts. The accounts of the company for years 1961 to 1971 were supplied in May 1973 and the balance sheet and accounts for the year ended 30th June 1972 was supplied in December 1973. The action was then discontinued.

During 1972 various discussions took place between Caratti and Zampatti, the purpose of which was to put a value on Zampatti's interest in the Caratti group. In the course of this Caratti made an offer to purchase 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. It was the fact, although whether Zampatti appreciated it or not I do not know, that as at the year ended 30th June 1972 shareholders' funds stood at $4,778,192. The details appear in Exhibit 92.

On 26th March 1973 Zampatti issued a writ seeking a dissolution of the partnership and accounts. The action was heard and judgment upon it was reserved on 26th November 1974. On the following day Caratti gave notice to Zampatti pursuant to Article 32 of the company requiring him to transfer his shares in the company to him for $3,000. He did this, he says, "because I wanted to bring matters to a head". If purpose is relevant to the exercise of the power, as generally it is, my opinion would be that he gave the notice to prevent the matter coming to a head. For some time he had been in dispute with Zampatti as to the value of Zampatti's interest "in the business", that is to say, in the partnership and in the company considered as one, and he had reason to anticipate that Zampatti, having taken proceedings to wind up the partnership, was about to take proceedings to wind up the company. This being so he gave the notice for two closely related and overlapping purposes, namely -

(a) to destroy Zampatti's standing to present the petition to wind up the company, and
(b) to solve his difference with Zampatti as to the value of his 1,500 shares in the company by compulsorily acquiring them for $3,000.

Caratti says inter alia that Zampatti was a competitor of the company and that it was in the interests of the company as a whole that he should cease to be a member. As to that, my finding is that he was not a competitor and further that Caratti did not give the notice for that reason.

In the Supreme Court

No. 24
Reasons for Judgment of Burt, J. 4th September 1975

This petition was issued on 3rd December 1974. The transfer of Zampatti's shares has not been registered and the company is presently restrained from doing so, hence Zampatti is still the registered holder of 1,500 $2 shares in the company.

I should now deal more specifically with contentions put forward and with allegations of fact made by Zampatti in his petition.

It is in the petition pleaded that it was an implied term or condition of the agreement pursuant to which Zampatti became a shareholder in the company that there would be "no limitation or inhibition on the petitioner's absolute ownership and control of the ... 10 per cent shareholding". See paragraph 24B of the petition.

Zampatti applied for the shares which were issued to him, by the letter to which I have referred, and he agreed to be bound by the Memorandum and Articles of Association of the company. In the face of that finding it immediately appears that by his pleading and as between himself and the company he is endeavouring to raise an implication which is inconsistent with Article 32, and hence inconsistent with the express agreement entered into between himself and the company. This he cannot do, and although I find it to be the fact that he did not - and in making this finding I have not overlooked the wording of the minute of 2nd August 1961 - when he applied for his shares have any knowledge of Article 32, he is nonetheless, assuming that article to be valid, as between himself and the company, bound by it. As between Zampatti and Caratti personally the position was different. As between them the agreement simply was that Zampatti would be admitted into the family business without any regard to the manner in which it 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. 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.

By paragraph 41 of the petition Zampatti contends that Article 32, if valid and within power, is conditioned by implication, the condition being that the power thereby granted to Caratti cannot be exercised until after all profits earned by the company have been distributed to its members. I can see no basis for that implication.

By paragraphs 57, 58 and 59 of the petition Zampatti alleges that between 30th June 1967 and 30th June 1972 Caratti withdrew moneys from the company and although those withdrawals from the company were dealt with in the company's books as being a loanmade by the company to the partnership, it was the fact that the money so withdrawn was used by Caratti for Caratti's own purposes and for the purposes of the members of his family. I find this as a fact to have been the case. The amount involved was approximately $800,000 - the precise amount would not seem to matter.

By paragraph 60 of his petition Zampatti alleges that Caratti used company moneys for the purpose of developing the business of and increasing the capital value of the assets of his various family companies. I have dealt with this in my reasons and I find the allegations, with a reservation as to Kent River Company, to be true in fact. The moneys appear in the books of the company as free of interest loans and as I have said the loans are apparently repayable on demand.

Expressed generally, my finding is that at all times Caratti recognised that Zampatti had a 10 per cent interest in "the business" but otherwise he carried on as if he were its absolute owner, and he dealt with its assets and used its moneys as he liked and without any regard being had to the rights of shareholders in the company. He was not concerned to know how the moneys which he used were dealt with in the books of the company. He simply didn't apply his mind to such things. He had left those matters to Pearce. At all times and whatever the legal structure may have been, he simply regarded it as being his business, over which he had absolute control, although he did at the same time recognise that Zampatti had a 10 per cent

interest in it.

Many submissions were made to me upon the validity of Article 32 and upon the impact upon these proceedings of the notice given under it by Caratti to Zampatti on 27th November 1974 and by which he appointed 10th December 1974 as the date upon which the sale, so called, was to be carried into effect. Anticipating the argument, to which I will refer, put forward by the company and by Caratti, it was contended on behalf of Zampatti that the article was, in the terms of the prayer in the petition, "void and of no effect." The reason for this was said to be that a company cannot issue shares with special rights attached to them unless the rights are created by, or in the exercise of a power to be found within the Memorandum of Association. No authority in support of that proposition was cited and it is a submission which I reject. Of course rights attaching to shares may be entrenched in the memorandum but it is enough that the memorandum states the amount of the capital and the number of shares into which it is divided - (Section 18(1)(c)) - leaving the rights of the shareholders in respect of the shares to be regulated by the articles. This in my understanding is well established and does not call for citation of any authority.

Then it was said that an article in the terms of 32 could not confer upon Caratti or upon the company the rights which in terms it purported to confer. This was said to be so for two reasons. In the first place it was said that Section 33(1) of the Act constituted the articles an enforceable contract between its members and the company but not as between or among its members inter se, and hence Article 32 did not confer upon Caratti any right enforceable by him as against Zampatti. The extent to which articles can bind one member contractually to another is a matter of long-standing debate, but the weight of authority seems clearly to establish that they do have that effect, particularly when the articles confer rights on members by way of pre-emption or otherwise to acquire the shares of another member. Borland Trustee v. Steel Bros. (1901) 1 Ch. 279, and Rayfield v. Hands (1960) Ch. 1; (1958) 2 W.L.R. 851, and Halsbury, 4th Edn., Vol. 7, para. 399. It may be, as Gower suggests - Modern Company Law, 3rd Edn. at p. 263 - merely a question of parties which if so

would make the debate for present purposes unnecessary.

In the second place it was said that the articles cannot as against the company or as against another member confer upon a shareholder rights in some capacity other than that of a shareholder. That as a general proposition is now well established, Hickman's case, 1915, 1 Ch. 881 now being regarded as the leading authority although by no means the authority first in time. The working out of the time-honoured expression "in his capacity of member" has caused much difference of opinion, as is apparent from the academic and textbook reaction to the decision in Rayfield v. Hands (above). The principle itself however is well established, but the article here under consideration does not in my opinion offend against it. The rights conferred by it on Caratti are conferred upon him "whilst he is the registered holder of the Life Governor's share" and they are in my opinion conferred upon him in his capacity of shareholder or member. The precedents in Palmer - 16th Edition, Forms 354 and 355 - proceed upon this assumption.

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 and upon the terms set out, and in terms of power his capacity to achieve this end is aided by Articles 65 and 66.

From this position it was argued by Caratti and by the company that even if it be held that Caratti had as a director and indeed as the sole director of the company acted in the affairs of the company in his own interests rather than in the interests of the members as a whole or in any other manner that appears to be unfair and unjust to other members, and even if it be held - without regard to Article 32 - that it is just and equitable that the company be wound up, and even if it be held that the affairs of the company have been conducted and as at the date of the presentation of the petition were being conducted in a manner oppressive to Zampatti, a winding up order should not be made, and this because Caratti having made a request pursuant to Article 32 Zampatti was "bound ... to sell and

transfer his shares" to Caratti, and this being so, Zampatti was no longer a contributory and so had lost standing. With this I would not agree. After the notice had been given by Caratti and before the day appointed by Caratti upon which the sale was to be carried into effect, that date being 10th December 1974, this petition was presented, and the winding up commenced. The shares have not been transferred. Pending the determination of these proceedings and by reason of the injunction confirmed by the Full Court on 19th May last, no transfer can be registered, and if a winding up order is made, no transfer can be registered without an order of the Court - Section 227(1) of the Act. So Zampatti remains a holder of fully-paid shares in the company and so remains a contributory.

Then it was said that whether Zampatti had lost standing or not, he was still in the terms of Article 32 "bound to sell and transfer his shares" to Caratti "in consideration of the payment of a sum equal to the capital paid upon his said shares". This being so, it was said that even if it should turn out that the transfer of the shares was never registered and never can be registered, Zampatti has ceased to be the owner of the shares at equity and hence has no interest in the winding up because anything which came to him as the result of the winding up he would hold for Caratti. This being so, Zampatti, it was said, has no tangible interest in a liquidation and hence it cannot be just and equitable on his petition to order a winding up. And if this position is reached, it was then contended that an order could not be made under s.186 - re Bellador Silk Ltd. (1965) 1 All E.R. 667.

I would agree that an agreement to sell shares made for value if specifically enforceable will create rights in equity as between the buyer and the seller and will operate so that the buyer of the shares becomes the owner of them at equity - Musselwhite v. Musselwhite & Son Ltd. (1962) Ch. 964. And it may be that if such an agreement is entered into after the commencement of the winding up and cannot without leave of the court be executed by the

registration of a transfer (Section 227(1) of the Act) and hence cannot be specifically enforced, it may still as between the parties create rights at equity - Barges case (1868) L.R. 5 Eq. 420 - but 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 pp.401-402, per Fullagar J. And if it did, and if for that reason it could be said not to be just or equitable to wind up the company, it would not in my opinion follow that an order would not or should not be made under s.186(2)(b), the power under that section being one which may be exercised not only - as is the case under s.210(2)(b) of the English Act - 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". This provision appears to be an adoption of the recommendation of the Jenkins Committee.

In my opinion the petitioner has on the facts established a ground for winding up under both section 222(1)(f) and 222(1)(g) 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.

Having reached those conclusions I will, as I indicated at the hearing of the petition, order that the matter stand adjourned for seven days so that the parties might consider their position, and I will then hear submissions as to the nature and the terms of the order to be made. Upon the further hearing counsel may see fit to make submissions to me upon the application to the facts found of s.225(3) of the Act.

In the
Supreme Court

No. 24

Reasons for Judgment of Burt, J.

4th September 1975.

NO. 25

ORDER OF THE HONOURABLE MR JUSTICE BURT ON HEARING OF PETITION

In the Supreme Court

No. 25

Order of Burt J. 19.9.75

BEFORE THE HONOURABLE MR. JUSTICE BURT
THE 19TH DAY OF SEPTEMBER, 1975

UPON THE PETITION of BERNARDO ZAMPATTI a contributory of the abovenamed company on the 3rd day of December 1974 preferred unto the Court and upon hearing Mr. C.H. Smith, one of Her Majesty's Counsel, with him Mr. C.J.L. Pullin for the petitioner and Mr. D.K. Malcolm with him Mr. R. Garton Smith for the Company and upon reading the various affidavits filed herein:-

1. The Court being of the opinion that an order should be made under Section 186(1)(b) of the Companies Act 1961 doth order that all further proceedings on the petition be stayed upon condition that the orders hereinafter set forth in paragraphs 2 and 5 of this order be implemented.

2. The Court doth order and direct:

A. That the second respondent purchase the 1,500 shares held by the petitioner in Caratti Holding Co. Pty. Ltd. (hereinafter referred to as "the Company") at a sum to be certified by the Master of this Honourable Court such sum being the value of the shares ascertained upon enquiry by the Master in manner hereinafter set forth.

B. That the Master enquire into and ascertain the value of such shares as at the date of presentation of the petition herein and for the purpose of such valuation

(i) Article 32 of the Articles of Association of the Company shall be disregarded.

(ii) It shall be deemed that the loans outstanding at the aforesaid date made by the Company to any of the following namely:

Albany Forts Freeholds Pty. Ltd.

Caratti (Bullfinch) Pty. Ltd.

Caratti (Chapman Valley) Pty. Ltd.

Caratti Freeholds Pty. Ltd.

Caratti (Kent River) Pastoral Co. Pty. Ltd.

Delbar Investments Pty. Ltd.

W.A. Bulldozing Co.

are recoverable in full on demand by the Company.

(iii) The petitioner have liberty to apply with respect to loans to any other persons, firms or companies.

C. That the Master also enquire into and take an account of all rents loans and other moneys due from the petitioner to the Company as at the date of such enquiry and account.

In the Supreme Court

No. 25
Order of Burt J.
19th September 1975

D. That pending the purchase of such shares by the second respondent in the Company in manner hereinafter set forth or until further order:

(i) The second respondent charge the shares in the Company held by him absolutely in favour of the petitioner to secure the payment of the purchase price.

(ii) The Company and the second respondent be restrained from selling or otherwise disposing of any of the assets of the Company

otherwise than in the ordinary course of the businesses of farming and earthmoving carried on by the Company

(iii) Notwithstanding anything to the contrary in the Articles of Association of the Company or as required by the shareholders of the Company in general meeting the second respondent shall not exercise any of the powers vested in him as Governing Director of the Company but shall remain as an ordinary director and subject to their consents being obtained the following and only the following shall also be directors of the Company, namely:

Frank Valentine Bentley Hillman (who shall be Chairman); and the petitioner or his nominee in writing.

(iv) The directors of the Company be directed not to seek to recover any loans made by the Company to the persons or firms named in subparagraph B(ii) hereof.

(v) The second respondent be restrained from exercising the powers contained in Article 32 of the Articles of Association of the Company as against the petitioner.

(vi) The Company be restrained from receiving any consideration moneys pursuant to Article 32 of the Articles of Association of the Company in respect of the petitioner's said shares and from otherwise exercising any of the powers contained in such Article in respect of such shares.

E. (i) The second respondent shall pay to the petitioner the purchase price of the petitioner's shares as certified by the Master within the following period whichever is applicable:

In the Supreme Court

No. 25

Order of Burt J. 19th September 1975

(a) if the amount certified is less than $20,000, 10 days;

(b) if the amount certified is $20,000 or more but less than $50,000, 28 days, but in any event if the sum so certified exceeds $50,000 the sum of $50,000 shall be paid within 28 days, such sum to be in reduction of the amount certified;

(c) if the amount certified is $50,000 or more but less than $100,000, the balance of the amount certified shall be paid within 40 days;

(d) if the amount certified is $100,000 or more but less than $200,000 the balance of the amount certified shall be paid within 60 days;

(e) if the amount certified is $200,000 or more the balance of the amount certified shall be paid within 90 days.

(ii) If the second respondent shall not have paid to the Company the sum referred to in paragraph 2.E(iii) the petitioner shall pay to the Company such sum as the Master finds due by the petitioner to the Company at the time when he delivers to the second respondent the executed unstamped registerable transfer referred to in paragraph 2.E(iv).

(iii) The second respondent shall be at liberty to pay to the Company such sum as the Master finds due by the petitioner to the Company for and on behalf of the petitioner whereby the purchase price for the said shares shall be reduced by such amount as is paid by the second respondent.

(iv) Upon receipt by the petitioner of the purchase price as certified by the Master (or

In the Supreme Court

No. 25

Order of Burt J. 19th September 1975

such lesser sum in the event that the second respondent makes payment to the Company as provided in subparagraph (iii) hereof) the petitioner shall deliver to the second respondent an executed unstamped registerable transfer of the petitioner's shares.

3. There be liberty to either party to apply.

4. The Master shall be at liberty to make orders as to the costs of the aforesaid enquiries.

5. The respondents pay the petitioner's costs of and incidental to the petition to be taxed on the scale applicable to a claim of the amount certified by the Master pursuant to paragraph 2A hereof on the basis that the limit in Order 66 Rule 16 shall be increased for the purposes of taxation to $15,000.

By the Court

Deputy Registrar

In the
Supreme Court

No. 25

Order of Burt J.
19th September
1975

THIS ORDER was extracted by Messrs. Northmore Hale Davy & Leake of 8th Floor, Law Chambers, Cathedral Square, Perth, Solicitors for the petitioner whose address for service is 8th Floor, Law Chambers, Cathedral Square, Perth.

Before the Full Court

No. 26
Notice of Appeal

9.10.75

NOTICE OF APPEAL

NOTICE OF APPEAL

TAKE NOTICE that the Full Court of the Supreme Court of Western Australia will be moved by way of Appeal at the first sittings of the Full Court appointed to be held after the expiration of six weeks from the institution of this Appeal or so soon thereafter as Counsel can be heard by Counsel on behalf of the abovenamed Appellants (Respondents) for an order that:

1. The whole of the order of the Honourable Mr. Justice Burt on the 19th day of September 1975 on the petition of the Respondent (Petitioner) whereby the learned Judge ordered that:

(1) 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 hereinafter set forth in paragraphs (2) and (5) of this order be implemented.

(2) The Court doth order and direct:

A. That the second-named Appellant (Second Respondent) purchase the 1,500 shares held by the petitioner in Caratti Holding Co. Pty. Ltd. (hereinafter referred to as "the Company") at a sum to be certified by the Master of this Honourable Court such sum being the value of the shares ascertained upon enquiry by the Master in manner hereinafter set forth.

B. That the Master enquire into and ascertain the value of such shares as at the date of presentation of the petition herein and for the purpose of such valuation.

(i) Article 32 of the Articles of Association of the Company shall be disregarded.

(ii) It shall be deemed that the loans outstanding at the aforesaid date made by the Company to any of the following namely:

Albany Forts Freeholds Pty. Ltd.

Caratti (Bullfinch) Pty. Ltd.

Caratti (Chapman Valley) Pty. Ltd.

Before the Full Court

No. 26
Notice of Appeal
9th October 1975

Caratti Freeholds Pty. Ltd.

Caratti (Kent River) Pastoral Co. Pty. Ltd.

Delbar Investments Pty. Ltd.

W.A. Bulldozing Co.

are recoverable in full on demand by the Company.

(iii) The Respondent (Petitioner) have liberty to apply with respect to loans to any other persons, firms or companies.

C. That the Master also enquire into and take an account of all rents loans and other moneys due from the Respondent (Petitioner) to the Company as at the date of such enquiry and account.

D. That pending the purchase of such shares by the second-named Appellant (Second Respondent) in the Company in manner hereinafter set forth or until further order:

(i) The second-named Appellant (Second Respondent) charge the shares the Company held by him absolutely in favour of the Respondent (Petitioner) to secure the payment of the purchase price.

(ii) The Company and the second-named Appellant (Second Respondent) be restrained from selling or otherwise disposing of any of the assets of the Company otherwise than in the ordinary course of the businesses of farming and earthmoving carried on by the Company.

Before the Full Court

No. 26
Notice of Appeal
9th October 1975

(iii) Notwithstanding anything to the contrary in the Articles of Association of the Company or as required by the shareholders of the Company in general meeting the second-named Appellant (Second Respondent) shall not exercise any of the powers vested in him as Governing Director of the Company but shall remain as an ordinary director and subject to their consents being obtained the following and only the following shall also be directors of the Company, namely:

Frank Valentine Bentley Hillman (who shall be Chairman); and the Respondent (Petitioner) or his nominee in writing.

(iv) The directors of the Company be directed not to seek to recover any loans made by the Company to the persons or firms named in subparagraph B(ii) hereof.

Before the Full Court

No. 26
Notice of Appeal
9th October 1975

(v) The second-named Appellant (Second Respondent) be restrained from exercising the powers contained in Article 32 of the Articles of Association of the Company as against the Respondent (Petitioner).

(vi) The Company be restrained from

receiving any consideration moneys pursuant to Article 32 of the Articles of Association of the Company in respect of the Respondent's (Petitioner's) said shares and from otherwise exercising any of the powers contained in such Article in respect of such shares.

E. (i The second-named Appellant (Second Respondent) shall pay to the Respondent (Petitioner) the purchase price of the Respondent's (Petitioner's) shares as certified by the Master within the following period whichever is applicable:

(a) if the amount certified is less than $20,000, 10 days;

(b) if the amount certified is $20,000 or more but less than $50,000, 28 days, but in any event if the sum so certified exceeds $50,000 the sum of $50,000 shall be paid within 28 days, such sum to be in reduction of the amount certified;

(c) if the amount certified is $50,000 or more but less than $100,000, the balance of the amount certified shall be paid within 40 days;

(d) if the amount certified is $100,000 or more but less than $200,000 the balance of the amount certified shall be paid within 60 days;

Before the Full Court

No. 26
Notice of Appeal
9th October 1975

(e) if the amount certified is $200,000 or more the balance of the amount certified shall be paid within 90 days.

(ii) If the second-named Appellant (Second Respondent) shall not have paid to the Company the sum referred to in paragraph (2)E(iii) the Respondent (Petitioner) shall pay to the Company such sum as the Master finds due by the Respondent (Petitioner) to the Company at the time when he delivers to the second-named Appellant (Second Respondent) the executed unstamped registerable transfer referred to in paragraph (2)E(iv).

(iii) The second-named Appellant (Second Respondent) shall be at liberty to pay to the Company such sum as the Master finds due by the Respondent (Petitioner) to the Company for and on behalf of the Respondent (Petitioner) whereby the purchase price for the said shares shall be reduced by such amount as is paid by the second-named Appellant (Second Respondent).

(iv) Upon receipt by the Respondent (Petitioner) or the purchase price as certified by the Master (or such lesser sum in the event that the second-named Appellant (Second Respondent) makes payment to the Company as provided in subparagraph (iii) hereof) the Respondent

Before the Full Court

No. 26
Notice of Appeal
9th October 1975

(Petitioner) shall deliver to the second-named Appellant (Second Respondent) an executed unstampted registerable transfer of the Respondent's (Petitioner's) shares.

(3) There be liberty to either party to apply.

(4) The Master shall be at liberty to make orders as to the costs of the aforesaid enquiries.

(5) The Appellants (Respondents) pay the Respondent's (Petitioner's) costs of and incidental to the petition to be taxed on the scale applicable to a claim of the amount certified by the Master pursuant to paragraph (2)A hereof on the basis that the limit in Order 66 Rule 16 shall be increased for the purposes of taxation to $15,000.

be set aside.

2. In lieu thereof there be an order that:

(1) The petition be dismissed.

(2) The Respondent (Petitioner) pay the Appellants' (Respondents') costs of the petition to be taxed as in an action on the basis that the value of the subject matter be fixed at such sum as the Court considers just with a certificate for the whole of the costs in accordance with the details of the scale provided that the limit in Order 66 Rule 16 shall be increased for the purposes of taxation to $15,000; a certificate for second

Before the Full Court

No. 26
Notice of Appeal
9th October 1975

Counsel and four extra days.

(3) The injunction restraining the registration of a transfer of the Respondent's(Petitioner's) shares in the Company be discharged.

(4) The Respondent (Petitioner pay the Appellants' Respondents') costs of the Appeal to be taxed

GROUNDS OF APPEAL

AND TAKE FURTHER NOTICE that the grounds of this Appeal are:

(1) As to the meeting held on 2 August 1961 the findings of the learned Judge that:

(i) ".... the central matter discussed at the meeting held on 2 August 1961 was not the issue of shares to Zampatti in the Company but the admission of Zampatti as a partner in the partnership of "S. & M. Caratti" and "W.A. Bulldozing Co."..... and I accept Zampatti's evidence that in his understanding that was all that he was then concerned with."

(ii) ".... not withstanding the minute that was put in evidence, I believe Zampatti when he says that he did not then understand that he was becoming a shareholder in a limited liability company. My finding is that the understanding of the matter is that his understanding of the matter was simple and single, namely that he had acquired a 10 per cent interest in Caratti's business." and

(iii) "The minutes to which I have referred are a

Before the Full Court

No. 26
Notice of Appeal
9th October 1975

record not of any consensus but of Pearce's decisions."

were in error and against the evidence and the weight of evidence and the learned Judge (having regard to the provisions of Section 148 of the Companies Act 1961; the admissions made by the Respondent (Petitioner) through his Counsel concerning the minutes of the meeting on 2 August 1961 and related documents and the contents thereof; the fact that the second-named Appellant (Second Respondent) was not cross-examined concerning his evidence in relation thereto; and the affidavits and cross-examinations of the Respondent (Petitioner) the learned Judge should have found that on 2 August 1961

(a) The basis upon which the Respondent (Petitioner) was to become a 10 per cent partner in the partnership and a shareholder in the company was discussed.

(b) The function of the company as the holding company of the assets used by the partnership was explained to the Respondent (petitioner).

(c) Verbal agreement was reached between the parties concerning the financial terms upon which the Respondent (petitioner) would become a 10 per cent partner in the partnership and a shareholder of the company.

(d) So far as the meeting on 2 August 1961 was a meeting of the company at which the Respondent (Petitioner) was present by invitation the minutes thereof

Before the Full Court

No. 26
Notice of Appeal
9th October 1975

correctly recorded what was agreed to by the Respondent (Petitioner) so far as his shareholding in this Company was concerned.

(e) Although the Respondent (Petitioner) may not have had a perfect understanding of the details of the transaction he was prepared to accept the advice and recommendations of Pearce for the purposes of his agreement to become a partner in the partnership and a shareholder in the Company was conceived.

(f) On August 2 1961 the Respondent (Petitioner) entered into a verbal agreement to apply for 1500 ordinary shares in the capital of the Company of $2.00 in consideration of the sum of $3,000.00 as set out in the minutes of the meeting.

Before the Full Court

No. 26
Notice of Appeal
9th October 1975

(2) Insofar as the learned Judge held that the purpose of the second-named Appellant (Second Respondent) in giving the notice to the Respondent (Petitioner) pursuant to Article 32 of the Articles of Association of the Company was relevant to the exercise of the power or the right conferred on the second-named Appellant (Second Respondent) by that Article the learned Judge was wrong in law and should have held that the motive or purpose of the second-named Appellant (Second Respondent) was not relevant.

(3) The learned Judge having correctly found or held that:

(a) The Respondent (Petitioner) on or about 21 August 1961 signed an application for shares in the Company bearing that date

on the following terms:

"I hereby apply for 1500 ordinary shares at £1 each. I agree to accept the said shares and to be bound by the Memorandum and Articles of Association of the Company;

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

(c) The Respondent (Petitioner) agreed to be bound by the Memorandum and Articles of Association of the Company;

(d) As between himself and the Company the Respondent (Petitioner) was bound by Article 32;

(e) The Articles of Association of the Company constituted a contract as between the members of the Company inter se;

Before the Full Court

No. 26
Notice of Appeal
9th October 1975

(f) Article 32 conferred on the second-named Appellant (Second Respondent) at law the right compulsorily to acquire the shares of any other member (including the Respondent (Petitioner) in the manner and upon the terms therein set out; and

having done so his further finding that as between the second-named Appellant (Second Respondent) and the Respondent (Petitioner)

"....personally the position was different. As between them the agreement simply was that Zampatti would be admitted into the family business without any regard to the manner in which it 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. As between Caratti and Zampatti nothing was said of Article 32."

was wrong in law in that upon the Respondent (Petitioner) becoming a member of the Company he was as a matter of law deemed to have entered into a contract with the second-named Appellant (Second Respondent) upon the terms of the Memorandum and Articles of Association of the Company including Article 32 and further the said finding was against the evidence and against the weight of evidence for the reasons set out in paragraph (1) hereof.

(4) Insofar as the learned Judge held or found that:

(i) ".... Article 32 although formulated in terms of sale is in substance the grant to the founder of a power of compulsory acquisition." and

(ii) ".... I cannot think that an attempt to exercise that power so as to compulsorily acquire shares at a gross under value .... and contrary to a clear understanding which as between Caratti and Zampatti had existed from the beginning, that understanding being that Zampatti would have a 10 per cent share in the business does prior to the transfer being registered and to prior to the acquisition being effected result in the founder becoming the owner of the shares at equity ...."

the learned Judge was wrong in law and his finding was against the evidence and against the weight of evidence and the learned Judge should have held or

Before the Full Court

No. 26
Notice of Appeal
9th October 1975

found that:

(a) The position was as set out in sub-paragraphs (a) to (f) of paragraph (3) hereof.

(b) The effect of Article 32 was that the Respondent (Petitioner) had agreed in writing with the second-named Appellant (Second Respondent) that upon notice being given requesting him to do so the Respondent (Petitioner) would sell and transfer to the second-named Appellant (Second Respondent) his 1500 shares in the capital of the Company for the sum of $3000 being the capital paid upon such shares and that such notice had been duly given on 27 November 1974 prior to the presentation of the Petition.

(c) Such agreement was specifically enforceable at the instance of the second-named Appellant (Second Respondent) or could be carried out by the alternative means provided in Article 32.

(d) The second-named Appellant (Second Respondent) had in fact 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 pending the hearing and determination of the Petition the transfer had not been registered by the Company.

(e) The giving of the said notice or alternatively the payment of the purchase price and

Before the Full Court

No. 26
Notice of Appeal
9th October 1975

the execution of the said transfer constituted the second-named Appellant (Second Respondent) the owner of the said shares in equity and thereafter and in particular at the date of hearing the petition the Respondent (Petitioner) held the said shares upon trust for the second-named Appellant (Second Respondent).

(f) Article 32 did not in substance confer any power on the second-named Appellant (Second Respondent) 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 (Petitioner) "would have a 10 per cent 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.

Before the Full Court

No. 26
Notice of Appeal
9th October 1975

(5) Notwithstanding that the learned Judge held that the Respondent (Petitioner) had on the facts established a ground for winding up under both Sections 222 (1)(f) and 222(1)(g) of the Companies Act the learned Judge should have held that by reason of the matters referred to in paragraph (4) hereof the Respondent (Petitioner) was not entitled to relief by way of an order winding up the Company because the Respondent (Petitioner) 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.

(7) Insofar as the learned Judge held that the Respondent (Petitioner) 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 27 November 1974 of the notice dated 26 November 1974 pursuant to Article 32 of the Articles of Association the learned Judge was wrong in law in that the giving of the said notice was given by the second-named Appellant (Second Respondent) in his capacity as a shareholder in exercise of his contractual rights conferred at law by the Article to purchase the Respondent's (Petitioner's) share and did not constitute any part of the conduct of the affairs of the Company by the second-named Appellant (Second Respondent) 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 (Petitioner) by reason of the giving of the notice.

Before the Full Court

No. 26
Notice of Appeal
9th October 1975

Dated the 9th day of October 1975.

Main Settlement

Solicitors for the Appellants (Respondents)

To the Respondent (Petitioner)
AND to his Solicitors,
Messrs. Northmore Hale Davy & Leake,
Law Chambers, Cathedral Square,
Perth. W.A. 6000

NO. 27

NOTICE OF PETITION PURSUANT TO ORDER 63 RULE 9 (12)

Before the Full Court

No. 27
Petitioner's Notice

19.12.75

TAKE NOTICE that the respondent while seeking to uphold the order made by the learned trial Judge upon the hearing of the petition herein on the grounds upon which such order was made will contend on the hearing of the appeal that the order should be affirmed on the following additional ground:

That Article 32 of the Articles of Association of Caratti Holding Co. Pty. Ltd., is void and of no effect by reason :

(i) that the rights which such article purports to vest in the Appellant while the registered holder of the Life Governor's share in the company were not within the ambit of the powers of the company expressed or implied in its Memorandum of Association or derived from the Companies Act 1948 and its amendments;

(ii) Alternatively that the provisions of such article do not impose contractural obligations upon the shareholders of the company in respect of which an action will lie either at the suit of the company or the Appellant.

DATED the 19TH day of DECEMBER 1975.

.....

Solicitors for the Respondent
(Petitioner)

TO: The Appellant and to
Messrs. Muir Williams Nicholson & Co.,
his solicitors.

Before the
Full Court

No. 27
Petitioner's
Notice
19th December 1975

REASONS FOR JUDGMENT

Before the
Full Court
No. 28
Reasons for
Judgment
17.11.76

This is an appeal from an order of Burt J. made under s. 186(2)(b) of the Companies Act 1961-1975. The Court made an order that Mr. Caratti, the second appellant, purchase the shares in the appellant company held by the respondent, Mr. Zampatti, at a sum to be found and certified by the Master of the Court after enquiry.

The business relationships of Caratti and Zampatti have been ventilated in the Supreme Court before, and in this and in these cases the reasons for judgment set out all the detail of their relationship which need not be repeated. Reference may be made to the reasons of Wallace J. in the case of Zampatti v. Caratti No. 2631 of 1973 in which case Wallace J. on 6th December 1974 ordered that the partnership hereafter mentioned be dissolved with accounts and enquiry, to the reasons of Jackson C.J. and of Lavan and Jones JJ. for dismissing an appeal to the Full Court from that judgment, and to the reasons of Jackson C.J., Burt and Lavan JJ. in the Full Court given in an appeal by the present appellants from an order of Wallace J. relating to the injunction hereafter mentioned in this matter Company No. 108 of 1974.

The questions now before the Court arise out of Zampatti's petition for the winding up of the appellant company or alternatively for an order under s. 186 of the Act. His Honour held that the petitioner had established a ground for winding up both under s. 222(1)(f) and under s. 222(1)(h) of the Act and that he had also established oppression within the meaning of s. 186(1). The appellants now ask that the resulting orders be set aside and the petition be dismissed.

The basic primary facts are now stated.

On 6th June 1960 the appellant company had been incorporated and in this company Caratti held the life governor's share which gave him total control and also, by the effect of Article 32, enabled him [illegible] any other member's shares

Prior to 30th June 1961 Caratti by himself, or as a member of a family partnership which he controlled, carried on the business of bulldozing and earthmoving contractors. Zampatti, a relative of Caratti, was manager of that part of the business carried on at Mount Barker.

Caratti offered Zampatti a 10% interest in the family business. Zampatti for valuable consideration accepted this offer. A new partnership deed was or had been drawn up but it was not signed, although the parties before us accepted an unsigned engrossment as correctly setting out the agreed relationship between the partners. Caratti was the managing partner and had total control although not the power to acquire Zampatti's share at a fixed price.

The new partnership carried on the business as from and inclusive of 1st July 1961. The initial assets of the business, and of the partnership, comprised plant, land and buildings, and the nominal local and personal goodwill of the business although no figure was placed on the value of goodwill.

Soon after the start of the new partnership, the plant, land and buildings were sold to the company for £174,262 the purchase price being posted to a loan account. The goodwill of the business was not sold. Until 1964 the business was operated by the hiring of the plant, land and buildings from the company.

On 2nd August 1961 Zampatti was allotted 1,500 ordinary shares at one pound in the company, and Caratti and his family were allotted between them 13,500 ordinary shares.

In 1964 the partnership sold its entire business to the company (including its goodwill) for a purchase price of £118,000, being the difference between debtors and creditors. Nothing was paid for goodwill.

The company by itself, or through a tax loss subsidiary, carried on the business from 1964 to 1967 when the whole of its assets were sold to another company, controlled by Caratti, under a transaction which yielded a capital profit of $4,500,000 as a result of the sale of goodwill from the one company to the other. The total sale price of $5,230,000 was secured by debenture free of interest.

Thereafter there were many company and inter-company transactions, all controlled by Caratti. By 1972 discussions were taking place between Caratti and Zampatti for the purpose of putting a value on Zampatti's interest in the Caratti group.

On 26th March 1973 Zampatti issued a writ seeking a dissolution of the partnership and accounts (this resulted in the order of dissolution made by Wallace J. of 6th December 1974).

On 27th November 1974 Caratti gave notice to Zampatti under Article 32 of the Company requiring him to transfer to shares to him for $3,000.

Zampatti filed his petition on 3rd December 1974. On the same day Zampatti obtained an interlocutory injunction restraining Caratti and the Company from acting under Article 32 and on 6th December this was confirmed until the hearing of the petition. The appeal from this latter order resulted in the injunction against the company being maintained, but for reasons which do not now matter that against Caratti was discharged.

His Honour's conclusions of fact are now summarised:

(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;

(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;

(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 h had acquired a 10% interest in Caratti's business, and Caratti had that same understanding;

(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.

His Honour's conclusions of law are now summarised:

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

(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 distributed 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;

(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.

These legal findings were not attacked by the appellant except the last, and this is I think the real nerve of the case.

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 but it was denied that the giving of the notice of acquisition by Caratti when added to these circumstances justified an order under s.186.

His Honour's findings of fact were generally accepted by the appellant except findings (iv), (vi), (vii) and the understanding in (ix). It was submitted that the proper finding should have been that on 2nd August 1961 it was agreed that the intentions of the parties would be implemented by Zampatti acquiring a 10% interest in the partnership and 10% of the issued shares of the company and that, this being the agreement, Zampatti took these interests for what they were. It was contended that Zampatti did know that he was taking up shares in the company and, although not being aware of the legal consequences of that, necessarily accepted whatever legal relationships might result, not as a matter of agreement but as a matter of law stemming from the fact that he applied for the shares in writing and received what he applied for with all the advantages and disadvantages so attached. It was said that in these circumstances it did not matter whether Zampatti fully understood the situation or not, that he was bound by the resulting legal position and had no equity either to resist a suit for specific performance of the provisions of Article 32 or to sustain an injunction to prevent performance.

These arguments invite rejection of some of the findings of fact referred to.

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

"The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking of which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm". See Birtchnell v. Equity Trustees Executors and Agency Co. Ltd., 42 C.L.R. 384 per Dixon, J. at 408.

It is clear that the subject matter was "the business" and that the content of the business was its goodwill, plant, land, buildings, and other assets. When the plant, land and buildings were sold to the company the subject matter of the business was then together with any other assets, the goodwill, the interest in the lease of the tangible assets and the debt owing for the price. The company was then a holding company only, holding the tangible assets for the use of the business. Consistently with this arrangement Zampatti having become the holder of 10% of the shares in the company maintained indirectly a 10% interest in these tangible assets.

The situation however dramatically changed in 1964 when the entire undertaking of the partnership including its goodwill was sold to the company for the difference in value between debtors and creditors. Although neither Caratti nor Zampatti then knew it, as soon as this sale was effected Zampatti was left with an interest in a non-operating partnership which had no goodwill and was merely a creditor of the company. Instead, he had a 10% shareholding in a company with his shares being encumbered by a type of option in favour of Caratti by the exercise of which Caratti could effectively disposses Zampatti's interest in "the business".

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".

The correctness of his Honour's ultimate conclusion may be

tested by enquiring what would have been the position in equity if Caratti had in 1964 discovered his strength and given notice of acquisition to Zampatti in accordance with Article 32. The legal situation had arisen from a common mistake or perhaps more accurately common inadvertence. Had Zampatti then resisted the takeover and forced Caratti to sue for specific performance the principle then applicable is that set out by the High Court of Australia as applying to a case of unilateral mistake not contributed to by the plaintiff:-

> "Where there is a unilateral mistake on the part of the defendant not contributed to by the plaintiff, the question whether the Court should in the exercise of its discretion make a decree for specific performance or leave the plaintiff to sue for damages must, we think, depend on the circumstances of the particular case. But the general rule governing the exercise of the discretion is, we think, that laid down by James L.J. in Tamplin v. James, 1879, 15 C.H.D. at 221 where he said 'for the most part the cases where a defendant has escaped on the ground of mistake not contributed to by the plaintiff, have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it'".
>
> Slee v. Warke, 86 C.L.R. 271 at 278

The same principle was adverted to by Isaacs J. in Goldsbrough Mort & Co. Ltd. v. Quinn, 10 C.L.R. 674 at 669 where his Honour referred to "judicial pronouncements of high authority which state the law in unequivocal terms". The principle was recently accepted as beyond doubt in Fragomeni v. Fogliani, 42 A.L.J.R. 263 and see generally on this question Spry Equitable Remedies, page 149 & 182.

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 and 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 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.

Counsel for the appellant however touched upon another point and that is that on the wording of Art. 32 Caratti did not necessarily need the aid of a court of equity. The article provided that if Zampatti would not execute a transfer then the directors of the company could operate the necessary conveyancing machinery. He, Caratti, was the governing director. This raises the question as to whether the power of Zampatti to resist specific performance would have been sufficient to support an injunction against Caratti as governing director, authorising some officer of the company to transfer the shares to him on Zampatti's behalf. The power to resist specific performance is not co-extensive with the right to an injunction. One question is whether equity would grant relief on the ground that the consequences of Caratti operating the article would weigh so harshly and oppressively

upon Zampatti that it would be unfair and unreasonable for a court of equity not to intervene. The jurisdiction may be said to arise through the need to prevent Caratti from acting in a manner which is not in breach of his legal obligations but which is unconscionable as being contrary to established equitable principles found entrenched in the rules relating to fiduciary relationships. Whether injunction would or might not be the only test to determine whether it was equitable to wind up the company but if the answer is in the negative then the submission that Zampatti had, in effect, no more than a nominal interest in the proceedings gains more force. Because it is a matter of discretion the answer might only be in the affirmative when the injunction is seen to be ancillary to pending winding-up proceedings. I have found no authority to support the view that, in the face of a legal right, equity will make an order that would in effect destroy the legal right. In my view, if nothing more appears that cannot be done.

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 to 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 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 and -

> "...it appears to me very important, that we should concur in laying down again and again the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit

without the knowledge and consent of his principal; that that rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that."

Parker v. McKenna (1874) Ch. App. Cas., Vol. X. pp.124 and 125 per Sir W.M. James L.J. The result of a breach of this rule is stated in the same case by Sir G. Mellish, L.J. at p.125:

"In my opinion, as long as the contract remains executory, and the trustee or agent has power either to enforce it or to rescind or alter it, as long as it remains in that state he cannot re-purchase the property from his own purchaser, except for the benefit of his principal. It appears to me that that necessarily follows from the established rule that he cannot purchase the property on his own account." 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.

"The principle was stated by Turner L.J. in Clegg v. Edmondson (1857) 8 DeG. M. & G. at p.806:- '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 consequence which, according to the ordinary rules of this Court, flow from that relation must 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."

Birtchnell v. Equity Trustees, Executors and Agency Co. Ltd. 42 C.L.R. at p. 398 per Isaacs J.

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. This also disposes of what would otherwise be Caratti's claim for common law damages as, because of the equities, Caratti by Zampatti's non-performance would have suffered no damage.

In my view Zampatti 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. This conclusion disposes of the case except for the contention of the appellant that it was not a case where an order of the kind made by the trial judge should have been made. I think it unnecessary to pursue this because the appellant indicated that if the petition was not to be dismissed he would prefer an order of the kind made, with the result that the order in fact made was in the nature of a consent order.

I would dismiss the appeal.

Before the Full Court

No. 28

Reasons for Judgment
17th November 1976

NO. 29

ORDER DISMISSING APPEAL

Before the
Full Court

No. 29
Order
Dismissing
Appeal
17.11.76

BEFORE THE FULL COURT: THE HONOURABLE THE CHIEF JUSTICE, THE HONOURABLE MR. JUSTICE WICKHAM AND THE HONOURABLE MR. JUSTICE BRINSDEN THE 17TH DAY OF NOVEMBER, 1976

THIS APPEAL coming on for hearing on the 26th, 27th and 28th days of October, 1976 and UPON READING the appeal book filed herein and UPON HEARING mr D.K. Malcolm and Mr R. Garton Smith of Counsel for the Appellants (Respondents) and Mr C.H. Smith one of Her Majesty's Counsek with him Mr C.J.L. Pullin of Counsel for the Respondent (Petitioner) and the Court having ordered that the appeal stand for judgment and the same standing for judgment this day THIS COURT DOTH ORDER THAT:-

1. The appeal be and is hereby dismissed.

2. The Appellants (Respondents) pay the Respondent's (Petitioner's) costs of the appeal to be taxed without restriction to the limits in the Fourth Schedule of the Rules of the Supreme Court, 1971 and with a certificate for second counsel.

By the Court,

Ivor Evans

DEPUTY REGISTRAR

NO. 30

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

Before the Full Court

No. 30

Order Granting Final Leave to appeal to Her Majesty in Council 13th April 1977

BEFORE THE FULL COURT:
THE HONOURABLE THE CHIEF JUSTICE,
THE HONOURABLE MR JUSTICE WALLACE
AND THE HONOURABLE MR. JUSTICE SMITH
THE 13TH DAY OF APRIL, 1977.

U P O N M O T I O N this day by Counsel for the Appellants and UPON READING the Notice of Motion herein dated the 6th day of April, 1977 and UPON HEARING Mr. R. Garton Smith of Counsel for the Appellants and Mr. C.J.L. Pullin of Counsel for the Respondent

AND WHEREAS

(A) This Honourable Court is of opinion that the matter in dispute on this Appeal exceeds the sum of £500 sterling.

(B) On the 17th day of December 1976 this Honourable Court ordered that the Appellants have leave to appeal to Her Majesty in Council from the Judgment of the Full Court (The Honourable the Chief Justice,

The Honourable Mr. Justice Wickham and The Honourable Mr. Justice Brinsden) herein dated the 17th day of November, 1976 dismissing the Appellants' Appeal from the order of The Honourable Mr. Justice Burt herein dated the 19th day of September 1975 and ordering the Appellants to pay the Respondent's costs of that Appeal to be taxed which leave was granted on the following conditions: -

(i) The Appellants within a period of 3 months from the 17th day of December 1976 deposition fixed deposit at Perth for a term of 3 months with any banking company or building society carrying on business in Western Australia the sum of $1,000.00 in the name of "Master, Supreme Court of Western Australia" and delivering the receipt therefor to the said Master as security for the due prosecution of such Appeal and the payment of all such costs as may become payable to the Respondent in the event of the Appellants' not obtaining an order giving them or either of them final leave to appeal or of the Appeal's being dismissed for non-prosecution or of Her Majesty in Council's ordering the Appellants or either of them to pay the costs of the Respondent (as the case may be); and

Before the Full Court

No. 30
Order Granting Final Leave to appeal to Her Majesty in Council
13th April 1977

Before the Full Court

No. 30
Order Granting Final Leave to appeal to Her Majesty in Council 13th April 1977

(ii) That the Appellants within a period of 3 months from the 17th day of December 1976 take the necessary steps for the purpose of procuring the preparation of the Record within the meaning of Rule 5(b) of the Rules contained in the Order in Council dated the 28th day of June, 1909 as to appeals from the Supreme Court of Western Australia to Her Majesty in Council.

(C) On the 1st day of March 1977 the Appellants deposited into the Town and Country Permanent Building Society of 297 Murray Street Perth in the State of Western Australia the sum of $1,000.00 in the name of Master, Supreme Court of Western Australia: and on Friday, the 11th day of March, 1977 delivered the receipt in respect thereof to the said Master.

(D) On the 16th day of March, 1977 the Appellants procured the preparation of the Record within the meaning of the aforesaid Rule 5(b).

BY CONSENT THIS HONOURABLE COURT DOTH ORDER that the Appellants have final leave to appeal to Her Majesty in Council from the said Judgment of the Full Court.

BY THE COURT,

Evans

Deputy Registrar