

(1) **Caratti Holding Co. Pty. Ltd.**

(2) **Sergio Caratti** - - - - - *Appellants*

v.

**Bernardo Zampatti** - - - - - *Respondent*

FROM

**THE FULL COURT OF THE SUPREME COURT  
OF WESTERN AUSTRALIA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 5TH OCTOBER 1978

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*Present at the Hearing :*

LORD DIPLOCK

LORD EDMUND-DAVIES

LORD RUSSELL OF KILLOWEN

LORD SCARMAN

SIR GARFIELD BARWICK

*[Delivered by LORD SCARMAN]*

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This is an appeal by Caratti Holding Co. Pty. Ltd. and Mr. Caratti, its founder and governing director, from a decision of the Full Court of The Supreme Court of Western Australia dismissing their appeal from an order made by Burt J. in winding up proceedings begun by the petition of a contributory, Mr. Zampatti, the registered holder of 10 per cent of the company's issued share capital. The order restrained Mr. Caratti and the company from exercising against Mr. Zampatti a power conferred on Mr. Caratti by the Articles of Association to compel a member to transfer to him his shares for a price very much less than their value. The company was, and is, solvent: indeed, it possesses assets which must upon a fair valuation make its shares very valuable indeed. Put very shortly, Mr. Zampatti's case is that the affairs of the company were being conducted by Mr. Caratti, who controlled it, in a manner inconsistent with Mr. Zampatti's rights as a shareholder. He is concerned to secure those rights, seeking a winding-up order only as a last resort.

Mr. Zampatti presented his petition on the 3rd December 1974. He did so because on the 27th November 1974 Mr. Caratti had served upon him a notice in writing requiring him to transfer to Mr. Caratti the shares he held in the company for the price he had originally paid upon allotment. 1,500 shares in the company had been issued to Mr. Zampatti on the 22nd August 1961 for £1,500, paid in cash (or cash equivalent). In 1974, upon such information as was available to the judge, it would appear

these shares were worth at least 400,000 dollars. In serving his notice, Mr. Caratti was exercising a power conferred on him by Article 32 of the company's Articles of Association. That article enables Mr. Caratti, as founder of the company and registered holder of the "Life Governor's share" to request in writing any member of the company to sell and transfer his shares to him "in consideration of the payment of a sum equal to the capital paid upon his said shares". Upon such request, the member is bound to sell at that price and, if he makes default, the company may receive from Mr. Caratti the consideration monies on his behalf and may register the transfer.

The one issue which their Lordships' Board has to decide is whether Mr. Caratti was entitled to invoke Article 32 against Mr. Zampatti. It is accepted now that Article 32 was a valid article, and binding upon members of the company. It is also accepted that, in 1961, when he acquired his shares, Mr. Zampatti, although ignorant of its existence, must be taken to have had notice of it. The issue turns on the effect of a partnership agreement reached between Mr. Caratti and Mr. Zampatti on the 2nd August 1961. Mr. Zampatti's case is that the terms of that agreement were such that Mr. Caratti could not, without defeating the object of the agreement, invoke Article 32 against him. Mr. Caratti's and the company's case is that the issue of shares to Mr. Zampatti was a wholly separate and independent transaction from the partnership agreement. The issue is a question of fact. In a wide-ranging and detailed judgment Burt J. found the facts in favour of Mr. Zampatti. The Full Court found that there was "no sufficient reason to conclude that any of his Honour's findings of fact were in error". In their Lordships' view these concurrent findings of fact are conclusive. There is nothing, in their Lordships' opinion, in the case which would justify a departure from the long-standing practice of refusing to disturb concurrent findings of fact.

In his petition Mr. Zampatti put forward two grounds for winding up the company:—

- (1) that Mr. Caratti had conducted the affairs of the company in his own interests rather than in the interests of the members as a whole: section 222 (1) (f), Companies Act, 1961, and
- (2) that it was just and equitable that the company be wound up: section 222 (1) (h), Companies Act, 1961.

Burt J. held that both grounds were established: and there is now no challenge to this conclusion. The judge was further asked to rule on the applicability of section 186 (1) of the Companies Act, 1961, to the facts of the case, and did so, holding that "the 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 Act". The judge expressed the view that "in the particular and peculiar circumstances of this case" Mr. Caratti's attempt to invoke against Mr. Zampatti the power conferred upon him by Article 32 was oppressive conduct of the affairs of the company.

After so holding, the judge adjourned the proceedings to allow the parties to consider their position.

On the 19th September 1975 the hearing was resumed and a detailed order made. The order contained the following provisions relevant to this appeal:—

- "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 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.

. . . . .

D. That pending the purchase of such shares by the second respondent in the Company in manner hereinafter set forth or until further order :

. . . . .

(v) The second respondent be restrained from exercising the 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.

. . . . . ”

The order also recited that, in making the order, the Court was acting pursuant to section 186 of the Companies Act, 1961.

In effect, therefore, the judge made an order restraining Mr. Caratti from using his Article 32 power to acquire Mr. Zampatti's shares and restraining the company from completing the transaction against the will of Mr. Zampatti. The company and Mr. Caratti, appealed to the Full Court. The appellants now conceded that the facts were such as would justify a winding-up order but contended :—

- (1) that Mr. Zampatti had no "*locus standi*", i.e. no sufficient interest in the company to support his petition for winding-up, and
- (2) that the giving of notice by Mr. Caratti of his intention to acquire the shares under Article 32 did not justify an order under section 186.

The Full Court dismissed the appeal, holding that Mr. Zampatti was entitled in these proceedings to the assistance of the court in preventing the company and Mr. Caratti from acting under Article 32 to dispossess Mr. Zampatti of his shares.

When the appeal was opened before their Lordships' Board, Counsel for the appellants abandoned the "*locus standi*" point. He made two submissions :—

- (1) that section 186 was not applicable to the circumstances of the case;

- (2) that no injunction should issue against the company to restrain it from completing the compulsory transfer of Mr. Zampatti's shares to Mr. Caratti pursuant to Article 32.

At a very early stage in the argument it became clear that it was not necessary for their Lordships to consider the applicability of section 186 of the Act. Indeed, the Board is indebted to Counsel on both sides for limiting their argument to the crucial issue in the case—the appellants' second submission. The appeal, therefore, turns on the view taken of the appellants' second submission. If the circumstances in which Mr. Zampatti acquired his shares in 1961 were such that Mr. Caratti was entitled to exercise his power of compulsory acquisition under Article 32, Mr. Zampatti must accept 3,000 dollars as the price for their transfer: and he is not concerned to force a liquidation of the company. If, however, he is correct in his submission that Mr. Caratti is not entitled to invoke his power under Article 32 against him, Mr. Caratti and the company are content with the order as drawn up by Burt J. As the Full Court observed, "because the appellant [i.e. Mr. Caratti] indicated that if the petition was not to be dismissed he would prefer an order of the kind made, . . . the order in fact made was in the nature of a consent order".

Accordingly, their Lordships' Board has only the one issue to consider. It is now accepted:—

- (1) that grounds exist enabling the Court to make a winding-up order.
- (2) that, if the petitioner has made out a case for injunctive relief to restrain the two appellants from completing against his will the compulsory transfer of his shares to Mr. Caratti, such an order can be made and is preferable to a winding-up order, but,
- (3) that, if he has not, the petition may be dismissed.

The issue turns on what was agreed between Mr. Zampatti and Mr. Caratti in 1961. The two men are cousins: but their family relationship was of no significance in the development of their business association. Mr. Caratti came to Western Australia in 1949 or 1950. He established a bulldozing and earth-moving contractors' business. It prospered, and he organised it as a family partnership, those interested being himself, his wife, and their two children (for whom he acted as trustee). He was the managing partner. Mr. Zampatti entered the business as an employee in 1955. He made rapid progress. He became manager of a very important part of the business—its operations in the Mount Barker area. Mr. Caratti, seeing him as a key man indispensable to the business, suggested in 1960 or early in 1961 that Mr. Zampatti should acquire a 10 per cent interest in the business. The judge found that:

"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 understood, as meaning that Zampatti should acquire a 10 per cent interest in the business as it was then being carried on by the partnership".

The business as then carried on, i.e. at the time the suggestion of partnership was put by Mr. Caratti to Mr. Zampatti, included, as the Full Court said, "its goodwill, plant, land, buildings and other assets".

There was no concluded agreement between them until the 2nd August 1961. Mr. Zampatti's evidence, accepted by Burt J., was that at a meeting held on that date Mr. Zampatti was admitted as a partner in the partnership of "S. & M. Caratti" and "W.A. Bulldozing Co."—the two names under which the family partnership carried on business.

The judge found that the central matter discussed was not the issue of shares to Mr. Zampatti in the company, but his admission into the partnership which was then carrying on the business.

The agreement reached on the 2nd August was summarised by the judge in these words:—

“ 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 ”.

It would appear that either at the meeting or shortly thereafter a draft of a partnership deed was prepared. It was never signed: and in their Lordships' opinion no importance should be attached to it.

Between the making of the first suggestion of partnership in 1960 or early 1961 and the agreement of the 2nd August 1961 there occurred a number of events upon which the appellants strongly rely. The company had been formed on the 6th June 1960, the Caratti family being the shareholders. Mr. Caratti held the Life Governor's share, which gave him total control of the company, while Article 32 enabled him during his lifetime to acquire compulsorily any other member's shares for the price paid by that member for them. The article was, as the trial judge and the Full Court have found, an appropriate and valid article introduced to enable Mr. Caratti to manage the family's holdings in the company. It must be treated as in the ordinary course of events binding upon all members of the company: and there is no suggestion of fraudulent concealment of its existence by Mr. Caratti, or his advisers, when he negotiated Mr. Zampatti's admission into the partnership.

On or shortly before the 2nd August 1961 Mr. Caratti, on the advice of Mr. Pearce, his accountant, had decided that the company would buy the physical assets of the partnership and lease them back to the partnership. No cash passed. The transaction was a paper one. But its effect was that the plant, land and buildings of the business, i.e. its working capital, became the property of the company, and were hired or “ leased ” back to the partnership at a yearly rental. Mr. Zampatti was not a party to this decision: indeed, he had no knowledge of it. Nor did it appear to be a matter to which Mr. Caratti attached any importance in the negotiations for his admission into partnership. Nevertheless Mr. Caratti and his accountant—very properly and fairly—took the view that, as they were admitting Mr. Zampatti into partnership on a 10 per cent basis, he should have a 10 per cent interest in the company which now owned the physical assets (but not the goodwill) of the business. The trial judge put it as follows:

“ 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 [i.e. the family] as he did in the partnership ”.

The judge found that these legal questions relating to the business assets, the partnership and the company, were neither fully understood nor believed to be of any significance by either Mr. Caratti or Mr. Zampatti. He summed up his findings in these words:—

“ My finding is that his [i.e. Mr. Zampatti's] 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 . . . ”

In the result, therefore, Mr. Zampatti was admitted into partnership with a 10 per cent share of its profits and capital. He was to receive 10 per cent of the issued share capital of the company; and neither he nor Mr. Caratti bothered their heads about the legal position as between the company and the partnership. In due course Mr. Zampatti was allotted 1,500 shares in the company for a price provided in cash (or cash equivalent) of £1,500. The decision to allot is recorded in a company minute of the 2nd August 1961 and was effected by Mr. Zampatti signing a letter of application for the shares dated the 21st August 1961 followed by the ensuing allotment. At no time during the transaction was Article 32 mentioned: it was not known to Mr. Zampatti; nor was it considered by Mr. Caratti to be of any relevance to his negotiation with Mr. Zampatti.

The appellants submit that the agreement whereby Mr. Zampatti was admitted into the family partnership was quite separate from the offer of shares in the company which he subsequently accepted. The company had acquired the physical assets of the partnership before Mr. Zampatti became a partner. He, therefore, acquired a 10 per cent interest in the profits and capital of the partnership as they stood at the date of his admission. Article 32 was not mentioned in the partnership negotiation or agreement because it was an irrelevance. The article became relevant only when on the 21st August Mr. Zampatti decided to accept the offer of shares in the company. It was conceded before the Full Court that Mr. Zampatti must be taken to have had notice of the existence of the article, even though, as the judge found, he was ignorant of it. Mr. Hume Q.C. for the appellants summed up his argument as follows:—

“ Article 32 had nothing to do with Mr. Zampatti's partnership agreement, but was a valid article and bound Mr. Zampatti when he applied for and obtained his allotment of shares ”.

Mr. Hume made the point, with which their Lordships agree, that the issue turns on what happened in 1961, and that subsequent events cannot relieve Mr. Zampatti of the burden of Article 32, if in fact it bound him when he accepted his shares in 1961.

The subsequent history, therefore, can be taken very shortly. As from the 30th June 1961 the business was carried on by the partnership of which Mr. Zampatti was a member. In 1964 the partnership sold the entire business to the company—a transaction to which Mr. Zampatti raised no objection. The price was 118,000 dollars, being the difference between the firm's debtor and creditor accounts, nothing being paid for goodwill. No cash passed: the price was to be payable over a period of 10 years. From the 1st July 1964 until the 30th June 1965 the business was carried on by the company, Mr. Zampatti being employed by the company. Thereafter the business was carried on by a succession of companies controlled by Mr. Caratti under the advice of Mr. Pearce. The various moves and transfers were motivated entirely by tax considerations. Mr. Zampatti remained in employment in the business until differences arose between him and Mr. Caratti in 1972, when he severed his connection with the business. Since then, there has been a history of bitter disputes and litigation, into which their Lordships need not go.

Upon analysis the appellants' case consists of three short propositions of fact. First, it was said Mr. Zampatti was never a member of “ the old partnership ”, i.e. the family partnership which prior to the 2nd August 1961 owned the physical assets of the business. When he became a partner, the firm no longer owned the assets, but leased them back from the company. Secondly, nothing was said or agreed about the effect of

Article 32 when Mr. Zampatti entered the partnership: nor was this surprising, since the article related not to the partnership but to the company and its members. Thirdly, there was no link either in contract or otherwise between Mr. Zampatti's admission into the partnership and his becoming a member of the company. He was not obliged to take up the shares offered him: and, when he applied for them, he had notice of the article, which had been an Article of Association since the company's foundation in 1960.

This case collapses, in their Lordships' judgment, because it is inconsistent with the concurrent findings of Burt J. and the Full Court. The judge found that the offer, first made in 1960 or early in 1961, of a 10 per cent interest in the business as then being carried on, was never departed from: it was the offer which was accepted on the 2nd August 1961. The understanding of Mr. Zampatti and Mr. Caratti was "simple and single"—a 10 per cent interest in the business, whether "carried on by the partnership or by a company". The judge went on to say 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."

Later in the course of his judgment he added the comment

"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".

Further, the judge expressly found that Mr. Caratti and Mr. Pearce decided that, to give effect to the agreement that Mr. Zampatti would have a 10 per cent interest in the business, shares in the company would be issued to him "so that he would stand in the company in the same position relative to the other shareholders as he did in the partnership".

These findings were accepted by the Full Court. They revealed an agreement between Mr. Caratti and Mr. Zampatti which is totally inconsistent with Mr. Caratti retaining against Mr. Zampatti his right under Article 32 to require any member of the company to sell his shares upon demand for the price he originally paid for them. The retention of the right as against Mr. Zampatti would be inconsistent with the agreement which conferred upon Mr. Zampatti a 10 per cent share in the profits and capital of the business, however carried on (whether by the partnership or a company). The interest offered to and accepted by Mr. Zampatti was a 10 per cent share of "the business". Questions as to the legal structure of the business or as to the legal entities created to hold its assets were, so far as Mr. Caratti and Mr. Zampatti gave any thought to them, matters for the accountant: they did not touch upon the basic agreement between the two men that, whatever the legal structure of the business, however matters were arranged, Mr. Zampatti's interest was 10 per cent of the profits earned and capital employed in the business. It would be contrary to the whole basis of such agreement for Mr. Caratti to invoke Article 32, since to do so would be to seek to deprive Mr. Zampatti of that which it had been agreed he should have—a 10 per cent share in the profits and capital of the business.

As Burt J. observed when discussing the applicability of section 186, the case is a very peculiar one. Not the least of its peculiarities is that the history of events in 1961, as alleged by Mr. Zampatti and found by the judge and the Full Court to have culminated in the agreement of the 2nd August 1961 and the issue of shares at the end of that month, bears little or no resemblance to what is recorded in the contemporary documents of the period. But there is an explanation: and it was accepted below. The faithful and ingenious Mr. Pearce organised the paper work so as best to serve the financial interests of the Caratti family: it was not his purpose nor Mr. Caratti's purpose that this paper work should in any way undermine the business agreement with Mr. Zampatti; in particular, it was not intended to diminish Mr. Zampatti's 10 per cent interest in the business. Though at first sight strange, there is nothing incredible or unique in two self-made business men getting on with the job of running the business on an agreed basis as to their respective shares in its profits and capital, while leaving its legal structure or pattern to a trusted accountant.

Article 32 was neither understood nor accepted by Mr. Caratti and Mr. Zampatti as having any reference to the business agreement between them: and the use of its provisions against Mr. Zampatti is inconsistent with that agreement. In their Lordships' judgment, therefore, the order of Burt J. restraining its use against Mr. Zampatti was correct.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

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**In the Privy Council**

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(1) CARATTI HOLDING CO. PTY. LTD.  
(2) SERGIO CARATTI

v.

**BERNARDO ZAMPATTI**

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DELIVERED BY  
LORD SCARMAN