IN THE SUPREME COURT OF VICTORIA
COURT OF APPEAL
IN THE MATTER OF — Appeal against conviction

Between:

VASILIS BARIAMIS — **Applicant**

and

DIRECTOR OF PUBLIC PROSECUTIONS — **Respondent**

APPLICANT'S WRITTEN CASE

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A. Convictions from which leave to appeal is sought

1. On 17 February 2016, a jury was empanelled before Kaye J to try the applicant on

   (1) Charge 6: dishonestly obtaining a financial advantage by deception on or about 13 November 2009;

   (2) Charge 7: attempting to dishonestly obtain a financial advantage by deception between 6 July 2010 and 30 March 2011, relating to an attempt to refinance with the WBC;

   (3) Charge 8: dishonestly obtaining a financial advantage by deception on or about 5 November 2010;

   (4) Charge 14: dishonestly obtaining a financial advantage by deception on or about 26 November 2010.

2. The charges related to bank loan facilities for the benefit of the Viking Group (Viking) of which the applicant was the Executive General Manager from August 2008.

3. On all four charges the prosecution case was that the applicant was guilty on the basis of the doctrine of joint criminal enterprise with his wife Loukia Bariamis, and co-accused Steve Iliopoulos. Loukia Bariamis had already pleaded to substantially the same three charges as

6, 8, and 14. On 2 May 2016 the jury returned guilty verdicts on charges 7, 8 and 14, and not guilty on charge 6.

B. Summary of relevant facts

4. Loukia Bariamis was a certified public accountant, a registered auditor, and a tax agent. From the early 1990s she was a partner of a firm of accountants. In 2004 and 2005 she defrauded the ATO of about $1.8m by falsifying the BAS statements of a number of her clients. Mrs Bariamis took elaborate steps to conceal her fraud from her husband, family, business partner, and clients. In June 2005 that fraud was detected. She later pleaded guilty to charges emanating from the taxation fraud.

5. Steve Iliopoulos was a trained mechanic. In 1999 he started working at Viking Fleet Service (VFS) which did truck maintenance work. In 2007 he purchased VFS. From the time Mr Iliopoulos took it over, VFS grew rapidly. It became the Viking Group of Companies of which the main trading entities were VFS, Perth Freightlines (PFL), and Viking Transport and Logistics (VTL). Mrs Bariamis provided significant accounting and financial services to Viking from about 2005 to April 2011. For much of that time she was Viking's Chief Financial Officer.

6. In August 2008, the applicant joined Viking and became its executive general manager. His background was in transactional banking, starting at NAB. There his role was manager of sales for EFTPOS machines and similar services. He had no relevant background in accounting or in commercial banking. At Viking, his role was primarily in operations and strategy.

7. Viking grew and diversified rapidly into transport, warehousing, logging, and fishing. Its interstate transport company, PFL, had depots in several States. Because of its rapid expansion, Viking suffered chronic cash flow shortfalls. Its bank, the Commonwealth Bank (CBA), responded to these shortfalls by providing a series of temporary excesses over Viking's formal lending limits. Over time, it increased those limits.

8. The most significant facility offered by the CBA was a receivable finance facility. It provided finance to the main trading companies of the Viking by lending 80% of those companies' current debts, up to a prescribed limit. Debts between companies of Viking ('related company debts') were excluded from the lending facility under the loan contract. To draw down funds from the facility, Viking would send the bank statements setting out

the invoices in respect of which it sought funding. At the end of each month, the bank reconciled the statements with the Aged Debtors Trial Balance ledgers (ADTBs) of the relevant Viking company.

9. To deal with increasing cash flow problems, Mrs Bariamis conceived and implemented a fraudulent system by:
    (1) including related-company debts by altering the name of the Viking company to false ones: V/Line for VTL, Linfox for PFL;
    (2) falsely inflating the debts owed by legitimate debtors, and
    (3) creating false debts owed by false companies, namely 'CMH Transport' and 'Ryans Transport'.

10. In July 2009, Mrs Bariamis and Steve Iliopoulos applied to the CBA for a limit increase. (Charge 4). Mr Iliopoulos was acquitted of that charge. In October 2009, the CBA approved a further application for finance. (Charge 6) The jury acquitted the applicant of that charge, but convicted Steve Iliopoulos of it. In October 2010, the CBA approved a further application for an additional $13.9m of facilities. (Charge 8) Both the applicant and Steve Iliopoulos were convicted of that charge. The particulars of that charge were falsified ADTBs and a false representation concerning Aldi Stores. The particular ADTB deceptions were twofold: $5.84m of inter-related company debts were included under fake names, and $1.38m of entirely fictitious debt was added. (Annexure A, a table provided to the jury summarizing the deceptions. (T2508)

11. The false representation concerning Aldi was that it had engaged VFS as its exclusive supplier of heavy vehicle maintenance for Victoria. The representation was included in a document entitled 'Viking Group – Divisional Strategic Overview 2010-2011' which the applicant gave to the CBA in July 2010 and 'spoke to' at a meeting on 22 July 2010.

12. The same documentation and information was relied upon by the CBA in a further loan on 17 November 2015. (Charge 14) Both Steve Iliopoulos and applicant were convicted of that charge.

13. Charge 7 related to a refinancing application with Westpac Banking Corporation (WBC) between 6 July 2010 and 30 March 2011. WBC offered a more flexible and accessible receivables finance facility, which was important to alleviating Viking's chronic cash flow difficulties. The application commenced with a preliminary meeting between the applicant, Steve Iliopoulos and Mrs Bariamis on 6 July 2010. Following that meeting, and a further meeting in August 2010, financial documents were provided to WBC. Additionally, a copy

of the Divisional Strategic Overview was provided. With respect to that Overview, it was alleged that it included false representations that VFS was the exclusive supplier to Aldi, and that it had substantial business generated by contracts with Boral and Linfox. The financial documents falsely represented that they were prepared by accountant Alex Vovos when in fact they were prepared by Mrs Bariamis.

14. WBC noted an inconsistency between the closing balance of one year and the opening balance of the next. It asked Mrs Bariamis for further documentation to explain or correct the discrepancy. She could not explain the inconsistency without disclosing the fraud. Accordingly, she did not provide the documents. WBC then asked the applicant for the documents. He did provide a large number of them, but not all that had been requested. Accordingly, the negotiations stalled. In early 2011, steps were taken to revive the application, but did not proceed further. A receiver was appointed to Viking Group in April 2011.

C. Grounds of Appeal and Submissions

<u>Ground 1</u>: The verdicts on charges 7, 8, and 14 are unreasonable or unable to be supported having regard to the evidence. In particular –

(1) it was not open to the jury to infer that an agreement was formed between the applicant, Steve Iliopoulos and Loukia Bariamis to defraud either the CBA or WBC;

The test on appeal

15. In determining whether a conviction is unsafe, an appellate court is to make 'an independent assessment of the evidence, both as to its sufficiency and its quality'.[1] As the High Court said in *M v The Queen*:[2]

> The Court does not consider as a question of law whether there is evidence to support the verdict...The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand'.[3]

[1] *SKA v The Queen* (2011) 243 CLR 400, [14], citing *Morris v The Queen* (1987) 163 CLR 454, 473 with approval.
[2] (1994) 181 CLR 487
[3] *M v The Queen* (1994) 181 CLR 487, 492-493 per Mason CJ, Deane, Dawson and Toohey JJ.

Further:

> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.[4]

No agreement

16. The prosecution case was that the applicant, Loukia Bariamis and Steve Iliopoulos defrauded CBA and attempted to defraud WBC as a joint criminal enterprise. It is submitted that there was no direct evidence of an agreement and insufficient evidence from which an agreement could be inferred. Further, there was no evidence, or insufficient evidence, that the applicant knew that the information provided to the banks was false. It is submitted that the prosecution failed to exclude the reasonable possibility that the applicant in his representations to the banks simply passed on and believed information provided to him by members of Viking.

17. The prosecution case was that the applicant knew that the financial information provided to the banks was false. There was no direct evidence of this. The prosecution relied upon the applicant's position within Viking, his knowledge of the affairs of Viking as shown at meetings with the bankers, his preparation of the Strategic Overview document, and his attendance at sales meetings and knowledge of sales as providing the basis for a conclusion that he knew of and was party to the frauds.

18. The prosecution relied upon the applicant being copied into emails from Viking that were sent to the banks. Some of those emails contained false financial information. There was no evidence that the applicant was aware that the financial information was false. The applicant was never copied in on any email that contained false ADTBs. The documents forwarded to the bank were prepared by Loukia Bariamis or staff working in the accounts department of Viking. There was no evidence that the applicant ever received the true financial documents. As Kaye J in sentencing observed, Loukia Bariamis 'took particular care to ensure that other persons, associated with the Viking Group, only had limited access to, and familiarity with, the details of the financial documents that she was producing.' (Sentence [11])

[4] *M v The Queen* (1994) 181 CLR 487, 494 per Mason CJ, Deane, Dawson and Toohey JJ.

19. On the evidence, the false profit and loss figures and the false balance sheets provided to the banks were not significantly greater than Viking's true position. Thus, the falsity would not have been readily apparent to the applicant. The profit and loss statements and balance sheets would have legitimately included related companies' debts irrespective of whether they were falsely included in the ADTBs. (T1698) They were not false debts. Related companies' debts aside, the actual overstatement in charges 8 and 14 was $1.38m in false debtors and inflated debts for legitimate debtors. (Annexure A) That is the figure the profit and loss statements and balance sheets must have been inflated by to remain consistent with the ADTBs. In a group the size of Viking this was a small discrepancy. As Kaye J remarked, there was a reasonable basis to believe the group was operating profitably and successfully. Some of the prosecution witnesses stated that their perception was that the group was thriving and growing. "Apart from its cash flow issues, the business of the Group bore all the hallmarks of being successful and viable". (Sentence [57]). There was no warrant to conclude that 'you only had to open one aged debtor trial balance to see that they had been changed.' (T2540)

20. The prosecution argued that the applicant was involved in all negotiations with what the false financials statements purported were Viking's larger customers. (T2532) However, there was no evidence of the applicant representing to the banks or any other person that he had negotiated with all larger customers.

21. The prosecution also relied upon applicant's role as executive general manager and involvement in sales management. The applicant conducted sales meetings over the phone and received sales reports. Witnesses Michael Duckworth, Mark Hooper and George Lerias gave some evidence of the applicant's involvement in sales. Their evidence, it is submitted, was insufficiently detailed. Further, no witness was called to give evidence as to the applicant's knowledge of VFS' relationship with customers Aldi, Boral and Linfox (particulars in charges 7 and 14). Witnesses who were involved with VFS were not asked by the prosecution as to the applicant's involvement with and knowledge of VFS' customers and sales.

22. The allegations surrounding the Aldi deal, in particular, are illustrative. The prosecution case was that the applicant had dishonestly represented that VFS "is now the exclusive supplier of heavy vehicle maintenance services to [Aldi] for Victoria. Aldi has recently contacted VFS to provide services in Dandenong". [Strategic Overview Document Ex AZ] The applicant never stated that he had negotiated the contract with Aldi. Andrew Cassar of VFS testified that Aldi representatives told him that apart from trucks under warranty, Aldi

"could service the rest of their fleet and do the service and repair work to their trailers" at Viking's Dandenong facility. (T2148) Exhibit BB5 showed there was a plan by Viking to establish a servicing depot at Dandenong. The applicant did not attend the meetings between Mr Cassar and Aldi representatives but was copied into the minutes of such meetings.

23. Kaye J noted that Gerrit Knauth from CBA testified that the applicant had in fact said at the meeting of 22 July 2010 that VFS was establishing a connection with Aldi and was starting to service Aldi trucks at a Dandenong facility, which was true. (Sentence, [19]) The misstatement in the Strategic Overview document was corrected at that meeting. At its highest, it was a mistake. It strongly suggests that the applicant was simply passing on to the banks information he had been given.

24. Although the applicant was married to Mrs Bariamis the evidence of their relationship was such that she would not be expected to divulge her fraudulent conduct to the applicant. A series of secretive emails between Loukia Bariamis and Steve Iliopoulos (Exhibit BB3) suggested quite the opposite. They show Loukia's contempt for her husband describing him as 'that stupid, stupid man' who thought he could outsmart her. (T1769).

25. Charge 7's particulars included further representations from the Strategic Overview document: that VFS had substantial business generated by contracts with Boral and Linfox. The prosecution said it would be 'a remarkable coincidence if Bill Bariamis and Steve Iliopoulos just happened … to mention those two companies as being companies that had given Viking significant new work'. (T2530) However, as with the case of Aldi, the prosecution could not exclude the reasonable possibility that the applicant was simply repeating information he had been given.

26. The remaining particulars in charge 7 were misrepresentations by Loukia Bariamis on her financial documents that Alex Vovos had prepared the documents. The crown conceded there was no evidence that the applicant knew his wife was producing false financial reports under Alex Vovos' name and that those particulars were irrelevant to the applicant. (T2518)

27. There was opinion evidence from some of the bankers as to the applicant's familiarity with the financial reports. However, the CBA banker's evidence was provably tainted by 'brainstorming sessions' conducted by Detective Lal in group meetings with CBA witnesses. (Ex BB4) In any event, the evidence of the CBA bankers did not go beyond showing that the applicant was able to discuss the financial information he had been provided.

28. On the evidence, it was not open to the jury to exclude the reasonable possibility that an agreement was *not* formed between the applicant, Steve Iliopoulos and Loukia Bariamis to defraud the CBA and WBC. It was not open to the jury to conclude beyond reasonable doubt that the alleged agreement was formed. It was not open on the evidence for the jury to conclude that the applicant was even aware of the frauds being perpetrated.

<u>Ground 2</u>: The verdict on charge 7 is unreasonable or unable to be supported having regard to the evidence. In particular –

(1) it was not open to characterize the steps towards obtaining finance from the WBC otherwise than as mere preparation.

29. Mr Shakes, from WBC, testified as to the steps involved in obtaining finance from WBC. Kaye J found that the substance of his evidence was that there were seven 'major steps':

(1) The first stage involved the bank having an introductory meeting with the potential customer to discuss the background of the customer and to ascertain why the customer wanted to change banks.

(2) The second stage in the process was that the customer then provided to WBC all of its financial information. Mr Shakes stated that, in this respect, he made it clear, at the initial meeting, what information would be required by Westpac to assess Viking's application. While much financial information was provided by Viking, by March 2011, two important pieces of information were still outstanding. First, Viking had failed to provide balance sheets for successive years that had corresponding opening and closing balances. Secondly, Viking had failed to provide projections for the current financial year.

(3) The third stage would have involved Mr Shakes and Mr Camilleri reviewing the financial information provided by Viking, and preparing a credit submission to be provided to the credit department. However, Mr Shakes stated that that process could not be completed because WBC had not been provided with the projections nor the balance sheets that had corresponding opening and closing balances.

(4) The fourth stage ordinarily involved review and analysis of the credit submission. That process is undertaken by two or three people in the credit department, who take into account a number of factors, including the potential customer's historic financial performance, its projected financial performance, the nature of the industry, and margin analysis management. If the credit department accepts the credit submission,

the application is passed to the loans and syndication department, which prepares the 'credit section term sheet'. That document is approximately 15 pages in length, and includes operating covenants, the required security, and other such matters. The term sheet is then provided to the customer. It does not constitute an offer but, in contractual terms, consists of an invitation to treat.

(5) If the term sheet is acceptable to the customer, the matter is passed to the business analyst team of the bank, which prepares a 40 page credit submission. That team also prepares its own budgets and analysis of the applicant's business, and conducts a sensitivity analysis. When that process is completed, the credit submission is passed to the credit department for formal sign off.

(6) The seventh and final stage consists of the issue, by the credit department of the bank, of a binding letter of offer to the potential customer. If the offer is accepted, the application process is completed.[5]

30. Mr Shakes, in re-examination, testified that WBC had started but not completed step 3, and that 30-60 hours had been spent by it in preparation; that the credit paper would have likely supported the loan application; and that the reason the credit paper was not completed was that Loukia Bariamis had failed to provide the requested figures.[6]

31. *R v Tadic* [2003] VSCA 28 and *R v Andreola* [2002] VSCA 92 are two cases of obtaining financial advantage by deception. Both concern loan applications. Both consider whether the verdicts were unsafe and unsatisfactory on the ground of mere preparation.

32. In *Tadic*, the conviction on count 3 was quashed because the evidence was insufficient to show conduct going beyond mere preparation.[7] The evidence there showed that the accused had:

(1) applied for a loan facility;

(2) provided the necessary documents;

(3) been provisionally approved; but

(4) decided not to proceed with the application.

33. The application in *Tadic* had proceeded significantly further than that of the applicant and his co-accused. The only respect in which the accused in *Tadic* had done 'less' was that it was a simpler application, so that the accused and lender spent less time. It is submitted that

[5] *DPP v Iliopoulos & Ors (Ruling No 4)* [2016] VSC 133, [29]
[6] *DPP v Iliopoulos & Ors (Ruling No 4)* [2016] VSC 133, [30]
[7] *R v Tadic* [2003] VSCA 28, [25].

the amount of time spent is not material. What is material is what steps are taken towards completion.

34. In *Andreola*, the accused committed four counts of attempting to obtain a financial advantage by deception. His *modus operandi* was similar on each. He falsely represented that:
    (1) he was enormously wealthy;
    (2) he had $40m held overseas in US Government Bonds that would be wired over;
    (3) he represented a wealthy US corporation;
    (4) he was going to buy Coles-Myer;
    (5) he had purchased a well-known golfer's jet, and was having another built for him.[8]

35. He sought relatively small amounts of $5,000, $11,000, $50,000, said to tide him over until the $40m was transferred. In each case, the bank refused to lend him the money without documentation or other evidence.[9] His appeal against conviction was refused.

36. The two cases differ in principle: in *Andreola*, the accused never had any intention of providing further documentation. As in count 1, where he represented that his overseas US banker would be sending the funds, his plan was to receive the funds immediately. That case is explicable on the last act principle. That is, the accused had completed his plan, but the plan failed. In *Tadic*, he had not. The applicant, Mrs Bariamis, and Steve Iliopoulos, it is submitted, are in the same position as *Tadic* rather than *Andreola*.

37. It is of no consequence that it was Loukia Bariamis rather than the applicant who halted the negotiations. Framed as a JCE, her failure is sheeted home to the group. It is submitted that, consistently with *Tadic*, the group did not pass beyond mere preparation.

G A Georgiou SC L Howson

Counsel for the applicant, Vasilis Bariamis

Dated 5 September 2016

[8] *R v Andreola* [2002] VSCA 92, [16].
[9] *R v Andreola* [2002] VSCA 92, [18].