

THE QUEEN

Respondent

and

VASILIS BARIAMIS

Applicant

**RESPONSE TO APPLICANT'S WRITTEN CASE**

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Filed on behalf of:	Respondent
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**Part A and B: Particulars of Conviction and Sentence, Relevant Statutory Provisions and Maximum Penalties**

1. The Applicant was charged with 4 dishonesty offences. On 2 May 2016 the Applicant was convicted by a Supreme Court jury verdict of 3 of those charges and was sentenced on 9 August 2016.

Charge on Indictment	Offence	Maximum	Sentence	Cumulation
6.	Obtaining a financial advantage by deception [s 82(1) of the <i>Crimes Act 1958</i> ]	Acquitted		
7.	Attempting to obtain a financial advantage by deception [s 321M of the <i>Crimes Act 1958</i> ]	10 years [s 82(1) & s 321P of the <i>Crimes Act 1958</i> & s 6I(1) of the <i>Sentencing Act 1991</i> ]	5 years	15 months

Charge on Indictment	Offence	Maximum	Sentence	Cumulation
8.	Obtaining a financial advantage by deception [s 82(1) of the <i>Crimes Act 1958</i> ]	20 years (CCE Offence) [s 82(1) of the <i>Crimes Act 1958</i> & s 6I(1) of the <i>Sentencing Act 1991</i> ]	5 years	Base
14.	Obtaining a financial advantage by deception [s 82(1) of the <i>Crimes Act 1958</i> ]	20 years (CCE Offence) [s 82(1) of the <i>Crimes Act 1958</i> & s 6I(1) of the <i>Sentencing Act 1991</i> ]	2 years	2 months
<b>Total Effective Sentence:</b>		6 years 5 months		
<b>Non-Parole Period:</b>		4 years		
<b>Pre-Sentence detention declaration pursuant to s 18(1) of the <i>Sentencing Act 1991</i>:</b>		100 days		
<b>Other relevant orders:</b> Nil				

### **Part C: Summary of Relevant Facts<sup>1</sup>**

#### ***a) Introduction***

2. The offences arose out of representations made to financial institutions to provide lending facilities to the Viking Group of Companies, with which the Applicant was the executive general manager (GM) at the relevant time.
3. The charges alleged that the Applicant had committed the offences charged in a joint criminal enterprise with Steve Illiopoulos (SI) and Loukia Bariamis (LB) (the Applicant's wife). It was common ground that the relevant documents contained falsehoods, but the defence was conducted on the basis that the Applicant lacked knowledge of these falsehoods.

<sup>1</sup> *DPP v Vasiliou & Iliopoulos* [2016] VSC 447, [3]-[52], <sup>1</sup> *DPP v Iliopoulos & Bariamis* [2016] VSC 447, [3]-[52]. Summary of Prosecution Opening dated 22 September 2015 (Note that the Opening refers to 17 charges when there were only 14 charges on the final trial indictment), Summary of Charges and Exhibits provided to the jury during the prosecutor's closing address, A document handed to the jury during the prosecutor's closing address headed 'Table of Deceptions in Regards to the RFF – charge 6, 8 & 14', Exhibit List, Trial Exhibits

**b) Loukia Bariamis**

4. In 2013 LB pleaded guilty in the Supreme Court to three charges of obtaining a financial advantage by deception from the Commonwealth Bank of Australia ('the CBA'), those charges being the equivalent of charges 6, 8 and 14 in the indictment in this case. On her plea, LB gave an undertaking to cooperate with the prosecution in this matter<sup>2</sup>.
5. LB was a certified public accountant, a registered auditor, and a tax agent. From the early 1990s, she was a member of the accounting firm Greenfield Fox. In 2004 and 2005, LB perpetrated an extensive fraud on the Australian Taxation Office, totalling the amount of \$1.8 million. Her criminal activities were entirely unknown to all of her clients. Her fraud was detected by the Australian Tax Office in June 2005 and she was subsequently charged with tax offences and sentenced in the County Court in 2013<sup>3</sup>.

**c) Steve Iliopoulos and the purchase of Viking Fleet Service**

6. SI was a mechanic by trade. In 1999, he commenced to work with a company called Viking Fleet Service (VFS), a small business involved in the repair of trucks and prime movers. SI entered into an agreement with the owner to purchase the business over a period of years, concluding in 2007. In the meantime, LB assisted SI to refinance lending facilities for the business.
7. The business of VFS expanded rapidly and LB commenced work for SI in an accounting capacity. In 2007, SI negotiated to purchase Perth Freightlines Pty Ltd (PF), a large freight service business. Around that time, SI became the CEO of the Viking Group of Companies. LB assumed the role of CFO. She assumed responsibility for the production of financial and accounting documents relating to the business.

**d) The Applicant**

8. In August 2008, the Applicant joined the Viking Group as its executive general manager, responsible for the operational and strategic side of the business.

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<sup>2</sup> *DPP v Bariamis* [2013] VSC 457 (6 September 2013)

<sup>3</sup> *DPP v Bariamis* [2013] VCC 1032 (28 June 2013)

***e) Growth of the Viking Group***

9. The business of the Viking Group continued to grow and diversify very rapidly. Its business was divided among a number of different corporate entities. As a result of its rapid growth, the Viking Group experienced chronic cash flow shortfalls. The CBA provided a series of temporary excesses over Viking's formal lending limits.

***f) Receivable Fund Facility***

10. One of the facilities provided by the CBA was a receivable finance facility. Under that facility, the bank provided finance to three members of the Viking Group, namely Perth Freightlines, Viking Transport and Logistics, and VFS, for 80% of those companies' current debtors, up to a prescribed limit. Debts owed to those companies by related entities in the Viking Group were excluded by the facility. In order to access finance under that facility, Viking provided a statement to the CBA setting out the invoices in respect of which it sought funding. At the end of each month, the CBA reconciled that document with the aged debtor trial balances of the companies.
11. In order to deal with the increasing cash flow problems of the Viking Companies, LB created a system by which debts owed to the three Viking companies by related entities in the Group were, in the documentation provided to the CBA, replaced by fictitious debts owed by other unrelated entities. LB also falsely inflated the amounts that were owed to the Viking companies by their debtors. Additionally, entirely false or fictitious debtors were created.

***g) Charges 6, 8 & 14***

12. In October 2009, the CBA approved a further application by the Viking Group for additional financial facilities, totalling \$12.15 million. The application was based on falsified aged debtor trial balances for the three Viking companies. Those documents fraudulently inflated the amounts owed by debtors to each of those three companies by \$5.5 million. In addition, the application was based on falsified accounting documents for entities in the Viking Group that purported to have been prepared by Alex Vovos of Meridian Financial Services, but had actually been prepared by LB. SI was convicted of that charge (charge 6). The Applicant was

acquitted of charge 6.

13. The ongoing cash flow problems of the Viking Group were the subject of three meetings between officers of the CBA, the Applicant, SI and LB in June and July of 2010. In October 2010, the CBA approved a further application on behalf of the Group for additional financial facilities in the sum of \$13.9 million. That application, and the meetings which preceded it, were the basis of charge 8, of which the Applicant and SI were both convicted.
14. That charge was based on aged debtor balances falsely inflated by a sum of \$7.2 million. In addition, charge 8 alleged that the increase in financial facilities was based on a false representation made to the CBA that VFS was the exclusive supplier of heavy vehicle maintenance services to Aldi stores in Victoria. That representation was contained in a document entitled 'Viking Group — Divisional Strategic Overview 2010-2011', which the Applicant had sent to an officer of the CBA in July 2010. The Applicant made a presentation on that document in the course of one of the meetings with bank officers on 22 July 2010.
15. The Viking Group still continued to experience liquidity problems. At a meeting on 17 November 2010, the bank approved a further \$4 million increase in the credit facilities based on the same documentation and information that formed the subject of charge 8 (Charge 14). The Applicant and SI were both convicted on charge 14.

***h) Refinancing with Westpac (charge 7)***

16. Charge 7 arose out of an attempt by the Applicant, SI and LB to re-finance with Westpac the lending facilities provided by CBA to the Viking Group between 6 July 2010 and 30 March 2011. Westpac provided a more flexible, and accessible, receivables finance facility than CBA, which was important to the alleviation of the chronic cash flow difficulties experienced by the Viking Group.
17. The application to Westpac commenced with a meeting between the Applicant, SI and LB, and officers of the Westpac Bank on 6 July 2010. Following that meeting, and a further meeting in August 2010, a number of financial and accounting documents were provided to Westpac, principally by the Applicant. Those documents included financial accounts of a

number of entities in the Viking Group prepared by LB, which falsely purported to have been prepared by Alex Vovos of Meridian Financial Services. In addition, the Applicant provided to Westpac a copy of the Divisional Strategic Overview document of the Viking Group. That document contained statements that VFS was the exclusive supplier of heavy vehicle maintenance services to Aldi stores in Victoria, and that it had substantial business generated by a contract with Boral Resources (Vic) Pty Ltd and by a contract with Linfox. Those false statements, and the falsified accounting documents purporting to have been prepared by Alex Vovos, constituted the deceptions alleged in charge 7. The Applicant and SI were convicted on this charge.

18. An officer of Westpac noted that there was an inconsistency between the closing balances for one year, and the opening balances for the succeeding year in the accounts that had been prepared by LB. LB could not explain that inconsistency without disclosing the fraud. Accordingly, negotiations stalled. In early 2011, steps were taken to revive the application, but they did not proceed further, before a receiver was appointed to the Viking Group in early April 2011.

#### **Part D: Grounds of Appeal**

19. **Ground 1 – The verdicts on charges 7, 8 and 14 are unreasonable or unable to be supported having regard to the evidence. In particular -**

**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 the WBC.**

***a) Unreasonable verdicts:***

- 19.1. It is respectfully submitted that the jury's verdict was reasonably open and the evidence led before the jury did not 'oblige' the jury to come to a different conclusion.<sup>4</sup>

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<sup>4</sup> *Badem (a Pseudonym) v. R* [2016] VSCA 200 at [40] – [47].

19.2. This was a case where the advantage experienced by the jury, in seeing and hearing the evidence, was significant. The verdicts, ultimately arrived at by the jury, could not be viewed as unreasonable or without support from the evidence.

19.3. There was sufficient evidence to establish, by inference, that there was an agreement between the Applicant, SI and LB to defraud the CBA and Westpac.

**b) *The Applicant's knowledge and involvement in an agreement:***

19.4. A key issue for the jury to determine in this case was the Applicant's knowledge about the falsity of documents used in support of applications for finance. Reliance was placed on the documentary evidence, evidence from witnesses who dealt with the Applicant and the inferences, which could be drawn from the evidence as a whole, to prove the requisite knowledge of the Applicant and his involvement in an agreement with SI and LB to defraud either the CBA or the WBC.

19.5. The Applicant's involvement in meeting with the banks, in the presence of SI and LB, and making oral and written representations to the bank that were demonstrably false were critical pieces of evidence. The fact such false representations were made in the presence of SI and LB confirmed the representations were part of a pre-arranged plan or agreement to induce the bank to provide additional finance.

**c) *The Applicant's position in the Viking Group of companies:***

19.6. The Applicant was part of a three person management team, along with SI and LB, that led the Viking Group. He was the executive general manager, responsible for the operational and strategic side of the business.

19.7. The companies within the Viking Group practically operated as different divisions of the same large business.<sup>5</sup> The financial arrangements, fraudulently entered into by the Viking Group, benefited this group.

**d) *Evidence of Loukia Bariamis – a difficult witness:***

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<sup>5</sup> Trial Transcript, Prosecution Closing Address, p.2423.

19.8. LB was an important witness as she was the Chief Financial Officer of the Viking Group and ‘cooked the books of the companies.’<sup>6</sup>

19.9. The prosecution did not argue she was a credible witness who deserved to be accepted on all topics. The prosecutor made it clear that any part of her evidence, could only be accepted by the jury after close scrutiny.

19.10. During the prosecutor’s closing address he stated:

- He would not be trying to persuade the jury to ‘accept LB as generally a truthful and reliable witness’;<sup>7</sup>
- The prosecution had a duty to call all relevant witnesses and it was the juries function to assess the witness’s evidence and work out which part, if any, they accept and which parts they reject;<sup>8</sup>
- The prosecution did not accept parts of LB’s evidence – for example LB’s evidence that her husband, The Applicant, was not a party to the receivable finance facility frauds committed against the CBA or that the Applicant was not part of the attempt to refinance with Westpac. The prosecution position was that LB was lying to protect her husband;<sup>9</sup>
- There were parts of LB’s evidence the jury would find was untruthful;<sup>10</sup>
- The jury should ‘be very cautious about accepting anything she told you’ but the prosecutor did remind them that ‘some of her evidence was not in dispute’;<sup>11</sup>
- ‘A person who has been involved in a crime has a motive to shift the blame and the very fact that the person has participated in dishonesty offences demonstrates that the person is willing to be dishonest ... [and] is reason enough to be cautious about what she tells you’;<sup>12</sup>

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<sup>6</sup> Trial Transcript, Prosecution Closing Address, p.2424.

<sup>7</sup> Trial Transcript, Prosecution Closing Address, p.2425.

<sup>8</sup> Trial Transcript, Prosecution Closing Address, p.2425.

<sup>9</sup> Trial Transcript, Prosecution Closing Address, p.2425.

<sup>10</sup> Trial Transcript, Prosecution Closing Address, p.2425.

<sup>11</sup> Trial Transcript, Prosecution Closing Address, p.2426.

<sup>12</sup> Trial Transcript, Prosecution Closing Address, p.2427.



- ‘If you look at the other evidence just because she has told a lie, so many lies, does not mean she is lying about this if the other evidence supports that conclusion beyond reasonable doubt.’<sup>13</sup>

*e) Prosecution case against the Applicant:*

19.11. The prosecution case was that the Applicant was part of a joint criminal enterprise involving the commission of frauds which he participated in.

*f) Charge 6 – the acquittal:*

19.12. The Applicant was acquitted of charge 6 on the indictment, demonstrating that the jury were able to follow the direction of the trial judge regarding separate consideration of each of the counts before them.

19.13. As such the evidence underpinning charge 6 has not been analysed in greater detail. However the approach undertaken concerning charges 6, 8 and 14 must be considered.

*g) Charges 6 & 8 – an overview – understanding the fraudulent methodology:*

19.14. Although the Applicant was acquitted of charge 6, an understanding of the fraudulent methodology used in charges 6 and 8 is necessary.

19.15. LB, with the assistance of Carly Hartley, fraudulently manipulated the receivable finance facilities by submitting false invoices to the CBA which had the effect of increasing the sales and debtors for the three main trading entities within the Viking Group. These actions, in manipulating the receivable finance facility, induced the CBA to increase the limit on that facility on two occasions – this was the subject of charges 6 & 8.

19.16. There was ample evidence of the Viking Group improperly operating the receivable finance facility. Fraudulent invoices that were submitted to the bank fell into three categories:

- Invoices for related companies – for example invoices to Perth Freightlines were rebadged, purporting to be invoices to Linfox Linehaul, and invoices to Viking

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<sup>13</sup> Trial Transcript, Prosecution Closing Address, p.2428.

Transport Express were rebadged, purporting to be invoices to V/Line Express. Invoices from related companies should not have been submitted for the receivable finance facility;<sup>14</sup>

- Legitimate invoices for legitimate customers had the amount of work performed increased; and
- Invoices issued to fictitious companies – for example Ryan’s transport. Carly Hartley confirmed this was a fictitious company based on the name of her partner.<sup>15</sup>

19.17. The prosecution case was that the Applicant and SI participated in a joint criminal enterprise with LB. It was not in dispute that the receivable finance facilities were fraudulently manipulated by LB with the assistance of Carly Hartley.<sup>16</sup> The issue was whether the Applicant had knowledge of this scheme at the time he was involved in applying for that finance. In other words, whether he was part of an agreement or arrangement to apply for that finance knowing that false documents were being supplied.<sup>17</sup>

19.18. Receivable finance facilities were first offered to the Viking Group in August 2008. The limits on these facilities were increased in 2009 and 2010. It was a method by which the Viking Group could sell their invoices to the CBA, so instead of waiting 30 or 60 days to get paid the CBA would pay them straight away. The CBA paid 80% of the value of the invoice, 20% being kept as security. There was a limit at which the CBA would not buy any further invoices from the Viking Group. The Viking Group would tell its customers to pay the CBA directly for the invoice, the CBA on receipt of payment would forward 20% of the invoice back to the Viking Group.<sup>18</sup>

19.19. Carly Hartley gave evidence that she was responsible for sending the false documents to the bank, but she only did this after sending them to LB to finalise the false manipulation of these documents. The submission of the false invoices and aged debtor trial balances had the effect of increasing the sales, and correspondingly the debtors, for the Viking Group.<sup>19</sup>

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<sup>14</sup> Trial Transcript, Prosecution Closing Address, p.2496.

<sup>15</sup> Trial Transcript, Prosecution Closing Address, p.2498-99.

<sup>16</sup> Trial Transcript, Prosecution Closing Address, p.2494.

<sup>17</sup> Trial Transcript, Prosecution Closing Address, p.2494.

<sup>18</sup> Trial Transcript, Prosecution Closing Address, p.2495.

<sup>19</sup> Trial Transcript, Prosecution Closing Address, p.2500.

19.20. It was significant that Carly Hartley only became involved in the scheme in late 2009, while the scheme was in ‘full swing by August 2009.’<sup>20</sup> The relevance of this was that LB operated the scheme for a number of months without the assistance of Carly Hartley.<sup>21</sup> The aged debtor trial balances for three of the Viking Group companies dated 21 August 2009 contained many false entries and overstated the debtors by more than \$5 million.<sup>22</sup>

***h) Charge 8 - analysis:***

19.21. The prosecution case, and argument to the jury concerning charge 8, was as follows:<sup>23</sup>

- The Applicant, SI and LB were participating in a joint criminal enterprise to commit this offence;<sup>24</sup>
- This charge related to the 2010 annual review, which the CBA conducted on the credit facilities the Viking Group had with the bank. The Viking Group were applying for increased limits and the bank approved the increased limits on the receivable finance facility. \$13.9 million in further credit was approved;<sup>25</sup>
- When the review started in mid-2010 the Viking Group was again experiencing cash flow problems and the CBA had granted temporary excesses on a number of occasions;<sup>26</sup>
- There was no dispute that LB committed this offence, the issue was whether the Applicant and SI were a party to the offending;<sup>27</sup>
- The effect of LB and Carly Hartley submitting false invoices to the bank was that the debtors were overstated by over \$7 million;<sup>28</sup>
- Some of the representations made at the meetings in June and July of 2010, and the representations contained in the Applicant’s strategic overview document, made it clear that both the Applicant and SI were a party to those frauds;<sup>29</sup>

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<sup>20</sup> Trial Transcript, Prosecution Closing Address, p.2501.

<sup>21</sup> Trial Transcript, Prosecution Closing Address, p.2501.

<sup>22</sup> Trial Transcript, Prosecution Closing Address, p.2501.

<sup>23</sup> Note that the prosecutor indicated, during his closing address, that he was not relying on particular e) in relation to charge 8.

<sup>24</sup> Trial Transcript, Prosecution Closing Address, p.2522.

<sup>25</sup> Trial Transcript, Prosecution Closing Address, p.2521.

<sup>26</sup> Trial Transcript, Prosecution Closing Address, p.2522.

<sup>27</sup> Trial Transcript, Prosecution Closing Address, p.2522.

<sup>28</sup> Trial Transcript, Prosecution Closing Address, p.2523.

- The involvement of the Applicant, LB and SI in the meetings, underpinning the ultimate increase the subject of charge 8, demonstrate that all three were aware of the fraudulent manipulation of the Viking Group’s financial records;<sup>30</sup>
- The first meeting took place on 17 June 2010 a file note was produced of that meeting – **exhibit AV**. The Applicant, LB and SI all attended this meeting on behalf of the Viking Group. Heib and Gerrit Knauth (‘Knauth’) attended on behalf of the CBA and stated the meeting was to discuss the Viking Group’s cash flow problems and to consider a request for a temporary excess. Heib and Knauth gave evidence that it was mainly LB who explained why it was that the Viking Group were experiencing cash flow problems.<sup>31</sup> They noted that the Applicant did provide input about software problems;<sup>32</sup>
- The second meeting took place on 30 June 2010 a file note was produced of that meeting – **exhibit AW**. The Applicant, LB, SI and Natalie Rompotis (legal counsel) all attended this meeting on behalf of the Viking Group. Heib, Knauth and Malcolm Bull (‘Bull’) attended on behalf of the CBA.<sup>33</sup> There was a long discussion about collecting outstanding debts within 45 days.<sup>34</sup> During the meeting there was discussion about significant new work which had been obtained from Amcor, Toll, Linfox, V/Line, Aldi, TNT and other national companies.<sup>35</sup> Heib recalled the conversation, regarding the business mix, was driven by the Applicant. Heib recalled the Applicant talking about Aldi and TNT.<sup>36</sup> Linfox and V/Line were mentioned in the file note (**exhibit AW**) and were mentioned at this meeting.<sup>37</sup> Lies were told in this meeting about who, and to what extent, the Viking Group was doing work for. These lies would not have been told in such a meeting unless all three members of the Viking Groups management team (the Applicant, LB and SI) were in on the lie. The Applicant and SI were in a good position to know who the

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<sup>29</sup> Trial Transcript, Prosecution Closing Address, p.2523.

<sup>30</sup> Trial Transcript, Prosecution Closing Address, p.2525.

<sup>31</sup> Trial Transcript, Prosecution Closing Address, p.2525.

<sup>32</sup> Trial Transcript, Prosecution Closing Address, p.2526.

<sup>33</sup> Trial Transcript, Prosecution Closing Address, p.2526.

<sup>34</sup> Trial Transcript, Prosecution Closing Address, p.2526-27.

<sup>35</sup> Trial Transcript, Prosecution Closing Address, p.2527.

<sup>36</sup> Trial Transcript, Prosecution Closing Address, p.2527.

<sup>37</sup> Trial Transcript, Prosecution Closing Address, p.2528.

Viking Group's major clients were. Both the Applicant and SI were responsible for attracting new business and assessing the profitability of new clients. George Lerias, Michael Duckworth and Mark Hooper gave evidence that the Applicant was very familiar with the Viking Group's customer base. If Linfox and / or V/Line were major customers both the Applicant and SI would have known. Similarly if such a lie was told in a meeting, without their prior knowledge, they would have been able to identify it as an obvious lie immediately. Neither the Applicant or SI said, during the meeting, we don't do any work for V/Line or we only do a minimal amount of work for Linfox;

- Linfox was mentioned in the strategic overview document produced by the Applicant a few weeks later;<sup>38</sup>
- After seeing the list of debtors Heib rang LB who told him V/Line, which owed the Viking Group over \$2 million, was the train operator which comforted Heib;<sup>39</sup>
- The Viking Group, in its dealing with the bank, rebadged Viking Group companies as 'Linfox' and 'V/Line.' When Viking Fleet Service did work for Perth Freightlines the bank was told the work had been done for Linfox. When Viking Transport Express did work for Perth Freightlines it was recorded under the name of 'V/Line' for purposes of paperwork supplied to the CBA;<sup>40</sup>
- No Viking Group company did any work for V/Line, while Viking Fleet Service did a small amount of work for Linfox. The amount of actual money owing by Linfox to Viking Fleet Service in mid-2010 was just over \$2500;<sup>41</sup>
- The fraudulent use of Linfox and V/Line in the aged debtor trial balance was done with the knowledge of the Applicant and SI in that it was to be used to induce the CBA to provide additional finance. They appeared in the documents as major customers, this was a lie intended to deceive the bank;<sup>42</sup>
- Brendan Barry-Murphy ('Barry-Murphy'), a CBA banker, gave evidence that the Applicant had told him he had a relationship with Lindsay Fox;<sup>43</sup>

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<sup>38</sup> Trial Transcript, Prosecution Closing Address, p.2528.

<sup>39</sup> Trial Transcript, Prosecution Closing Address, p.2528.

<sup>40</sup> Trial Transcript, Prosecution Closing Address, p.2529.

<sup>41</sup> Trial Transcript, Prosecution Closing Address, p.2529.

<sup>42</sup> Trial Transcript, Prosecution Closing Address, p.2530.

<sup>43</sup> Trial Transcript, Prosecution Closing Address, p.2530.

- The documents produced to the bank suggested the Viking Group was doing over \$1 million work for Linfox per month at that time. That is very different from actually doing about \$3000 work for Linfox per month which appeared to be the true position;<sup>44</sup>
- The Applicant told Barry-Murphy that a substantial amount of work was being done for Linfox, which was a lie and he knew it to be a lie, because he knew it would be looked on favourably by the CBA during an application by the Viking Group for increased finance;<sup>45</sup>
- The third meeting occurred on 22 July 2010 and the Applicant, LB and SI attended on behalf of the Viking Group. Heib, Knauth and Bull attended from the CBA. A file note of this meeting was produced – **exhibit AX**;
  - Bull conducted a whiteboard exercise during that meeting to determine where all of the Viking Group’s cash flow was going.<sup>46</sup> The results of this exercise were set out at page 2 of the file note;
  - The Applicant presented a paper headed ‘Viking Group Division Strategic Overview 2010 to 2011’ which was **exhibit AZ**;
  - Knauth gave evidence that he has a clear memory of the Applicant presenting that paper and could recall the Applicant talking about Aldi. He was not challenged about this recollection;<sup>47</sup>
  - The paper produced by the Applicant contained false representations intended to induce the CBA to believe the Viking Group was a lot more profitable and had a much better customer base than it actually did. This document stated that ‘The Aldi contract is of particular interest as VFS (Viking Fleet Service) is now the exclusive supplier of heavy vehicle maintenance to the retailer for Victoria.’<sup>48</sup> Lee Buchanan and Steven Smith, from Aldi, gave evidence that no one from Aldi would ever consider such an exclusive arrangement as they don’t do exclusive arrangements. Aaron Jolliffe, who produced a list of invoices being **exhibit EO**, gave evidence

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<sup>44</sup> Trial Transcript, Prosecution Closing Address, p.2531.

<sup>45</sup> Trial Transcript, Prosecution Closing Address, p.2531.

<sup>46</sup> Trial Transcript, Prosecution Closing Address, p.2533.

<sup>47</sup> Trial Transcript, Prosecution Closing Address, p.2533-34.

<sup>48</sup> Trial Transcript, Prosecution Closing Address, p.2534-35.

that the percentage of Aldi maintenance work performed by Viking Fleet Service never got over 10%,<sup>49</sup>

- This representation about Aldi was a lie. It was in a paper produced by the Applicant and delivered to a meeting with the CBA on 22 July 2010 in the presence of the SI and LB. This lie would not have been told, or committed to writing, unless the SI had prior knowledge of it and approved of its telling.<sup>50</sup>
- Carly Hartley confirmed that all emails she sent to LB and the CBA, concerning the fraudulent manipulation of the receivable finance facility and documents to this end, were copied to SI. Perth Freightlines had been re-badged as Linfox and Viking Transport and Logistics had been rebadged as V/Line Express. According to the aged debtors trial balance submitted to the CBA those companies owed just under \$6 million to the Viking Group.<sup>51</sup>

19.22. The Applicant presented a strategic overview document (**Exhibit AZ**) at the meeting held on 22 July 2010 wherein it was claimed that Viking Fleet Services was the exclusive supplier of heavy vehicle maintenance to Aldi in Victoria. Such a representation would have had a favourable effect on the minds of the bankers. The fact that such information was presented to the CBA whilst all three of the management team were present shows it was done in accordance with a prearranged plan or agreement. They all knew the CBA was going to be furnished with this false information to support their application.<sup>52</sup>

19.23. This was a team effort to provide false information to the CBA, the Applicant's guilt was proved by his presence at those meetings and the evidence of the CBA representatives.<sup>53</sup>

19.24. The Applicant and SI knew that false invoices and aged debtor trial balances were being submitted to the CBA and that the sales and debtors had been grossly exaggerated. They also knew that Viking Fleet Service did not have a contract to be the exclusive supplier of heavy vehicle maintenance to Aldi in Victoria. They knew that the representations were

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<sup>49</sup> Trial Transcript, Prosecution Closing Address, p.2536.

<sup>50</sup> Trial Transcript, Prosecution Closing Address, p.2537.

<sup>51</sup> Trial Transcript, Prosecution Closing Address, p.2539.

<sup>52</sup> Trial Transcript, Prosecution Closing Address, p.2429.

<sup>53</sup> Trial Transcript, Prosecution Closing Address, p.2429.

made to the CBA to induce the bank to approve the credit facilities. The representations were part of a team effort from the management team.<sup>54</sup>

*i) Charge 14 - analysis:*

19.25. The prosecution case, and argument to the jury concerning charge 14, was as follows:

- The Applicant, SI and LB attended a meeting with the CBA on 17 November 2010 representing the Viking Group. Knauth, Bull and Barry-Murphy attended on behalf of the CBA. The notes of this meeting are **exhibit BJ**,<sup>55</sup>
- This was another meeting wherein the Viking Group were seeking an increase to their facilities. According to Knauth it seems that this was approved in a preliminary way prior to the meeting. The CBA was told that the Viking Group was again experiencing cash flow problems and the bank agreed to provide credit facilities as a temporary measure,<sup>56</sup>
- Ticknell-Best and Knauth gave evidence that they relied on the same financial information to assess the application as they did when approving the credit facilities about 6 weeks earlier in October 2010 – this was the information provided in connection with charge 8;<sup>57</sup>
- The particulars for charge 8 and charge 14 are identical in so far as the respective particulars set out in a) to c) are concerned;<sup>58</sup>
- It must have been apparent to the Applicant and SI, that at the meeting the bank was relying on the same financial information, such that those previous false representations made to the bank induced them to approve the facilities sought.<sup>59</sup>

*j) Charge 7 – the attempt charge - analysis:*

19.26. The prosecution case, and argument to the jury concerning charge 7, was as follows:

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<sup>54</sup> Trial Transcript, Prosecution Closing Address, p.2545.

<sup>55</sup> Trial Transcript, Prosecution Closing Address, p.2546.

<sup>56</sup> Trial Transcript, Prosecution Closing Address, p.2546.

<sup>57</sup> Trial Transcript, Prosecution Closing Address, p.2546.

<sup>58</sup> Trial Transcript, Prosecution Closing Address, p.2546.

<sup>59</sup> Trial Transcript, Prosecution Closing Address, p.2547.



- The Applicant, SI and LB attempted to obtain a financial advantage from the Westpac Bank by attempting to re-finance the Viking Group's debt of approximately \$53 million with the Westpac Bank;<sup>60</sup>
- Jonathan Shakes ('Shakes') and Anton Camilleri ('Camilleri') from the Westpac Bank were the main witnesses supporting this charge. A great deal of their evidence was not in dispute;<sup>61</sup>
- The Viking Group had a pre-existing relationship with Westpac, having commercial hire-purchase agreements with Westpac totalling approximately \$10 million;<sup>62</sup>
- The Viking Group's property finance and receivable finance facilities were with the CBA and it was these facilities they were seeking to re-finance;<sup>63</sup>
- There was some dispute about who initiated these discussions, but this was not a critical issue;<sup>64</sup>
- There were two meetings between the Viking Group and Westpac. The Applicant, SI and LB were part of these meetings either by attending in person or being linked in by telephone;<sup>65</sup>
- There were two main issues in dispute for this charge:
  - Were the Applicant and SI party to any deception on the Westpac bank? Connected to this issue was the question of:
    - whether the Applicant knowingly provided false documents to Westpac and whether SI was a knowing party to the provision of these documents; and
    - whether the Applicant and SI knew and were party to the false documents provided by LB;
  - Did the combined actions of the Applicant, SI and LB go beyond mere preparation to commit the offence so their actions were immediately and not remotely connected to the offence?;<sup>66</sup>

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<sup>60</sup> Trial Transcript, Prosecution Closing Address, p.2547.

<sup>61</sup> Trial Transcript, Prosecution Closing Address, p.2547.

<sup>62</sup> Trial Transcript, Prosecution Closing Address, p.2547.

<sup>63</sup> Trial Transcript, Prosecution Closing Address, p.2547.

<sup>64</sup> Trial Transcript, Prosecution Closing Address, p.2548.

<sup>65</sup> Trial Transcript, Prosecution Closing Address, p.2548.

<sup>66</sup> Trial Transcript, Prosecution Closing Address, p.2548-49.

- The prosecution case was that the Applicant and SI were involved in a joint criminal enterprise to commit this offence;<sup>67</sup>
- The prosecutor made clear the Applicant and SI were not charged with thinking about a crime or even planning to commit a crime, they were charged with attempting to commit a crime;<sup>68</sup>
- Shakes and Camilleri gave evidence that at the first meeting, held at the Viking Group's Dockland offices on 6 July 2010, the Applicant, SI and LB were all present. Shakes gave evidence that the Applicant led the discussions on behalf of the Viking Group. Camilleri described the Applicant as dominating the whole meeting. The Applicant was the person who explained to Westpac why the Viking Group had such strong profit margins. Camilleri recalled that the Applicant told Westpac that the Viking Group was seeking to refinance its debt to the CBA which was about \$53 million. The Applicant stated that they needed receivable finance, debtor finance, property finance and leasing finance. The prosecutor acknowledged in his address, that if the discussions had stopped there, the Viking Group's effort would not have progressed past the preparation stage;<sup>69</sup>
- It was significant that at the first meeting all three members of the Viking Management team were present and participated in the meeting. This suggests all three were involved in the joint effort to obtain finance and the efforts then continued for several months after this initial meeting;<sup>70</sup>
- A series of emails was tendered as **exhibit DF1 – DF 30** which detailed the evolving efforts by the Viking Group, over a period of time, to secure finance from Westpac.
  - **Exhibit DF 1** – was an email from Camilleri to LB and the Applicant, among others, the day after the first meeting. This email set out the detailed financial information sought by Westpac to assess the application;
  - **Exhibit DF 2** – was an email response to **DF1** sent by the Applicant within an hour of receiving **DF1**. LB was copied into this email. The Applicant

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<sup>67</sup> Trial Transcript, Prosecution Closing Address, p.2549.

<sup>68</sup> Trial Transcript, Prosecution Closing Address, p.2552.

<sup>69</sup> Trial Transcript, Prosecution Closing Address, p.2553-54.

<sup>70</sup> Trial Transcript, Prosecution Closing Address, p.2555.

made it clear that the Viking Group would not be providing audited accounts and if this was necessary there was no point proceeding further. A subsequent call between Camilleri and the Applicant occurred wherein the bank indicated it needed audited accounts and the Applicant said if that was so any deal was off;<sup>71</sup>

- **Exhibit DF** contains a number of emails between Shakes and the Applicant in which the need for audited accounts was overcome;<sup>72</sup>
- **Exhibit DF14-16** – were three emails sent by the Applicant to Shakes and Camilleri which copied in the SI and LB. These emails each attached a data pack containing financial information sought by Westpac. All three of the Viking Group’s management team were a part of these ongoing discussions and provision of information to the bank.<sup>73</sup> One of the documents attached to these emails was the Strategic Overview Document presented to the CBA and dated 22 July 2010 (this document was considered above under ‘charge 8 – analysis.) The only change was the date, which was changed to 27 July 2010.<sup>74</sup> As discussed above, this document made false representations about business purportedly being done with Aldi and Linfox.<sup>75</sup> There was also a representation made of significant work being done by Viking Fleet Services for Boral. David Cowie, from Boral, indicated that in the 2010-2011 year Viking Fleet Service did \$28,843 of work for Boral. It was not a large external contract.<sup>76</sup> The Applicant emailed this document to Westpac knowing it contained false representations, because he had presented that same paper to the CBA five days earlier in the presence of the SI and LB. The fact that 5 days later he sent it to Westpac, and copied in the SI and LB, demonstrates it was done in accordance with a prearranged plan or agreement;<sup>77</sup>

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<sup>71</sup> Trial Transcript, Prosecution Closing Address, p.2559.

<sup>72</sup> Trial Transcript, Prosecution Closing Address, p.2559-60.

<sup>73</sup> Trial Transcript, Prosecution Closing Address, p.2560.

<sup>74</sup> Trial Transcript, Prosecution Closing Address, p.2564.

<sup>75</sup> See charge 8 analysis above.

<sup>76</sup> Trial Transcript, Prosecution Closing Address, p.2564-65.

<sup>77</sup> Trial Transcript, Prosecution Closing Address, p.2565.

- A second meeting occurred on 9 August 2010, despite the evidence of LB, the Applicant did attend this meeting and was the only representative who attended in person. LB and SI attended via teleconference. Shakes and Sebastian Cirocco attended on behalf of Westpac. Once again the evidence shows that the Applicant led the discussion on behalf of the Viking Group, but SI and LB agreed with his position that an uncontrolled debtor facility was the preferred option. In this meeting the Viking Group agreed to provide further financial information;<sup>78</sup>
- Further financial information was provided to the bank via emails – **exhibit DF20-27**. The Applicant was part of each of these emails and the Applicant was part of all but two of these emails. **Exhibit DF26** was an email from Carly Hartley to LB, which copied in Westpac, SI and the Applicant, attaching the current creditor debtor aged trial balances;<sup>79</sup>
- All three members of the Viking Group management team, namely the Applicant, SI and LB, were jointly participating in efforts to re-finance with Westpac. All three attended the meetings and adopted a common view as to what they wanted. They were all part of email traffic by which financial information, which contained significant untruths, were passed on to Westpac;<sup>80</sup>
- There was an agreement between these three people to provide false information to Westpac, they were all party to it and participated in it by being involved in the two meetings and the provision of false information. The combined actions, even at this stage, had gone well beyond preparation. They were well on the way to committing the completed offence. They had gone beyond merely talking about it, or even preparing to commit the offence, by compiling documents and providing them to the bank on more than one occasion;<sup>81</sup>
- The only thing that prevented the application from going further was that the figures provided did not ‘hang together’ as Shakes put it. Shakes had spent 30 – 60 hours putting a credit paper together but could not complete it because the figures did not balance. The Viking Group had provided the financial information and ‘put the ball

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<sup>78</sup> Trial Transcript, Prosecution Closing Address, p.2566.

<sup>79</sup> Trial Transcript, Prosecution Closing Address, p.2567.

<sup>80</sup> Trial Transcript, Prosecution Closing Address, p.2567.

<sup>81</sup> Trial Transcript, Prosecution Closing Address, p.2568.

in Westpac's court' as to whether or not the information stacked up such that they would approve the facilities;<sup>82</sup>

- In late October 2010 the application process seemed to stall after Shakes raised concerns about the figures provided – see **exhibit DF27**;
- LB gave evidence that in early February 2011 SI told her he wanted to pursue their efforts to re-finance with Westpac.<sup>83</sup> LB said that SI was concerned about the CBA finding out what they had been doing with their debtors;<sup>84</sup>
- The Applicant recommenced communications with Westpac on 7 February 2011 by sending an email to Shakes to see if they could get their discussions 'back on track' – **exhibit DF28**. Both SI and LB were copied into this email. If SI had not been consulted about this action, he would not have been copied into this email;<sup>85</sup>
- On 25 March 2011 the Applicant met with Shakes to discuss matter. The meeting concluded with the Applicant informing Shakes that the Viking Group would continue to discuss their financial needs with both the CBA and Westpac.<sup>86</sup>

**k) Conclusion:**

19.27. There was ample evidence for the jury to infer that an agreement was formed between the applicant, SI and LB to defraud the CBA and Westpac. The jury verdict on charges 7, 8 and 14 was both open and reasonable in all the circumstances.

20. **Ground 2 – The verdict on charge 7 is unreasonable or unable to be supported having regard to the evidence. In particular –**

**it was not open to characterise the steps towards obtaining finance from the WBC otherwise than as mere preparation.**

20.1. The evidence underpinning charge 7 has been set out in detail above when dealing with ground 1.

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<sup>82</sup> Trial Transcript, Prosecution Closing Address, p.2569-70.

<sup>83</sup> Trial Transcript, Prosecution Closing Address, p.2571.

<sup>84</sup> Trial Transcript, Prosecution Closing Address, p.2572.

<sup>85</sup> Trial Transcript, Prosecution Closing Address, p.2572.

<sup>86</sup> Trial Transcript, Prosecution Closing Address, p.2572.

20.2. In dealing with the evidence above, the question of whether the acts engaged in by the Applicant could be regarded as mere preparation have been considered. It is submitted the acts go well beyond preparation and were well capable of satisfying a jury that an offence of attempting to obtain a financial advantage by deception had been committed.

20.3. In summary:

- The Applicant attended two meetings with Westpac to discuss re-financing the facilities which the Viking Group held with the CBA;
- At the first meeting the Applicant played a prominent role in informing Westpac what facilities the Viking Group were seeking;
- If the discussions had stopped here – it would have properly been categorised as ‘mere preparation’;
- The Applicant, after this meeting, engaged in protracted correspondence with Westpac about the application to re-finance. He forwarded significant financial information to Westpac, which contained untruths which he was aware of, to induce the bank to grant the Application – see **exhibit DF1 – DF30**;
- A second meeting occurred where the application was further discussed;
- After the second meeting further financial information was provided by the Viking Group to the bank;
- As the prosecutor submitted to the jury, at this point the ‘ball was in Westpac’s court’ as to whether they granted the application or not;
- Westpac raised some concerns at this point about the figures and discussions stalled;
- In early 2011 the discussions were further revived by the Viking Group.

20.4. The actions of the Applicant, SI and LB went far beyond mere preparation. The verdict was both open and reasonable.

20.5. The Applicant relies on the decision of *R v. Tadic* [2003] VSCA 28. It is submitted this case dealt with a vastly different factual scenario than the present case and is distinguishable.

20.6. The facts in the current case go beyond mere preparation as contemplated by *Tadic*.

**DATED:** 23 December 2016



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**Counsel for the Respondent**