ANONYMISED AND ADAPTED FOR EDUCATIONAL PURPOSES

IN THE COUNTY COURT OF VICTORIA

AT MELBOURNE

Court Reference: CR-ZZ-ABABAC

Indictment no. G1101101

BETWEEN

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

-V-

**BEN HITCHCOCK**

OUTLINE OF SUBMISSIONS RELATING TO SENTENCE BY THE DEFENCE.

* 1. Obtaining Financial Advantage by Deception contrary to s. 82(1) of the Crimes Act 1958 has a maximum penalty of 10 years imprisonment and 5 years for an attempt.
  2. HITCHCOCK is 39 years of age without any history of prior offending and there are no charges or matters pending.
  3. lt is accepted that HITCHCOCK was employed as the IT manager and had responsibilities which included purchasing of equipment and products in his area of management. By virtue of his employment HITCHCOCK was in a relationship of trust which he breached.
  4. lt is accepted that it is an aggravating factor that the charges were

committed in breach of a relationship of trust, on numerous occasions over a period of approx. 37 months and with conduct directed at covering up his deception.

* 1. At committal HITCHCOCK was facing 390 charges. He pleaded guilty at

committal mention. In the circumstances his plea was entered at the earliest stage which had the benefit of avoiding a contested committal and the inconvenience and anxiety of witnesses to be called.

* 1. Given the volume of charges there is real community benefit in the

guilty plea of HITCHCOCK. Significant community resources would have been drawn upon in running a complex trial with many documents involving a number of weeks if not a number of trials and the disruption to the lives of all persons involved. The utilitarian value of the plea of guilty is great.

* 1. HITCHCOCK's plea of guilty at an early stage along with admissions made in his

record of interview, his expressed regret and remorse to a psychologist particularly expressed at paragraphs 31 and 37 of his report and his efforts to raise funds to go towards partial repayment for his offending shows genuine remorse.

* 1. General deterrence, denunciation and just punishment tend to dominate the sentencing exercise in white collar cases particularly if the features of the offending, as Justice of Appeal Charles commented in Bulfin at p.132 "... involve a carefully calculated course of conduct over a long period of time ...substantial amounts of money...and frequently losses (often tragic in their impact) to large numbers of small investors . The offender often holds a position...making it possible ...to disguise or camouflage the conduct... Detection is difficult, the investigation ...usually lengthy and very expensive ...The result of such considerations ,in my view, is that the element of general deterrence will usually carry particular significance ..."
  2. The total amount involved in the charges is $163,258 .72. As was stated in Koch v The Queen [2011] VSCA 453, at para 58, by Maxwell P (with whom Buchanan and Neave JJA agreed) "While...the amounts involved are not determinative of sentence, they are- for good reason- of very great significance in determining the appropriate sentence. This is so, at least in part, because the quantum provides some real indication of the measure of loss and damage, both financial and psychological, caused to the victims of the frauds."
  3. The amount in this case pales in comparison to that of the often mentioned authorities such as Bulfin and Dyason.

- DPP v Bulfin [1998] 4 VR 114 a case where the offender pleaded guilty to a variety of offences involving fraud and deception concerning public investments of many millions of dollars or in the view of Charles JA at

p.141 "...frauds on the colossal scale involved in this case call for more severe punishment." The Directors appeal was allowed in part, total effective sentence (TES) 6years NPP 3years.

- Dyason v The Queen [2015] VSCA 120 a case where the finance officer, Ms Dyason, over a 6 year period systematically diverted funds, belonging to St. John's Village a residential aged care facility, to herself through some 47 bank accounts used by her for this purpose. The total amount dishonestly obtained was approx . $1.4 million which was reduced to approx . $1.3 million after some repayments by her and a reversal of a transaction by the bank. She pleaded guilty to 7 charges of obtaining property by deception. The County Court judge imposed an aggregate sentence of 5 years with a non-parole period of 3 years which was not disturbed by the Court of Appeal.

* Gianello v The Queen [2015] VSCA 205 this case involved 'white collar' eo-offenders misappropriating funds from a publicly listed biotechnology company, POH, where Mr.Gianello worked during the relevant periods of offending. He pleaded guilty to 3 charges of OFAD over an 8 year period and had received a personal benefit of just under $680,000.00.

He was sentenced as a continuing enterprise offender to a TES 4 years

NPP 2 years. The sentence was not disturbed on appeal.

* Melinkas v The Queen [2016] VSCA 112 Ms Melinkas was employed by a community netball (not for profit} organisation whose aim was to promote the playing of netball by people of all ages within the community. Though she was paid an annual salary of $35,000.00 over a 5 *Yz* year period she stole just over $209,000.00. Over that period she was the only person with access the accounting system, MYOB, and deliberately attempted to hide the discrepancies by falsifying invoices and payments .Aggregate sentence of 18 months followed by a CCO of 18 months.
* DPP v Valerie Addison [2014] VCC 1686 Ms Addison was employed as administration manager with unrestricted access to the banking facilities of the company. Over the course of 18 months she made 245 dishonest payments or transfers totaling $319,608.29. These were divided into 3 charges of theft, each a rolled up count. Contacted by police 3 years after she had left her employment .When she attended the police station as arranged she gave over a cheque for $217,159.00 to repay her employer . Chronic depressive disorder affecting judgment. TES 20 months partially suspended, with 5 months to serve and 15 months suspended for 3 years.
* DPP v Lynne Philistin [2015] VCC 1535 Ms Philistin pleaded guilty to 2 rolled up charges of OFAD and 2 rolled up charges of theft. She was employed as a bookkeeper by TVM and primarily engaged to administer loans made by TVM. Over a period, in excess of 5 years, she stole or dishonestly obtained by deception $1,100,391.63 belonging to TVM. Repayments of $242,829 .83 were made by her to avoid being detected and she retained $857,561.80 which was not recovered. Aggregate term of 23 months followed by a CCO for a period of 3 years.
* DPP v Kylie Thompson [2012] VCC 970 Ms Thompson was employed as a senior secretary at Rio Tinto P/L and provided with a corporate credit card for business purposes which she used for personal purposes. She

created fictitious expenses and altered e-tickets amongst other things. There were 375 fraudulent transactions over a period of 5 Y2 years and these deceptions were difficult to detect. There were 6 counts of obtaining property by deception and 5 counts of obtaining a financial advantage by deception totaling nearly $350,000.00. Over a third of the funds were repaid and there was mitigation due to pre-existing depression .TES 3 years NPP 18 months.

* 1. lt is accepted that general deterrence, denunciation and just punishment have a significant role to play in the sentencing exercise and are often addressed by the imposition of a term of imprisonment. In my submission a CCO may adequately reflect the need for general deterrence, denunciation and just punishment . As Justice of Appeal Priest said in Hutchinson with the concurrence of Ashley JA "In Boulton, the court observed that a CCO may be suitable 'even in cases of relatively serious offences which might previously have attracted a medium term of imprisonment', since a sentencing judge may find that, in view of the objective gravity of the conduct and the personal circumstances of the offender, a properly-conditioned CCO of lengthy duration is capable of satisfying the requirements of proportionality, parsimony and just punishment, while affording the best prospects for rehabilitation." see Thorpe

v The Queen [2016] VSCA 158 para 34 Priest JA.

# 12 .There has been no further offending in the last 3 years since his dismissal and he has been in new employment since then and he has no prior criminal offending. In addition with no matters pending and the expressed view of the psychologist "...the risk of him reoffending is low." See para. 59 of his report, prospects of rehabilitation appear high with less emphasis needed on specific deterrence and protection of the community.

13. Some regard should be had to Verdins principles only to the extent that the psychologist reports that HITCHCOCK reports a symptom set indicative of reactive depression and anxiety which in his opinion HITCHCOCK's mental health would deteriorate further if he were incarcerated. See para 58-59 of his report. The corollary being in my submission that imprisonment would be more onerous than otherwise.

14. Combined sentences, imprisonment and CCO, are an alternative but only where the term of imprisonment is a maximum of one year .The amending Act provisions commenced on 20th March with the effect of reducing the maximum to 1year imprisonment. The transitional provisions as stated in the case of

Younger v The Queen [2017] VSCA 199, in the judgment of the court at para 46

*11* Transitional provisions ...apply to the sentencing of the offender on or after 20th March 2017 irrespective of when the offence was committed or the finding of guilt was made."

15. Whilst reasonable minds can differ, in my respectful submission following a synthesis of all relevant factors a CCO of significant length with appropriate conditions to address issues of deterrence, denunciation and just punishment whilst allowing HITCHCOCK to continue in his employment and his rehabilitation would still come within the sentencing range.

COUNSEL FOR BEN HITCHCOCK