

Case Note

Made a mistake? Tell the client asap or risk a finding of deceit

The decision of O’Callaghan J in the Federal Court at Victoria in *Neville’s Bus Service Pty Limited v Pitcher Partners Consulting Pty Limited & Ors* [2018] FCA 2098 sends a salutary warning to professionals to act honestly and appropriately as soon as they discover that they, or colleagues whom they supervise, may have made a mistake.

The case involved Neville’s Bus Service Pty Limited (**NBS**), a bus company run by the Calabro family, as applicant and its accountants as respondents. The three respondents comprised a consulting firm, a partnership (collectively **PP**) and Mr S, a director of the consulting firm and a partner of the partnership until 2014 after which he became a consultant to both PP entities.

In 2012 the Department of Transport sought tenders from private bus operators for the right to provide bus services in metropolitan Sydney. NBS retained PP to assist it with financial modelling for the tender. PP made a simple yet critical error in the tender response. As a result of the error, the costs incurred by NBS in performing the tender contract were significantly higher than the costs stated in the tender bid and upon which the contract price had been agreed. The profitability of the contract under which NBS was bound was reduced by about \$660,000 per year.

The nature of the error was not in dispute. The respondents ultimately conceded that the error occurred as a result of negligence, breach of contract and conduct that was in contravention of Section 18 of the Australian Consumer Law. The dispute concerned the point in time at which the respondents became aware of the error and whether they fraudulently concealed that error from NBS.

The Court concluded that:

1. Mr S acted dishonestly, including by fraudulently concealing the error and that the five elements of deceit had been made out against the respondents. His Honour commented that the “*obstinate refusal to confront and admit the fact of the error*” on the part of the respondents “*reflects no credit on any of them*”;
2. the acts or omissions of the respondents caused losses of \$5.485 million;
3. the PP consulting company was acting as agent for the PP partnership but both entities purported to provide, and take responsibility for, the services provided to NBS and were liable to it;
4. the respondents were not acting as fiduciaries; and

5. given the finding of dishonesty, it was unnecessary for the Court to consider whether the Professional Standards Schemes in Victoria and NSW operated to limit liability in the circumstances of this case to \$1,000,000.

The lessons from this litigation are:

- always be candid and upfront with clients promptly about mistakes which may have been made
- if a dispute proceeds to litigation, decide as soon as possible what, if any, admissions can be made
- a finding of professional negligence is much more palatable than a finding of dishonesty or deceit
- always make sure that witness statements/affidavits are well tested at the time they are served and avoid trying to change evidence in the witness box
- review evidence carefully for inconsistencies
- never be unresponsive or evasive in the witness box
- if you intend to object to any aspect of your opponent's case, make sure you plead and particularise all available defences and that you adduce evidence in support of your contentions and/or conduct effective cross examination to challenge your opponent's case, and
- a settlement is always preferable to a finding of dishonesty.

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