

# File notes – recent developments



## In times of change, file notes are more important than ever.

The importance of comprehensive file notes, and contemporaneous Court records, were an important factor in the Supreme Court's decision to uphold a Lawcover settlement reached with an unrepresented litigant in one of the first COVID-19 court-ordered mediations conducted by a Registrar on 8 April 2020.

As the Court noted, the mediation was conducted by telephone through the Cisco WebEx program, a process then unfamiliar to all participants.

Uncertainty of process notwithstanding, the mediation unfolded with the usual offers and counter-offers culminating in, what Lawcover contended was, the claimant's oral acceptance of a final offer with a document recording terms to be circulated subsequently.

The claimant, however, then resiled from the settlement, refusing to sign the terms or provide bank account details for payment.

Negotiations to resolve the issue were unsuccessful so Lawcover sought orders to give effect to the settlement pursuant to s29(1) and/or s73(1) Civil Procedure Act, 2005.

The Lawcover Panel solicitor filed an affidavit in support of the motion, setting out his recollection of the mediation process based on his

detailed records of the telephone and digital interactions together with his file notes of offers/counter offers and of the conversations which resulted in an immediately binding settlement. Exhibits consisting of the Registrar's record of proceedings, and the order noting the settlement as the judgment of the Court, were tendered.

---

The claimant disputed Lawcover's affidavit evidence of an agreement reached and stated that there was no agreement as to terms of payment, or a request for bank account details.

If an agreement was reached in principle, it was conditional on the execution of written terms.

---

The claimant also alleged that he had been prejudiced by the conduct of the mediator and that he was further prejudiced as a self-represented litigant. He argued that enforcement of any agreement would be unjust in these circumstances.

After weighing up the evidence and authorities, the Court found that the claimant's evidence was unreliable and accepted the evidence of the Lawcover witnesses who provided objective, contemporaneous, written documentation in support of finality.

The Court went on to consider whether it should exercise its discretion not to enforce the settlement on the ground of alleged injustice to an unrepresented litigant arising from, amongst other things, a bar to seeking the same relief again in separate proceedings. The Court found this was a matter of ordinary fairness and, as the purpose of mediation was to achieve settlements, the Court should enforce agreements reached.

---

Jennifer O'Brien  
Claims Solicitor

---

