



# A tick is not a file note

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The importance of making file notes is an oft-repeated topic in the Bulletin, yet Law Claims still regularly encounters difficulties in defending practitioners because critical advice provided to clients is not able to be proved to have been given due to lack of evidence in the practitioner's file.

As if any further reasons for making proper and comprehensive file notes were needed, the case of *Renard & Geach [2013] FCCA 617* provides a particularly striking example of why you need to properly document your advice. The facts of *Renard & Geach* are straightforward and will be familiar to many practitioners: Mr Renard sought to set aside a Financial Agreement he had signed upon his marriage to Ms Geach in 2008 so that, in light of the breakdown of the relationship in 2012, he could pursue a property settlement under s.79 of the *Family Law Act 1975* (Cth). The principal ground upon which he relied to set aside the Financial Agreement was that (all together now!) he did not receive the requisite independent legal advice before he signed it.

Again, unsurprisingly, there was a conflict of evidence between Mr Renard and his solicitor, Mr Young, as to the circumstances in which the Financial Agreement was signed. Mr Renard said he was left alone in a room with a copy of the draft Agreement for about twenty minutes before Mr Young (who he had not met before) came back into the room and asked him if he had any questions. Mr Renard said that he had not understood the full implications of the Agreement but that he signed it anyway. Mr Young said that he had been contacted by Mr Kobo, the solicitor for Ms Geach, and had been requested to act for the husband (Mr Renard) for the purposes of a binding

financial agreement. Mr Young agreed and attended at Mr Kobo's office where he met Mr Renard for the first time and was provided with a draft Financial Agreement which had been prepared by Mr Kobo. Mr Young said that he spent probably a little less than an hour with Mr Renard going through the Agreement, however, he made no file notes of that meeting other than to place a tick next to each clause of the draft Agreement, to write on the draft Agreement the husband's correct age and date of birth, and to add the word "joint" to a clause in the Agreement, relating to bank accounts.

Mr Young's evidence was that his entire file in the matter consisted of a copy of the executed Agreement and the draft Agreement upon which he placed the ticks. In answer to the question "Where are the file notes?" his evidence was "the file notes are the document", and that "there's no need for notes" in the situation where he had ticked the clauses on the draft, which he said, was his common practice in these matters. His case was that the ticks on the draft Agreement and the certificate of advice were evidence that he had provided the requisite advice.

In evaluating the conflicting evidence between Mr Renard and Mr Young the Judge was not satisfied that Mr Young's evidence displaced Mr Renard's evidence that he had received no advice. The Judge said

*"A lawyer should always make clear and contemporaneous notes of any advice given to a client, and for exactly the reason that has led to this litigation – that is, to support any assertion that such advice has been given and to refute any assertion that it has not."*

....it would require detailed instructions being taken as to the assets and liabilities of the marriage, the husband's current position and the history of the relationship before even looking at the draft Agreement

*Mr Young's view that he did not need notes of the conversation and advice when he had placed ticks next to each clause of the draft Agreement, does not in my view pass muster as prudent practice in this situation. Indeed, it could be said that his view indicates a rather cavalier and even lazy approach to his responsibility under the Act."*

(paras [79] and [80])

In addition to this, the Judge also said that it was difficult to see how Mr Young could have fulfilled his role to provide independent legal advice in a 50 minute interview because:

*"....it would require detailed instructions being taken as to the assets and liabilities of the marriage, the husband's current position and the history of the relationship before even looking at the draft Agreement"*

(para [83])

The Judge therefore found that the Agreement should be set aside and Mr Renard was free to pursue Ms Geach for a property settlement untrammelled by the "pre-nup". It is likely that there were further difficulties for Mr Young (and his insurer) because Ms Geach (despite the fact that she was not Mr Young's client) would probably have made a claim against Mr Young by reason of her reliance on the Certificate of advice provided by Mr Young.

Hopefully this stark example shows why Law Claims places so much emphasis on proper file notes. Mr Young's problems would most likely have been avoided had he made proper and comprehensive file notes, or, better still, confirmed his advice in writing.