I certify that the Applicant's Submissions are suitable for publication in accordance with paragraph 27 of Practice Note SC CA 01.

Yiota Angelos, Solicitor
on behalf of Nicholas Angelos & Co, Solicitor for the Applicant

Filed: 23 October 2025 11:50 AM

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Written Submissions

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00234844

TITLE OF PROCEEDINGS	
First Applicant	Brad Anthony Wheatley
First Prospective Respondent	Ronald William Peek

FILING DETAILS	
Filed for	Brad Anthony Wheatley,Applicant 1
Legal representative	Nicholas Angelos
Legal representative reference	
Telephone	9516 4544

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Appellant's Annotated Submissions (filed for Brad Anthony Wheatley).pdf)

[attach.]

Form 1 (version 4)
UCPR 51.36

APPELLANT'S ANNOTATED SUBMISSIONS

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
Case number	2025/00234844
TITLE OF PROCEEDINGS	
Appellant	**Brad Anthony Wheatley**
Respondent	**Ronald William Peek**
PROCEEDINGS IN THE COURT BELOW	
Title below	*Peek v Wheatley* [2025] NSWSC 554
Court below	Supreme Court of New South Wales
Case number below	2023/00160738
Dates of hearing	28-30 October 2024
Material date	30 May 2025
Decision of	Justice Richmond
FILING DETAILS	
Filed for	**Brad Anthony Wheatley,** Appellant
Legal representative	Nicholas Panayi Angelos, Nicholas Angelos & Co
Legal representative reference	PCN: 290 NSW
Contact name and telephone	Yiota Angelos Tel: 02 9516 4544
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1 Please see the Appellant's Annotated Submissions dated and filed 17 September 2025 and annotated on 23 October 2025 as follows.

SUPREME COURT OF NEW SOUTH WALES, COURT OF APPEAL **NO. 2025/00234844**

BRAD ANTHONY WHEATLEY **APPELLANT**

v

RONALD WILLIAM PEEK **RESPONDENT**

APPELLANT'S SUBMISSIONS ON APPEAL

1. The proceedings below involved a document propounded by the Appellant as the informal, but final, Will of the late Colin Laurence Peek ("**the deceased**"), who died on 16 August 2022.
2. The Appellant sought orders under section 8 of the *Succession Act 2006* (NSW) (**"the Act"**) that a document found on the iPhone of the deceased be admitted as the final will of the deceased.

BACKGROUND

3. The deceased died on 16 August 2024, leaving no formal will.
4. A document contained in the 'Notes' program of the deceased's iPhone, was found following his death and was propounded as the final testamentary document of the deceased in the form of an informal will (this document was referred to in the judgment of Richmond J as **"the Note"** and for simplicity that term is adopted herein).
5. The Respondent is the older brother of the deceased who alleged intestacy.

APPEAL GROUNDS 1 & 2

Appeal Ground 1: *The trial judge erred in finding that the deceased did not intend the entry on his mobile phone, dated 5 August 2022, headed "Last Will of Colin L Peek" to form his last will.*

Appeal Ground 2: *The trial judge erred in not admitting the said document to probate.*

6. Richmond J stated the issue for determination was whether the Appellant had discharged the onus of propounding the Note as the last will of the deceased.[1]
7. His Honour accepted the Note satisfied the first and second elements contained within s 8 of the Act, and as confirmed in *Hatsatouris v Hatsatouris* [2001] NSWSC 408;[2] being the note was a document, and within the document were the testamentary intentions of the deceased.[3]

[1] J 6, Red 38 T.
[2] [2001] NSWSC 408, [56].
[3] J 122-123, Red 60 G.

8. It is the Appellant's case that his Honour erred in failing to find that the deceased intended the Note to operate as his Will (without more).[4]

9. His Honour identified that most of the factual background was undisputed.[5]

10. The Appellant submits that the third limb of the test is satisfied where: (a) the language employed in the Note is not susceptible of construction as a draft, (b) that his Honour misinformed himself as to the weight or relevance of the absence of evidence, and (c) that regardless of the deceased's intentions at the time when he finished the Note on 5 August 2022, if the Court was not satisfied the deceased intended the Note to be operative at that moment, it is undeniable the deceased made the Note "operative" when he gave it his imprimatur by stating to Judith Jones on 11 August 2022, "*I finalised my Will*".

11. The judgment references that one of the common phrases between the deceased and Dawson was "no fuck ups".[6] This phrase became an "ongoing joke" between the deceased and Dawson. This is evidenced in the Note wherein it was stated that "*PDawson to get 5% for handling CP will – no fuck ups*".

12. It was further detailed in the judgment, that the deceased directed Dawson to act for him on hundreds of occasions.[7]

13. The judgment identifies the Appellant and the deceased would be **in contact on a daily basis, multiple times a day, by telephone** and would often visit (noting that the Appellant had his own electronic fingerprint access to the deceased's home)."[8] In other words, it was not unusual for the Appellant to receive multiple phone calls a day from the deceased as the normal character of their relationship.

14. Both the Appellant and Dawson regularly socialised with the deceased.[9]

15. The deceased knew Dawson had been ill, and Dawson had not seen the deceased in person since around Christmas of 2021, due to substantial ill health afflicting Dawson (although it was noted they spoke regularly by phone during that time)."[10]

16. The judgment identifies Dawson regularly addressed the deceased, indeed 'badgered' him, about making a will. Regardless, the deceased continually avoided the topic of making a will when Dawson raised the issue. There is nothing in the matrix of evidence that gives rise to a belief, nor indeed a suspicion, that this had changed at or around the time of the Note's creation.

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[4] J 168, Red 76 T.
[5] J 8, Red 39 E.
[6] J 16, Red 40 C.
[7] J 16, Red 40 C; (T17:4-9), Black 64 D-F.
[8] J 17 Red 40 G.
[9] J 20, Red 40 O.
[10] J 24, Red 41 J; T15: 28, Black 62 M-N.

17. Further, his Honour found that in spite of this pattern of badgering, the deceased failed to provide testamentary instructions to Dawson.[11]

18. The deceased was in a period of rapidly decreasing health.[12]

19. The evidence of Dawson highlights a conversation on 21 July in relation to a further instance of Dawson pushing the deceased to make a will,[13] wherein the deceased gave Dawson very broad indications of his testamentary intentions. It is obvious from this conversation however, that the instructions were not comprehensive and were perhaps indicative of an intention of the deceased to not engage with specific instructions with Dawson. It is axiomatic that the deceased, should he have so intended, could have given the instructions for his will at that time, during that meeting. He did not. Further, he did not even give more than some broad intimations of his thought process.

20. The file note that Dawson took at that time, as related in his evidence, also indicates the deceased stated he would send something through in the next week or around that time. There was no commitment made (indeed Dawson gives evidence that it lacked commitment), was another broad statement lacking specificity, and without any definition as to what "it" was that was going to be sent by the deceased to Dawson, which could have meant instructions and equally could have meant a completed will.

21. It is reflected in the judgment that Dawson indicated the tenor of the statement that he was going to send through, was interpreted as the deceased only possibly intending to send anything through to Dawson, as the deceased avoided conversations about making a will.[14]

22. Despite this 'tone' and the lack of reliance upon the deceased to send through instructions (not least of which was based upon his history as well as the tone of his response), his Honour found that there were two occasions in which the deceased suggested he would send instructions regarding a will through to Dawson.[15] The judgment ultimately concluded that the deceased did not consider the document on his phone to be in a form ready for a solicitor and that this was perhaps due to it being a working document.[16]

23. The trial judge then stated that the failure to provide a copy of the instructions to Dawson achieved extra significance amidst a backdrop of email correspondence with Dawson at that time.[17] The trial judge further raised the issues of call records to Dawson's office and from Dawson to the deceased, and also phone contact between the deceased and the Appellant.[18]

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[11] J 21, Red 40 S.
[12] J 24, 29, Red 41 J, Red 42 E.
[13] J 25, Red 41 L.
[14] J 26, Red 41 U.
[15] J 26, Red 41 S.
[16] J 141(2), Red 68 A.
[17] J 141(2), Red 68 C.
[18] J 141(2), Red 68 D.

24. Of greater significance, it is submitted, is that when the deceased returned home, he continued the conversation… not with Dawson but with his housekeeper, Judith Jones, with whom he appears to have displayed little reticence in talking about his will.[19] Judith Jones was the only person to whom the deceased ultimately advised he had "finalised" his will.
25. There is another layer of significance in this conversation on 21 July. The deceased said to Judith Jones, "*I need to do something about my Will.*"[20] The deceased did not say that he needed to arrange to give Dawson instructions about his will. It is consistent with a general intention to (perhaps) attend to his testamentary affairs. This he later did.
26. It was accepted that the Note was created on 4 August 2022, opened again on 5 August 2022, and not opened again until accessed by Dawson on 19 August 2022 wherein Dawson forwarded the Note to himself via email.[21]
27. Once the Note was completed, his Honour focused on several aspects that led to the conclusion in the Court below.
28. These included that on 13 August 2022, the deceased spoke with the Appellant in a conversation about the Appellant inspecting an apartment in Milsons Point, wherein the deceased discouraged the Appellant from purchasing the apartment in question, but did not mention to the Appellant that he had finalised his will.
29. The publishing or public acknowledgment of an informal will, is not the test. It is submitted this is merely a factor, and one certainly that makes it easier to conclude that a will was intended to be operative, but nonetheless a declaration is not an essential element.
30. Section 8(3)(b) of the Act does direct attention to the evidence of statements by the deceased. In *Hatsatouris*, it is stated that the third arm is:

    "*did the evidence satisfy the Court that, either, at the time of the subject document being brought into being, or, at some later time, the relevant Deceased, by some act or words, demonstrated that it was her, or his, then intention that the subject document should, without more on her, or his, part operate as her, or his, Will?*"
31. Neither of the above state a need for an informal will to be published, but only that the deceased demonstrate his intention for the document to operate, without more, as his will.
32. It is submitted that the completeness of the document itself is that demonstration. If the Court were to not accept that proposition, it is difficult to accept that the statement of the deceased to Judith Jones did not otherwise cover any doubt with a mantle of certainty.

THE EVIDENCE OF JUDITH JONES

[19] J 27, Red 41 V.
[20] J 27, Red 41 W.
[21] J 34-35, 47, Red 43 B-Q, Red 45 K.

33. The judgment states that Judith Jones, the housekeeper for the deceased, gave evidence that the deceased would occasionally discuss his testamentary intentions with her.[22]

34. Pivotally, the evidence of Judith Jones was that the deceased had stated to her on the 11 August 2022, "*I have finalised my will…*".[23]

35. The dichotomy between the assessment at J 93 and the evidence above about the deceased having finalised his will, is that the prior conversations differ in that the last conversation about finalisation was finite and past tense. It expresses a decision and not a contemplation.

36. This was the only evidence of the deceased having acknowledged a will.[24]

37. There was nothing in that conversation that identified that the deceased had only finalised a draft. There was nothing in that conversation that identified that the deceased had finalised instructions to send to Dawson. There was nothing that identified that the deceased intended to do anything further with the will referred to at that time (and in absence of any other will, he must have meant the Note). There was nothing that identified a future event to occur before the will could operate as intended. There was nothing that indicated the deceased did not intend it to operate as his final testamentary direction.

38. It is the case of the Appellant that even if his Honour had not been satisfied the Note was intended to operate without more as the will of the deceased, the authorisation by the acknowledgement to Judith Jones in the terms used by the deceased must have had the effect of a declaration as to its completeness, and its operative effect.

39. The evidence of Rosemary Butler, who was not cross examined, was that the deceased tended "to be quite vague" when discussing his wishes upon death.[25] This would seem to corroborate the accounts of both the Appellant and Dawson. The evidence of Andrew Jones, again unchallenged, also confirmed the deceased's evasiveness when discussing testamentary intentions.[26]

THE INVOLVEMENT OF MR DAWSON

40. The judgment is critical of the actions of Dawson,[27] who was a primary witness and had a financial interest in the proceedings' outcome, leading to a position of conflict.[28]

41. Whilst his Honour's observations are correct, they fall short of stating that Dawson had interfered with or manipulated the evidence.

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[22] J 93, Red 54 W.
[23] J 39 & 94, Red 44 E, Red 55 E.
[24] J 39, Red 44 G.
[25] J 99, Red 55 T.
[26] J 103, Red 56 L.
[27] J 58-70, Red 46 V – 49 V.
[28] J 58, Red 46 X.

42. Whilst it was observed that Dawson had control of critical evidence which was in his possession, it was an accepted position, based on the evidence of Navid Sobbi (the joint appointed expert who conducted a forensic examination of the deceased's iPhone) that nothing had been changed on the Note.

43. Accordingly, the investigation appropriately turns to the actions of the deceased up to the date of death, which included: a distinct reticence to discuss any specific provisions of his will, a distinct reticence to discuss his will with two people who, on their own evidence, 'badgered' the deceased about completing his will, that he only seemed to speculate regarding the provisions in his will with one person, being the person to whom it declared that he had "finalised" his will, and that he left the Note, a document with specific (for a layman) directions.

44. His Honour rested heavily upon the missing emails and absence of explanation of the telephone calls. The Court did so despite evidence that the deceased called the Appellant multiple times a day, but there is no evidence that he would bring up his testamentary intentions (in fact it is clear that he only spoke of his testamentary intentions in response to other people's enquiries – with the sole exception being Judith Jones).

45. Further, the evidence that the deceased called the offices of Dawson, and then received a 21 second phone call from Dawson, who was terribly ill at the time and with whom the deceased was involved in an insurance dispute, appears to form the basis for rejecting the actions of the deceased.

46. It is submitted that the Note should stand on its own.

47. With respect to a reliance upon the principle in *Jones v Dunkel* (1959) 101 CLR 298 and *Blatch v Archer* (1774) 1 Cowp 63, and in circumstances where the trial judge had accepted the evidence of Judith Jones that the deceased had told her that "*I have finalised my will…*",[29] and where there was no dispute that the Note had not been amended, it is unclear why his Honour placed such critical importance upon the question of whether there were any communications by the deceased with either the Appellant or Dawson regarding the contents of the Note. Highly relevant to this element is the absence of evidence regarding the communications on 5 August 2022.

48. The Appellant says that the trial judge has misapplied this principle. This element will be addressed in more comprehensive submissions at the time of the hearing of the Appeal.

[29] J 94, Red 55 E.

49. With respect to J 138,[30] the application of the case of *Mahlo v Hehir* [2011] QSC 243, [40], has no function in circumstances where elements one and two of *Hatsatouris* were not disputed.

50. With respect to J 140,[31] which states that the evidence was unsatisfactory, it is submitted the evidence with respect to the Note, specifically, is:

    (a) The Note was created, initialled and dated by the deceased on his iPhone on 4 August 2022;

    (b) The Note was opened by the deceased on his iPhone on 5 August 2022, but was not amended;

    (c) The Note was captured at the time of the search for a will of the deceased and was unaltered; and

    (d) The Note was not edited since the time of creation on 4 August 2022.

51. To permit events outside of the deceased's control to infect the enaction of his testamentary wishes must be considered impermissible, contrary to the intent of the legislation, and set a standard that the protocols which preserve a formal will must be applied to an informal will, a standard which would have the effect of placing further distance from the willingness to allow informal documents that have failed to conform with the Act from being shepherded from the hands of the legally uninformed to the ability to have those documents gain the sanction of the Court. It impermissibly enacts a standard that is not in keeping with the nature of informal wills and confuses disciplinary issues of the profession with a further step which an uninformed informal testator must comply.

52. His Honour at first instance took the view that Dawson's conflict of interest affected the probative value of the evidence.[32] Despite this observation, it was the case that none of the witnesses for the Appellant were required for cross examination except for Judith Jones, and her evidence was accepted by his Honour.

53. Despite the observations in the judgment in respect to the possibility of witnesses influencing the evidence of others,[33] there was no such finding.

THE CALL LOG EVIDENCE

54. The judgment details the Telstra telephone logs were put to the Appellant and specifically highlighted a text message from the deceased to the Appellant on 5 August 2022.[34]

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[30] J 138, Red 65 U.
[31] J 140, Red 66-67 D- N.
[32] J 68, Red 49 E.
[33] J 68-69, Red 49 D-G.
[34] J 90, Red 54 Q.

55. The Telstra subpoenas resulted in "22,000 documents" being produced,[35] "and each document spanned nine spreadsheet documents…" (a total in excess of approximately 198,000 documents in total).
56. At T14:47-49,[36] Dawson accepts that he knew to include "*information that is both helpful and unhelpful to the case that you were putting before the court*".
57. Dawson further accepted that he sought to include any conversation that the deceased had with anyone about his will and he was careful not to suggest anything to witnesses.[37]
58. At the time of the 21 July 2022 meeting, between Dawson and the deceased, the deceased gave very broad and general instructions, stating he would send something "*through in the next week or so*".[38]
59. The evidence was such that the deceased was coughing incessantly and struggling to breathe on 2 or 3 August 2022,[39] and the deceased suffered a medical episode on 3 August 2022, of such severity that he contacted an ambulance who subsequently attended upon him, recommending he go to hospital.[40] The deceased died on 16 August 2022.
60. According to Dawson, the "*tone in the conversation indicated that 'he did not want to talk about making a will*".[41]
61. It was further identified in the judgment,[42] that Dawson "did not receive any further instructions in relation to the will."
62. It is a key contention of the Appellant that despite the comment that he would send "it" through,[43] there is nothing recorded in that paragraph of the judgment that indicated that the deceased intended to send a draft.
63. It was open to the deceased to give precise instructions to Dawson at that meeting, **but he chose not to** do so. This is difficult to reconcile with the hypothesis crafted by the judgment that there might have been propensity of the deceased in sending a draft will to Dawson which was ultimately not disclosed by Dawson in his management of the evidence.
64. Ultimately, the judgment engages in impermissible 'shadow boxing' in that it speculates about the importance of evidence that is not before the Court and does not exist.
65. J 28[44] identifies that Dawson did not receive any further instructions in relation to the preparation of a will. There it should have rested.

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[35] T9: 25, Black 56 M.
[36] Black 61 T-X.
[37] J 60, Red 47 J.
[38] J 25, Red 41 Q.
[39] J 29, Red 42 E.
[40] J 30-31, Red 42 G-R.
[41] T20:20-30, Black 67 H-Q.
[42] J 28, Red 42 A.
[43] J 25, Red 41 R.
[44] Red 42 A.

66. To do otherwise is to impermissibly craft a greater obligation upon the person propounding an informal will, and therefore on the informal testator themselves – leaving their testamentary instructions to founder on circumstances well beyond their control. There should be no impediment outside of the test encapsulated in *Hatsatouris* to further raise the bar to allow circumstances outside of the deceased's control to interfere with their testamentary directions.

67. The judgment identifies the deceased was terribly ill in the weeks preceding his death. [45]

68. As a result of the near-death experience on 3 August 2022, the deceased crafted the Note on his iPhone.[46] The Court accepted that the Note was created and amidst the backdrop of the acceptance that the document embodied the testamentary intentions of the deceased. It is curious the Court did not find if the Note was merely a draft why the near death experience would not compel the deceased to **immediately** pass the Note to Dawson. In fact, this inchoate step is a telling non-action.

69. It is difficult to accept that the deceased was motivated to write the Note due to a near-death experience but not motivated to tell anyone or to send it to anyone. The only plausible explanations are that the deceased did not consider the Note needed anything more, or the solicitor (and/or the Appellant) conspired to hide instructions from the deceased – which was not found by his Honour.

70. Further, the comment to Judith Jones only underlies the first hypothesis.

71. Why would Dawson and Wheatley give evidence that they went to the deceased's home looking in his office for a will if it was part of the Court's position that Dawson otherwise would have known and deleted an email or text message in order to prosecute the Note into operative form?

72. In order to conclude that the Note was not operative and was merely a draft or a form of instructions, his Honour must have:

    (a) Concluded the terminology used, "Last Will of Colin L Peek", was merely the deceased pre-empting the work of a solicitor;

    (b) Concluded the date had little to no relevance;

    (c) Ignored the fact that the reference to "*PDawson to get 5% for handling of CP will-no fuckups*" did not appear different to any of the other residuary allocations;

    (d) Ignored the fact that in the circumstances where it was identified that the Note was not reopened until 19 August 2022 when Dawson discovered it whilst looking through the

[45] J 29, Red 42 E.
[46] J 34, Red 45 A.

deceased's iPhone,[47] and that if the deceased had meant the document to be a draft, why it was that neither he nor any other person re-entered the document for the purpose of editing;

(e) Attributed little to no weight to the fact that the deceased signed or authorized the Note with his initials at the foot of the document;

(f) Attributed little to no weight to the statement which identified the completed nature of the Note or alternatively authorised the Note by adoption, when the deceased stated to Judith Jones "*I have finalised my will…*"[48]

73. It must be noted that the assessment of the phone by Mr Sobbi indicated that there were "*10 voicemails (with dates ranging from 16 February 2022 to 13 October 2022), 87 contacts, 5 call logs (with dates ranging from 17 August 2022 to 13 October 2022) and 85 images.*"[49]

74. Much was made in the judgment about the absence of text messages and emails, yet nothing was explained in the retention of the ten voicemails. If someone was nefariously intent in removing key information, why would all of the emails and text messages be removed? Why not then also remove the voicemails?

75. His Honour identifies the iPhone as to be considered to be the most vital item of evidence, stating that it was provided to Court absent its other contents.[50] This is not true. The iPhone was missing its emails and text messages, but there was no investigation carried out as to the pertinence of this factor, it was not a part of the Respondent's case, only arising in cross examination and in the partial hypothesis of 'multiple upgrades' by the expert.

76. The trial judge stated that the evidence failed to satisfy what content was present on the phone at the deceased's death or after.[51] This is, respectfully not the case either. The Court knows, has expert evidence of, and accepts that the iPhone of the deceased contained the Note. The Note was not changed. It is the one irrefutable piece of evidence left by the deceased.

77. The Court led then to what must be the primary reason for the judgment against the Appellant, that being the question "*Did Colin email or SMS anyone about will making or his intentions?*"[52]

THE APPLICATION OF PRINCIPLES WITH RESPECT TO INFORMAL WILLS

[47] J 35, Red 43 B.
[48] J 94, Red 55 E.
[49] J 118(3), Red 59 B.
[50] J 140(4), Red 66 L-X.
[51] J 140(4), Red 66 L-X.
[52] J 140(4), Red 66 L-X.

78. The principles relating to the application of section 8 of the Act and the dispensing power are traversed in the judgment.[53]

79. *Hatsatouris* identifies the three key tests that an informal will must pass.

80. As identified above, the third test, or arm, goes to the fact that the deceased must have 'by some act or words' intended the informal will to be operative as his will 'without more' on his part.[54]

81. It is submitted the deceased, in having completed an informal will in the form of the Note, without express indications that he meant it to be a draft or a form of instructions, and having signed it by the insertion of his initials, and having dated it under his title wherein he claimed it as his "Last will" did enough to establish that this was his final testamentary direction.

82. As stated by Kirby P (as he then was) in *In the Estate of Masters (Deceased); Hill v Plummer* (1994) 33 NSWLR 446, 452,

> *A too stringent requirement of proof that a propounded document, otherwise clearly embodying the testamentary intentions of a deceased person, constituted his or her will would undo the reform proposed by the Law Reform Commission and accepted by parliament. Courts would continue to squirm at the results where the testamentary wishes of the deceased are sufficiently disclosed but cannot be given effect to because they fall short, in the court's conception, of constituting the deceased's "will". To adopt such a stringent approach is, in my respectful view, to permit the conceptions about the formalities required for a "will", which preceded and explained the enactment of s 18A of the Act, to rule us from the statutory grave.*

83. The extent to which his Honour raises the bar for the third arm of *Hatsatouris* in this case, the effect is that a "*too stringent approach*" has been adopted which has sought to defeat the layman deceased's testamentary actions.

84. This aspect was also spoken of in *Estate of Masters*, 462 per Mahoney JA, who stated,

> *Secondly, s 18A should, as I have indicated, be given a beneficial application. There are, in the history of this branch of the law, many cases in which the intention of the deceased has not been able to be given effect. That is an evil which should be remedied as far as may be. It may be understood why the legislature decided not to give testamentary effect merely to any statement of testamentary wishes, however casually stated and even if it was not contemplated that legal results would follow. The consequences of that, as far as concerns proof and otherwise, can well be imagined. But the benefits of the change should*

[53] J 121-138, Red 59-65 O-U.
[54] [2001] NSWCA 408, [56] per Powell JA.

not be withheld by requiring too rigid a manner of proof that what was put in a document should have legal effect. If a document is on its face such as contemplates legal effect, ordinarily it should be given effect unless — as in this case — there are contexts or circumstances that lead to the contrary conclusion.

85. In furtherance of the decision, his Honour has sought to rely upon the *Briginshaw Principle.*[55] However, the relevant facts are unequivocal – the date, the initials, the wording, and the statement to Judith Jones.

86. The judgment touched upon the relevant will-making habits of the deceased as a principle enunciated in *Kemp v Findlay* [2025] NSWCA 46. The previous will-making habits of the deceased was that he avoided the subject and routinely refused to submit to any suggestion no matter how strenuous to engage with a solicitor to undertake a formal document.

87. *Campton v Hedges* [2016] NSWSC 201, was a matter wherein Hallen J noted the importance of a signature at the base of a testamentary document. In this case, the deceased signed the Note with his customary usage of "CP", his initials.

88. Indeed, reference was made within the judgment to *Lindsay v McGrath* [2015] QCA 206,[56] wherein it was stated that,

In particular, the act of signing the document provides strong support for the conclusion that the deceased intended that the document itself constitute her will, rather than merely represent a draft or a working note or provisional instructions for a subsequent will.

89. It is submitted that his Honour's observations at J 135 are not in keeping with the accepted approach when the document was accepted to contain the testamentary intentions of the deceased, and the unequivocal matters referred to above.

90. With respect to the assertion that the deceased had an understanding that he required Dawson's professional legal assistance,[57] this is a matter of speculation as it was never put to Dawson in cross examination that the deceased had always and exclusively used Dawson's services for all legal matters. Even so, an appreciation of such a requirement (to complete a formal will) does not diminish the validity of the Note if the requisite intention was present.

91. The assertion the deceased did not prepare the Note in a sense of urgency,[58] can also not be accepted. The deceased had clearly had a near-death experience.[59]

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[55] J 130-131, Red 62 T, 63 G.
[56] J 133, Red 64 H.
[57] J 141(5) Red 68-69 U-I.
[58] J 141(7), Red 69 S.
[59] J 141(7), Red 69 S.

92. It was suggested that "*Colin was an astute and careful businessman who lived by the mantra, at least in his legal affairs, of 'no fuck ups'*."[60] The calibration of the deceased's business acumen was never put to scrutiny. The fortune he accrued when his land was purchased for subdivision by a large scale developer is not demonstrative of such acumen and cannot reasonably be used to dismiss his testamentary directions.

93. It is submitted that an astute and careful businessman might have ensured that he had a carefully crafted suite of testamentary documents and authorities, having undertaken a detailed consultation with his legal professional, well before a near-death experience. Section 8 is not merely for the benefit of unsophisticated laypersons who want nothing to do with lawyers.

94. At J 151,[61] his Honour states, with respect to the direction that Dawson receive 5% of the residue of the estate for "*handling of CP will-no fuck ups*" stating that this was consistent with the way that the deceased gave instructions to Dawson, albeit it must be noted, as referenced above, that this was an ongoing joke between Dawson and the deceased. The trial judge then goes on to state in that paragraph of the judgment that this element of the Note was suggestive (or consistent) with recognition for the work in *drafting* of the deceased's will. The trial judge relies on the part of the Note that states "*handling of CP will*"; ultimately observing that this must fail the 'without more' test as in the absence of the drafting of a will, there was nothing else to 'handle'.

95. It appears that his Honour has not turned his mind to that statement being consistent with a direction for Dawson to handle the Probate, and administration, of his estate. It is the case that solicitors routinely handle three phases of specific work when dealing with testamentary matters. These are: (1) the making of a will; (2) the securing of the Grant of Probate; and (3) actions taken on behalf of the Executor following the Grant to navigate the calling in of assets, the payment of liabilities; and the final distribution of the Estate. In the circumstances of item (2) and (3) above, there would be a significant amount of legal work to handle, not least of which would include the transfer of real property, calling in of accounts and assets, and navigating the legal regimen for the Grant itself.

96. At J 152,[62] the judgment states the Note lacks a comprehensive approach and it is stated by the Trial Judge that the totality of the deceased's assets is not effectively distributed in its text.[63]

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[60] J 141(6), Red 69 K.
[61] Red 72 S.
[62] Red 72 S.
[63] J 152, Red 72 K.

97. This is also challenged in circumstances where the Note is assembled by a layman. It is entirely conceivable that his estimation of his "property" and his "accounts" might have sat quite comfortably in the deceased's mind. If this were the test, it is submitted that most informal wills would fail. It should bear observation that it is surprising, on the tenor of many informal testamentary documents, that the deceased had a concept of residuary estate.

98. The judgment carries the observation that there is insufficient evidence of the deceased signing other documents with his initials as is done in the Note.[64]

99. Whilst it is correct that there was no other evidence supplied that the deceased signed legal documents with his initials, it was the case that the use of initials (CP) was a matter referred to in the Appellant's submissions at first instance, highlighting that this was the way that Andrew Jones referred to the deceased in his affidavit,[65] and the deceased's initials were a feature of his motor vehicle licence plate.

100. It is submitted that the nature of the term "final will" must be assumed to be contradictive of a draft. Whilst his Honour appeared to accept this,[66] it is curious that the elements appear to be traded in the judgment, not unlike modular components, which can't be consistent with either a finalised operative document or a draft.

101. His Honour stated at J 155,[67] that he did not regard the drafting of the Note at a time of a near-death experience of import in circumstances where the deceased had the conversation (2 weeks before the Note was created) detailed herein,[68] where he expressed but perhaps reluctantly, that he would send his instructions through to Dawson – which Dawson interpreted as a possibility.

102. The trial judge stated that the inference taken is that the Note was a form of instructions and if the deceased had decided otherwise, the deceased would have informed Dawson.[69] Indeed, the opposite applies.

103. This inference is made without reliance upon Dawson's evidence that the tone of his reply was not as conclusive as the deceased's tone. There is a reliance upon this remark of the deceased that is unwarranted. There was no basis for the expectation that follows the inference.

104. His Honour's assessment that the failure to advise the Appellant or Dawson of the Note's existence constituted the position that the Note was a draft,[70] is pure speculation.

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[64] J 147, Red 72 I.
[65] T80: 2-3, Black 127 B-E.
[66] J 146, Red 71 W.
[67] Red 73 N.
[68] Appellant's Submissions, [20].
[69] J 155, Red 73 Q.
[70] J 156, .

105. It is submitted that there is enough in the Note for it to stand on its own. Even if there were not, discounting one witnesses evidence because the deceased chose not to inform another witness is a logical fallacy that strays outside the discretion. Again, it is not the test of an informal will.

106. This is evidenced further when, at J 160,[71] his Honour states that the lack of explanation of why the deceased had failed to inform the Appellant or Dawson, constituted a *Jones v Dunkel* inference.[72]

107. Evidence has been given in the Notice of Motion's supporting affidavit that the Appellant did not receive the text message that his Honour so heavily relied upon in the comment at J 160.

108. It was the Respondent's case at first instance that the Court could not be satisfied that the deceased intended the Note to operate as his will, as he had not "published" it.[73] With respect, again, this is not the test.

109. It was stated that the deceased did not mention the Note's existence.[74] This is not the case. The Court is able to infer that in telling Judith Jones he had "finalised" his will, that the deceased referred to the document by extension.

THE WORD 'FINALISATION'

110. The deceased stated to Judith Jones that he had "*finalised*" his will. In his Honour's view, this statement did not attract the simplicity it would appear to hold upon a reasonable reading.

111. The submissions of the Respondent were highlighted in the hearing where it was stated that evidence was equivocal as the statement may have occurred as an expression of the deceased having finalised his intentions without operative intent.[75]

112. This cannot be the case in the absence of there being key markers that indicate that this was merely a draft or a letter of instructions.

113. If it was a letter of instructions, the following are problematic:

    (a) The form of the Note was not indicative of instructions to a solicitor;

    (b) If it was instructions, why wasn't it simply in an email (i.e. why was it formed into a document which is a feature of the Notes program);

    (c) If it was merely a form of instructions, why wasn't there an immediate transmission of it by attachment and email to Dawson (a matter it is submitted was not put to the expert);

    (d) Why did the deceased not say to Judith Jones, 'I have finalised a draft'?

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[71] Red 74 V.
[72] J 160, Red 74 W.
[73] J 141(1), Red 67 Q.
[74] J 141(1), Red 67 Q.
[75] T107.16-19; J 141(3), Red 68 L.

APPEAL GROUND 3

Appeal Ground 3: *The trial judge erred in allowing extraneous or irrelevant matters to guide or affect his decision making process, particularly:*

(a) *The testator had opportunities after creating the subject document to make a formal will but did not take advantage of the opportunities or had opportunities to confirm the existence of the document but did not do so (J 41, J 42).*

(b) *Peter Dawson, a potential beneficiary under the document acted as solicitor for the appellant (J 58) and was a witness and this affected the probative value of the evidence of all the appellants witnesses (J 68, J 70, J 166).*

(c) *The telephone communications involving the deceased on 5 August 2022 (J 78).*

(d) *The absence of phone messages and emails (J 80, J 88, J 89, J 165, J 166).*

(e) *The failure of the appellant to give evidence of a text message from the deceased on 5 August 2022 (J 90, J 160, J 164).*

114. The third ground relates to specific instances where it is submitted his Honour allowed extraneous or irrelevant matter to guide his decision-making process.

115. At J 41 & 42,[76] his Honour refers to two conversations between the Appellant and the deceased. The first relates to a conversation about the Appellant looking at an apartment, the second relates to the flux of the deceased's health and a possible hospital admission, but for a paucity of beds at the hospital.

116. It is highlighted by his Honour that in neither of these conversations did the deceased mention the Note.

117. As submitted above, the test is not whether the deceased 'published' or advertised his having created the Note, as a necessary component of an informal will. Nonetheless, the deceased did publish, or the Appellant submits (at the very least) adopts the Note as his will during his statement to Judith Jones. There is no established quantum or requirement for certain individuals to have also been included in that confidence in order for it to have determinative probative value.

118. The judgment contains critical observations of the actions of Dawson at J 58, 68, 70, and 166.[77]

119. Whilst it is undoubtedly correct that the criticism is well within his Honour's power in reflection of the Court's inherent jurisdiction to uphold the standard of all Officers of the

[76] Red 44 I-Q.
[77] Red 46 V, 49 C & V, & 74 V.

Court, none of the assertions in those paragraphs diminish the standing of the Note itself, which the Appellant submits must stand on its own.

120. The matter of the phone records traversed at J 78, has been elaborated upon in challenge to the judgment above.

121. The judgment paragraphs at J 80, 88, 89, 165 and 166[78] have been covered above.

122. The text message referred to at ground 3(e) is dealt with in the Notice of Motion.

FURTHER ANOMALIES IN THE JUDGMENT

123. In addition to the above, the judgment contains some minor, but patent, mistakes of key aspects of the case, which are unexplained and raise questions as to the assessment of the facts and circumstances of the matter.

124. For example, the trial judge states the deceased and the Respondent had a close relationship throughout the deceased's life.[79]

125. This was certainly the position of the Respondent, but a matter that was sharply disputed by the Appellant on the accounts given to him by the deceased. In fact, in the opening exchanges on day one of the trial below, Counsel for the Appellant had the following exchange with his Honour:

HIS HONOUR: ... I suspect what's common ground - that there was a close relationship between the two of them.

PICKER: It's not necessarily common ground, your Honour.

HIS HONOUR: It's not necessarily common ground? All right.[80]

126. Nonetheless, in a matter where the trial judge made the observation that most of the factual background was "undisputed",[81] it was stated that the brothers had a close relationship.

127. The nub of the issue with Dawson is that the Court found at first instance that Dawson's conduct was improper and undermined the probative evidentiary value.[82]

128. The observations in the judgment then move to the context of telephone calls from the deceased to the office of Dawson (and one mobile phone call record to the deceased from Dawson's phone of only 21 seconds).[83]

129. In response, Dawson was not able to specifically recall having spoken to the deceased and did suggest that the calls could have been taken by his staff (whom having dealt with the deceased on many occasions could well have occupied his time without there being any

[78] Red 52 D, 53-54 Q-P, 76 G-N.
[79] J 14, Red 39 T.
[80] T3: 26-31, Black 50 K-P.
[81] J 8, Red 39 E.
[82] J 70, Red 49 W.
[83] J 78, Red 51 L.

fallibility in Dawson's recollections and it was also the evidence of Dawson he was ill at the time, and they were dealing with an insurance claim at the same time), and with respect to the one call from Dawson's mobile to the deceased for 21 seconds might have been anything but was surely not long enough to go into instructions for a will or anything similar.

130. His Honour expressed that Dawson, did not explain the calls nor was anyone else called to explain them.[84]

131. However, there was no evidence to challenge that these calls were not part of the normal to-and-fro of the interactions of the deceased and Dawson, nor that they contained anything with respect to the subject of testamentary directions.

132. The statement of the trial judge that the evidence did not depict any ongoing issue with the insurance matter Dawson was handling for the deceased,[85] was irrelevant in a context where it was identified that Dawson and the deceased were friends of some significant vintage.

133. Moving onto the possession of the deceased's iPhone by the Appellant, it was a matter of evidence that the Appellant had the phone, following the death of the deceased, in circumstances where renovation work commissioned by the deceased was ongoing, and tradesmen were ringing the deceased's phone.[86]

134. It was the evidence of the Appellant that as he dealt with messages related to these renovations, he deleted text messages as he went if they were spam.

135. Nonetheless, it was the case that Mr Sobbi (the forensic phone expert) opined that the "*minimal data on the device*" might have been due to "*multiple updates since the time of the event…*"[87]

136. His Honour states at J 165 that text messages and emails had been deleted from the deceased's phone which impugned the integrity of the primary piece of evidence.[88]

137. It is submitted that the main piece of evidence is the Note (which was not impeached in its integrity) and not the deceased's iPhone.

138. It was the case that his Honour was critical of Dawson not including affidavit material regarding any communications between 16 and 19 August 2022, including the absence of the emails and text messages from the deceased's phone.[89]

139. The judgment then canvassed the conversation between the deceased and the Appellant on 13 August 2022, noting that the deceased did not mention the Note. Again, this is not the test

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[84] J 78, Red 51 M.
[85] J 78 & 164, Red 51 Q & 76 E .
[86] J 79, Red 51 S; T31: 24-50 & T32: 1-10, Black 78-79 M-Y; and noting that the deceased's body was found by one of the tradesman at the home.
[87] J 119, Red 59 F.
[88] J 165, Red 76 G.
[89] J 80, Red 52 D.

or any kind of mandatory hurdle for an informal will under the dispensing power, and particularly so where the evidence is that the phone calls from the deceased to Dawson had no special character – given their friendship; the two were dealing with an insurance matter at the time; and where the testimony given was that the calls (but for the 21 second call) were made to the office of Dawson.

140. The judgment speaks of the chain of custody of the deceased's phone.[90] Again, this is irrelevant in the light of Mr Sobbi's evidence that the Note was untampered.

NOTICE OF MOTION AND AFFIDAVIT IN SUPPORT

141. On 26 August 2025, the Appellant filed a Notice of Motion:
    (a) That the Appellant has leave to rely on further evidence in these proceedings; and
    (b) That the affidavit filed the same date in support be read as evidence in the proceedings.
142. At J 140, the Trial Judge was critical of the Appellant not placing evidence of the text message sent by the deceased on 5 August 2022 before the Court, a matter that was first raised with the Appellant in cross-examination.[91]
143. As is the nature of cross-examination, the question from the Respondent's Senior Counsel, was one without notice.
144. The Appellant had the following put to him by the Respondent's Senior Counsel, during cross-examination:

Q. When I first started asking you questions, you agreed with me that it was important to include in your affidavit your conversations with Collin about his will?

Yes.

Q. Why didn't you include that?

I didn't think it was important at the time. I really didn't.

Q. Sir, is it the case that you're just making that up in the witness box now?

No. Not at all.

Q. You also had a phone conversation with Collin on the morning of 5 August 2022?

Yes.

Q. He sent you an SMS on 5 August 2022?

Yes.

Q. You had another phone conversation with Collin on 5 August at 3pm?

Am I looking at a phone log or something?

Q. I'm asking you to begin with. Do you recall that?

I spoke to Collin numerous times every day, so that's quite possible.

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[90] J 79-80, Red 51-52, R-D.
[91] J 140(5), Red 67 J.

Q. Do you recall having another phone conversation with Collin the following day on 6 August?

I would have, yes.

Q. I want to suggest to you that you had two further conversations with him on 8 August?

Yes, most likely.

Q. Would you accept that you also called him on 9, 10, 11, 12, 13 and 15 August?

I would agree with it.

Q. Is it the case that in none of those phone conversations did he mention that he had a new will?

A. No, he never had that conversation with me.[~~80~~ 92]

145. Since the time of the question regarding the text message, and once the Appellant viewed the judgment and saw that significant weight appears to rest on that answer, he investigated the matter further (as detailed in his affidavit sworn 26 August 2025).

146. In doing so he found that the text message indicated in the Telstra records as having been sent by the deceased to the Appellant on 5 August 2022, was never received by the Appellant.

147. The judgment states that the telephone logs show a text sent by the deceased to the Appellant and the trial judge is critical of the Appellant not revealing the contents of that message .[~~81~~ 93]

148. The Notice of Motion and affidavit in support explores the matter raised about the text message which under investigation has been found to not have been delivered to the Appellant's phone.

149. The Appellant cannot reasonably be condemned for failing to give evidence of something which he never received.

Date: **17 September 2025**

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92 ~~80~~ T+:79:6-44, Black 126 E-V.
93 ~~81~~ J 37, Red 44 B.